



IILP Review 2019-2020: The State of Diversity and Inclusion in the Legal Profession



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January 2019

Dear Colleagues,

It is my pleasure to share with you the most recent *IILP Review*. Our new Editor-in-Chief is Philip Lee, who is Professor of Law at the University of the District of Columbia David A. Clarke School of Law. Professor Lee has assembled a terrific mix of articles that reflect IILP's mission to offer imaginative, informative, and varied perspectives. Along with its content, this year's Review is notable in that its publication coincides with IILP's 10th Anniversary.

Sandra Yamate and Terry Murphy created IILP in 2009. Through their dedication and the extraordinary support of many people and organizations, IILP has become a respected voice in the legal profession's efforts to become more diverse and inclusive.

Whether sharing the facts about long-standing challenges — from systemic barriers to “diversity fatigue” — or bringing to light issues that have received too little attention, IILP has found its place. Longtime advocates for a more diverse profession along with a newer generation of leaders have enabled IILP to provide a much-needed forum for asking hard questions and discussing sensitive topics across many practice settings.

The practice of law rests on principles of equality and fairness, and we're rightly proud of the changes our profession has brought to society at large. Of all professions, ours should stand out as a model of social justice. Far more than admirable aspirations, diversity and inclusion should be vivid emblems of the legal profession itself. At least from my perspective, that's the essence of IILP.

With best wishes for the New Year.

Sincerely yours,



Marc S. Firestone

January 2019

Dear Readers,

The Institute for Inclusion in the Legal Profession (IILP) is proud to present the 2019-2020 edition of the *IILP Review: The State of Diversity and Inclusion in the Legal Profession*. The *IILP Review* brings together a statistical summary of recent demographic data, feature articles and thought pieces exploring diversity and inclusion issues in a wide range of professional contexts, and a roundup of diversity initiatives by an impressive array of professional and practice organizations—all in an accessible and readable format.

Our goal is to make it easier for busy lawyers, judges, law professors, law students, law school administrators, legal employers, and diversity professionals to keep informed of current thinking and research related to diversity and inclusion in the legal profession and provide a regular forum—along with forward momentum—for addressing the continuing challenges that we face.

This year's *IILP Review* includes contributions from almost forty practitioners and thought leaders in the legal profession. We are delighted to present such numerous and diverse voices in this volume and welcome the continued development of both the content and format of this publication.

We hope that you find the 2019-2020 IILP Review both informative and useful, and that you will consider contributing to a future issue of the *IILP Review*.

Philip Lee
Editor-in-Chief

April 24, 2019

Dear Participant:

LexisNexis, a division of RELX Group, is pleased to support IILP in its efforts to seek real change through its programs, projects and thought leadership. As a global organization, we recognize and applaud the efforts of IILP in addressing a global issue of diversity and inclusion affecting the legal profession.

LexisNexis believes our people are our strength. Diversity and inclusion are critical to our future. We need the engagement of people from a wide range of backgrounds, experiences and ideas to achieve real innovation for our customers around the world. Our commitment to diversity and inclusion earned us a top 100 placement in Equileap's Ranking, an assessment of more than 3,000 companies against 19 commitments, including gender balance in the workplace, equal compensation, work-life balance, policies promoting gender equality and commitment to women's empowerment. Additionally, RELX is a signatory to the Women's Empowerment Principles, a UNGC and UN Women's Initiative to help companies empower women and promote gender equality. We are guided in our understanding of the role companies play in furthering human rights by the UNGC, the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises and its mandate that business must "respect the internationally recognised human rights of those affected by their activities".

At LexisNexis, we believe in leading by example, which is a fundamental reason we are proud to support the work of the IILP.

Sincerely,



Ian McDougall
Executive Vice President & General Counsel
LexisNexis Legal & Professional

About IILP

The Institute for Inclusion in the Legal Profession (“IILP”) is a 501 (c)(3) organization that believes that the legal profession must be diverse and inclusive. Through its programs, projects, research, and collaborations, it seeks real change, now, and offers a new model of inclusion to achieve it. IILP asks the hard questions, gets the data, talks about what is really on people’s minds, no matter how sensitive, and invents and tests methodologies that will lead to change. For more information about IILP, visit www.TheIILP.com.

About the IILP Review: The State of Diversity and Inclusion in the Legal Profession

The IILP Review features the most current data about the state of diversity in the legal profession. The Review features compelling essays that explore the nuances and important subtleties at play in regard to diversity and inclusion for lawyers, along with current research from academic experts. As such, the Review brings together insights on programs and strategies to address diversity generally and in regard to the different challenges that different people face in reaching the law.

The depth and breadth of diversity and inclusion efforts makes it hard to keep abreast of the most current information about our progress or lack thereof. Furthermore, as notions of diversity and inclusion have expanded and evolved, it’s even more difficult to stay current with the latest thinking. *The IILP Review: The State of Diversity and Inclusion in the Legal Profession* addresses that challenge by making information about diversity and inclusion more readily and easily accessible.

If you are interested in submitting an article for a future edition of the “IILP Review: The State of Diversity and Inclusion in the Legal Profession,” please visit www.TheIILP.com for more information and to download the Call for Papers

IILP Review 2019-2020: The State of Diversity and Inclusion in the Legal Profession

DEMOGRAPHIC SUMMARY

Philip Lee

Professor of Law, University of the District of Columbia David A. Clarke School of Law

An executive summary of the most current statistical and demographic data on the legal profession by an expert on the intersection of diversity, race, and law.

The Institute for Inclusion in the Legal Profession (IILP) was created in 2009 to promote demographic and cultural diversity and inclusion in the U.S. legal profession. As part of this effort, the *IILP Review* publishes a statistical summary regarding the status of traditionally underrepresented groups within the profession. Such data are critical for assessing the profession's progress toward greater diversity and inclusion.

This summary takes stock of the profession's progress as of March 2019. Its goal is to provide a current, comprehensive picture of the demographics of the profession and to use this information to help the profession set an agenda for effective future action.

The summary is based on a review of academic, government, professional, and popular data sources. Most sources focus primarily on providing racial and ethnic data, or data about gender and minority¹ representation, and these emphases are reflected below. Where available, however, the summary also includes data about the representation of lesbian, gay, bisexual and transgender (LGBT) lawyers, lawyers with disabilities, and other demographic categories relevant to diversity and inclusion, broadly defined. One goal of the *IILP Review* is to promote the systematic collection of a wide range of demographic data.

The main findings of the 2019-2020 demographic summary are as follows:

GENDER

- The number of women in the legal profession continues to increase. Female representation among lawyers stood at 37.4% in 2018, up from 34.4% in 2008 and 28.5% in 1998 according to the Bureau of Labor Statistics (see Table 1). In 2018, female representation among resident active attorneys was 36% according to American Bar Association data (see Table 2).
- Compared to most other professions, women remain under-represented in the legal profession. Women's representation among lawyers (37.4%) is higher than their representation in some other professions, including software developers (19.3%), architects (29.7%), civil engineers (14.8%), and clergy (22.4%). Women's representation among lawyers is lower than their representation among financial managers (55.2%), accountants and auditors (60.6%), biological scientists (47.5%), and post-secondary teachers (49.0%); and significantly lower than their representation within the management and professional workforce as a whole (51.5%) (see Table 3).
- The number of women applicants to law school has been declining. The overall number of law school applicants has been declining from fall 2010 to fall 2015, with double-digit percentage declines in 2011-2013 (see Table 4). However, the large drop in applicants seemed to be tapering off in 2015 with only a 2.2% decrease of applicants from the prior year (see Table 4). The number of women admitted to law school has declined during each year from fall 2010 to fall 2015, with less pronounced declines in fall 2014 and fall 2015 (see Table 6).

1. The term "minority" typically is used to refer to aggregated data about African Americans, Asian Americans, Hispanics, and Native Americans, although there are variations from source to source. Unless otherwise noted, we follow the categories used in the original source and provide clarifications in the footnotes.

- Women comprise the majority of enrolled law students. Women’s law school enrollment has fluctuated over the past twenty years. After peaking in the early 2000s at about 49%, female representation among law students has dropped to around 47% in 2010, according to the most recent aggregate data (see Table 7). However, in 2016, women have, for the first time, become a majority of enrolled law students in the US.² This transition to majority female enrollment occurred, in part, because the rate of decline for admitted male law students was greater than the rate of decline for admitted female law students from fall 2010 to fall 2015 (see Table 6).
- The number of J.D. degrees awarded to women seems to be rebounding toward highs not seen since the years before the economic downturn of 2008. The number of J.D. degrees awarded to women has increased dramatically over the past few decades. In 1980-81, 32.8% of J.D.s went to women (see Table 9). The percentage jumped to 42.7% in 1990-91 and 47.5% in 2000-01 (see Table 9). In 2003-04, the percentage was at an all-time high at 49.5%, fell to 45.9% in 2008-09, and went back up to 47.3% in 2010-11 (see Table 9).
- Women’s entry into private practice has increased in the past few years. In 2016, 52.1% of white female and 49.3% of minority female law graduates began their careers in private practice, compared to 48.8% of white female and 43.5% of minority female law graduates in 2011 (see Table 11). In 2015, women’s representation among law firm associates dipped to 44.7%, but was up to 45.9% in 2018 (see Table 15).
- Women continue to be underrepresented in top-level jobs within the legal profession, such as law firm partner. In 2017, women made up only 22.7% of law firm partners (see Table 15)—and only 18.7% of equity partners that year (see Table 18). Minority women, especially, are underrepresented among law firm partners. In 2018, minority women made up only 3.2% of law partners nationally (see Table 15), and even this figure is skewed upward by a few standout cities, such as Miami (11.7%), San Jose (6.4%), Los Angeles (6.3%), and San Francisco (5.3%) (see Table 21). In many other cities, minority women’s representation among partners is less than 3.2% (see Table 21).
- Women who are racial/ethnic minorities continue to be underrepresented in the upper echelons of law firm partnerships. In 2018, only 0.7% of all law firm partners are African American women, only 0.8% are Hispanic women, and only 1.4% are Asian American women (see Table 22).
- Women’s representation among in-house lawyers has increased. The Association of Corporate Counsel’s 2015 global census found that women make up 49.5% of all in-house lawyers, including both entry-level and senior positions (see Table 23). This is up from 39.0% in 2006 (see Table 23).
- Women’s representation among judges also has dropped from a peak of 56.7% in 2004 to 32.3% in 2018 (see Table 25). However, these data appear somewhat noisy, with significant year-to-year fluctuations. Based on three-year (unweighted) averages, aggregate female representation among judges has decreased from 50.7% in 2003-05 to 31.5% in 2016-18 (see Table 25). For Article III federal court judges, 27% are women (see Table 29). President Trump’s judicial appointments have consisted of about 23% women judges (see Table 26).
- In 2013, women made up 28.7% of law deans, 32.7% of tenured law faculty, and 48.4% of tenure-track law faculty (see Table 30).

2. Elizabeth Olson, Women Make Up Majority of U.S. Law Students for the First Time, NY Times, Dec. 16, 2016, <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html>.

RACE/ETHNICITY

- The pace of racial/ethnic minority representation in the legal profession has been steadily increasing during the past decade. Aggregate racial minority representation among U.S. lawyers stood at 16.5% in 2018, according to the Bureau of Labor Statistics (see Table 1). Based on three-year (unweighted) averages, aggregate minority representation among lawyers has increased from 11.3% in 2006-08 to 15.3% in 2016-18 (see Table 1).
- Progress for different groups varies. African American representation among lawyers has increased over the past ten years, from an average of 4.8% in 2006-08 to an average of 5.2% in 2016-18 (see Table 1). During the same period, Hispanic representation among lawyers increased from an average of 3.7% to an average of 5.5%, and Asian American representation among lawyers increased from an average of 2.8% to an average of 4.7% (see Table 1). In 2018, according to American Bar Association data, minority representation for resident active attorneys consisted of 5% African American, 5% Hispanic, 3% Asian American, 1% Native American, and 1% Multiracial (see Table 2).
- Compared to other professions, the legal profession remains one of the least diverse of all professions in the US. Aggregate minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs. In 2018, minority representation among lawyers was 16.5%, compared to 24.9% among financial managers, 29.6% among accountants and auditors, 44.6% among software developers, 34.8% among physicians and surgeons, and 27.8% within the management and professional labor force as a whole (see Table 3).
- The overall number of admitted law school applicants has been declining since fall 2010, with the largest decreases in fall 2012 and fall 2013 (see Table 4). However, the number of admitted law school applicants for different minority groups has fluctuated during the same period (see Table 5).
- The entry of racial/ethnic minorities as a group into the legal profession has increased. When we disaggregate the data, however, a different picture emerges. The pace of African American entry into the profession has remained steady since 2010, with about 10,000 African American students enrolled in law school each year, according to data from the American Bar Association Section of Legal Education and Admissions to the Bar (see Table 8). Moreover, as overall law school enrollment has dropped since 2010-11 (see Table 7), African American representation among law students has increased, from 7.0% in 2010-11 to 8.0% in 2013-14—an all-time high (see Table 8). Hispanic representation among law students also has increased in both absolute and relative terms, from 10,454 students (7.1%) in 2010-11 to 11,215 students (8.7%) in 2013-14 (see Table 8). Also, law students self-reporting as two or more races has increased in both absolute and relative terms, from 2,048 students (1.4%) in 2010-11 to 3,088 students (2.4%) in 2013-2014 (see Table 8). As a result, aggregate minority representation among law students increased from 23.2% in 2010-11 to 26.7% in 2013-14 (see Table 8). Meanwhile, Asian American enrollment in law school has dropped in both absolute and relative terms, from 10,215 students (6.9%) in 2010-2011 to 8,696 students (6.8%) in 2013-14 (see Table 8). Native American enrollment has dropped in absolute but not relative terms, from a high of 1,208 (0.8%) in 2010-11 to 1,065 (0.8%) in 2013-14 (see Table 8).
- Initial employment patterns continue to differ between racial and ethnic groups, according to data from the National Association of Law Placement (NALP). African Americans are significantly less likely than other groups to start off in private practice, and more likely to start off in business or government. In 2016, only 38.9% of African American law graduates were initially employed in private practice, compared to 54.9% of Hispanic graduates, 57.6% of Asian American graduates, 41.2% of Native American graduates, and 53.7% of white graduates (see Table 12).
- In 2018, African Americans made up only 4.5% of associates in U.S. law firms, down from 4.7% in 2009, but up from a low point of 4.0% in 2014 and 2015 (see Table 16).

- Asian Americans are the most likely minority group to enter private practice (see Table 12). In 2018, Asian Americans made up 11.7% of associates in law firms, up from 9.3% in 2009 (see Table 16). Notably, a majority of Asian American associates have been women (see Table 16). Hispanics comprise 4.7% of law firm associates in 2018, up from 3.9% in 2009 (see Table 16).
- Despite this progress at the associate level, minority representation among law firm partners remains stubbornly low. In 2017, minorities made up only 8.4% of all partners (see Table 15) and only 6.1% of equity partners that same year (see Table 18).
- In 2018, only 1.8% of all law firm partners are African American, only 2.5% are Hispanic, and only 3.6% are Asian American (see Table 17).
- Initial employment differences can be identified based upon race/ethnicity and gender. From 2011-16, minority law school graduates were more likely to start their careers in business or public interest than white graduates (see Table 11). Among minorities in 2016, African Americans (20.5%) are the most likely to start off in business and Hispanics (13.8%) and Native Americans (13.2%) the least likely (see Table 12). African Americans (11.4%) and Hispanics (10.8%) are the most likely to start off in public interest jobs (see Table 12); and minority women are more likely to do so than minority men (see Table 11). In 2016, 11.3% of minority women began their careers in public interest positions, compared to 7.9% of white women, 5.8% of minority men, and 4.3% of white men (see Table 11).
- Among all J.D. graduates in 2017, the percentage of all law graduates who start their careers with judicial clerkships has increased from 7.7% in 2011 to 9.3% in 2017 (see Table 10). The percentage of minority law graduates starting with judicial clerkships has increased from 6.9% in 2011 to 7.9% in 2016 (see Table 11). However, minority men are the least likely to begin their careers with a judicial clerkship (see Table 11).
- Based on the limited data available for different employment settings, African American representation is highest among federal government attorneys (8.7% in 2010, see Table 24) and in law schools (see Table 31); Hispanic representation is highest among in-house lawyers (5% in 2015, see Table 23) and tenure-track faculty (6.4% in 2013, see Table 31); and Asian American representation is highest among law firm associates (11.7% in 2018, see Table 16) and tenure-track faculty (8.5% in 2013, see Table 31).
- In 2018, the Bureau of Labor Statistics reported that 21.2% of all judges were minorities (see Table 25). Article III judges have greater minority representation, with 20.4% minority judges in 2018 (see Table 28). This greater representation for federal court judges appears to stem from the diversity of many of President Obama's judicial appointments (see Table 26).
- As of July 26, 2018, President Trump has appointed one Hispanic judge and four Asian American judges to the federal bench, but no African American or Native American judges (see Table 26).

DISABILITY

- The initial employment of lawyers with disabilities varies from year to year, due in part to the small number of lawyers in the sample. In general, however, the percentage of graduates with disabilities who start off in private practice has declined in recent years, whereas the percentage who start off in business or public interest has increased. In 2016, 40.9% of law graduates with disabilities started off in private practice, down from 48.9% in 2011; whereas 20.7% started off in business and 11.5% in public interest in 2016, compared to 16.9% and 9.3%, respectively, in 2011 (see Table 13). From 2011-16, judicial clerkship rates for graduates with disabilities has fluctuated between 5.3% to 9.6% (see Table 13).



Among all J.D. graduates in 2017, the percentage of all law graduates who start their careers with judicial clerkships has increased.

- The representation of lawyers with disabilities in law firms has increased among associates, from 0.2% in 2009 to 0.5% in 2018, and from 0.3% in 2009 to 0.5% in 2018 among partners (see Table 20). More data are needed to place these figures in perspective, including data from other employment settings and occupations.
- President Trump has not appointed any judges with disabilities to the federal bench (see Table 27).

LGBT

- Law graduates identifying as LGB are less likely than most other groups to start off in private practice and more likely to start off in public interest jobs. In 2016, 14.6% of the law graduates identifying as LGB took public interest jobs—the highest percentage of any demographic group that year (see Tables 11, 12, and 14).
- Despite this, the representation of LGBT lawyers in law firms has been steadily inching upward since NALP began compiling these data. In 2018, 3.8% of associates and 2.1% of partners identified as LGBT, up from 2.3% and 1.4%, respectively, in 2009 (see Table 19).
- President Trump has not appointed any judges who identify as LBGT to the federal bench (see Table 27).

LACK OF DATA

- Tracking the profession's progress toward diversity and inclusion is made difficult by the continuing lack of data. Outside of law firms and Article III judgeships, the profession lacks even basic gender and racial/ethnic breakdowns by employment category, not to mention more detailed breakdowns by title, seniority and region; or more inclusive efforts covering sexual orientation and disability status. More robust statistics on the demographic distribution of lawyers are sorely needed.
- Gathering systematic data on diversity and inclusion in the profession requires a sustained commitment by the entire profession, including bar associations, employers, law schools, and research institutions. Contributing to this effort is a chief goal of the *IILP Review*.

Table 1 - U.S. Lawyers by Gender and Race/Ethnicity¹

	Lawyers	Female	Af Am.	Hisp.	As Am.	Minority
1995	894,000	26.4%	3.6	3.2		6.8
1996	880,000	29.5	3.5	2.8		6.3
1997	885,000	26.6	2.7	3.8		6.5
1998	912,000	28.5	4.0	3.0		7.0
1999	923,000	28.8	5.1	4.0		9.1
2002	929,000	29.2	4.6	3.1		7.7
2003	952,000	27.6	3.6	4.0	2.8	10.4
2004	954,000	29.4	4.7	3.4	2.9	11.0
2005	961,000	30.2	4.7	3.5	2.0	10.2
2006	965,000	32.6	5.0	3.0	2.9	10.9
2007	1,001,000	32.6	4.9	4.3	2.6	11.8
2008	1,014,000	34.4	4.6	3.8	2.9	11.3
2009	1,043,000	32.4	4.7	2.8	4.1	11.6
2010	1,040,000	31.5	4.3	3.4	4.3	12.0
2011	1,085,000	31.9	5.3	3.2	4.2	12.7
2012	1,061,000	31.1	4.4	4.0	4.3	12.7
2013	1,092,000	33.1	4.2	5.1	5.1	14.4
2014	1,132,000	32.9	5.7	5.6	4.4	15.7
2015	1,160,000	34.5	4.6	5.1	4.8	14.5
2016	1,133,000	35.7	4.4	5.6	4.7	14.7
2017	1,137,000	37.4	5.6	4.8	4.4	14.8
2018	1,199,000	37.4	5.5	6.1	4.9	16.5

1. Bureau of Labor Statistics, *Table 11: Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. DEP'T OF LABOR, <http://www.bls.gov/cps/tables.htm> (follow links for individual years and scroll down to "Characteristics of the Employed," Table 11). Figures for 2000 and 2001 are not available. Figures for minorities are derived from aggregating the minority categories listed. Note that the "Asian" category was not tracked from 1995-2002.

Graphic Representation of Table 1

Chart 1: Minority Lawyers in the US (2018)

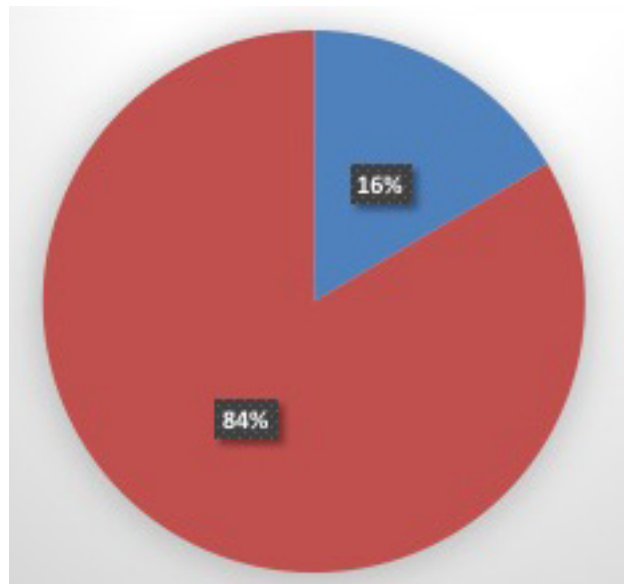


Chart 2: Women Lawyers in the US (2018)

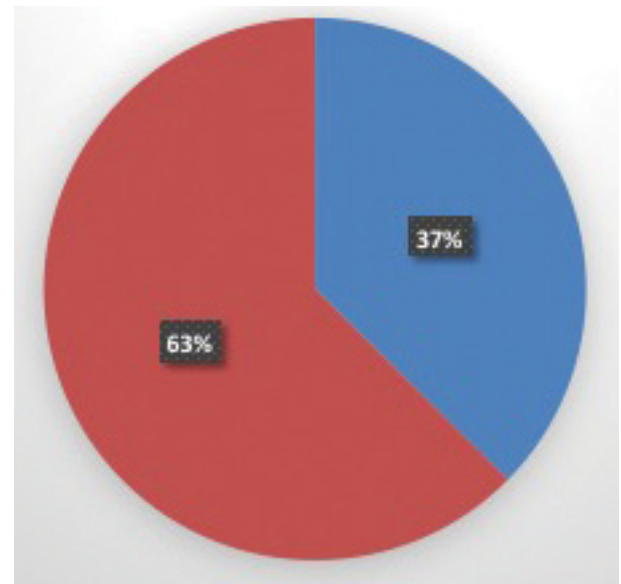


Table 2 - Resident Active Attorney Demographics by Gender and Race/Ethnicity²

	Female	Af Am.	Hisp.	As Am.	Na Am.	Multiracial
2008	32%	4	3	2	1	
2009	31	5	5	2	1	
2010	31	5	4	2	1	
2011	33	5	4	2	1	
2012	33	5	3	2	1	
2013	34	5	4	2	1	
2014	35	5	4	2	1	
2015	35	5	5	2	1	
2016	36	5	5	3	0	1
2017	35	5	5	2	1	2
2018	36	5	5	3	1	1

2. Am. Bar Ass'n (ABA), *National Lawyer Population Survey, 10-Year Trend in Lawyer Demographics*, ABA, https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_Demographics_2008-2018.authcheckdam.pdf. Figures for Asian Americans do not include Native Hawaiians or Pacific Islanders. During 2016-2018, the data reflect that 0% (less than 0.5%) of the U.S. resident active attorneys responded as Hawaiian/Pacific Islander. Beginning with the 2016 survey, the "Multiracial" category was added for race/ethnicity. In the same year, the "Other" category was added for gender; however, from 2016-2018, the data show that 0% (less than .5%) of resident active attorneys responded as "Other" gender.

Table 3 – Selected U.S. Occupations by Gender and Race/Ethnicity (2018)³

	Total Employed	Female	Af Am.	Hisp.	As Am.	Minority
Civilian Labor Force	155,761,000	46.9%	12.3	17.3	6.3	35.9
All Management/ Professional	62,436,000	51.5%	9.6	9.7	8.5	27.8
Management Occupations	18,263,000	40.0	7.6	10.3	5.9	23.8
Chief Executives	1,573,000	26.9	3.5	6.1	5.9	15.5
Financial Managers	1,231,000	55.2	8.1	9.4	7.4	24.9
Business and Finance	7,587,000	53.8	9.8	8.7	9.1	27.6
Accountants/Auditors	1,929,000	60.6	9.3	7.6	12.7	29.6
Human Resources Workers	664,000	70.7	10.5	13.2	7.0	30.7
All Computer/ Mathematical	5,126,000	25.6	8.4	7.5	22.0	37.9
Computer Systems Analysts	652,000	37.5	10.0	7.9	20.4	38.3
Software Developers	1,682,000	19.3	3.9	5.3	35.4	44.6
All Architecture/ Engineering	3,263,000	15.9	6.5	8.9	11.9	27.3
Architects	239,000	29.7	4.5	10.1	11.5	26.1
Civil Engineers	456,000	14.8	4.4	7.9	9.3	21.6
Life/Physical/ Social Sciences	1,529,000	46.7	7.1	8.7	12.8	28.6
Biological Scientists	104,000	47.5	1.6	3.6	13.7	18.9
Psychologists	224,000	75.9	7.7	11.2	3.0	21.9
All Community/ Social Services	2,680,000	66.5	20.4	12.1	3.9	36.4
Counselors	895,000	72.0	22.2	12.7	3.9	38.8
Clergy	415,000	22.4	12.5	6.4	4.3	23.2
Legal Occupations	1,891,000	51.6	7.3	9.9	4.7	21.9
Lawyers	1,199,000	37.4	5.5	6.1	4.9	16.5
Paralegals/ Legal Assistants	444,000	86.4	11.3	18.5	5.3	35.1
Education	9,313,000	73.2	10.6	10.7	5.2	26.5
Postsecondary Teachers	1,417,000	49.0	7.9	7.3	13.7	28.9
Secondary School Teachers	1,062,000	58.0	7.3	9.0	2.6	18.9
Healthcare Practitioners	9,420,000	75.0	12.6	8.5	9.9	31.0
Physicians/Surgeons	1,094,000	40.3	7.6	7.4	19.8	34.8
Registered Nurses	3,213,000	88.6	13.1	7.2	9.0	29.3

3. Bureau of Labor Statistics, *Table 11: Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. DEPT OF LABOR (2018), <https://www.bls.gov/cps/cpsaat11.pdf>. Figures for minorities are derived from aggregating the minority categories listed. Note that the “Asian” category was not tracked from 1995-2002.

Table 4 - End-of-Year J.D. Applicants by Enrollment Year⁴

	Fall 2010	Fall 2011	Fall 2012	Fall 2013	Fall 2014	Fall 2015
Final End-of-Year Applicants	87,900	78,500	67,900	59,400	55,700	54,500
% Change From Prior Year		-10.7%	-13.5	-12.4	-6.3	-2.2

4. Law Sch. Admissions Council, *Archive: ABA End-of-Year Summary—Applicants, Admitted Applicants & Applications*, LSAC, <https://www.lsac.org/lisacresources/data/aba-eoy/archive>. (last visited July 5, 2018).

Graphic Representation of Table 4

J.D. Applicants by Enrollment Year

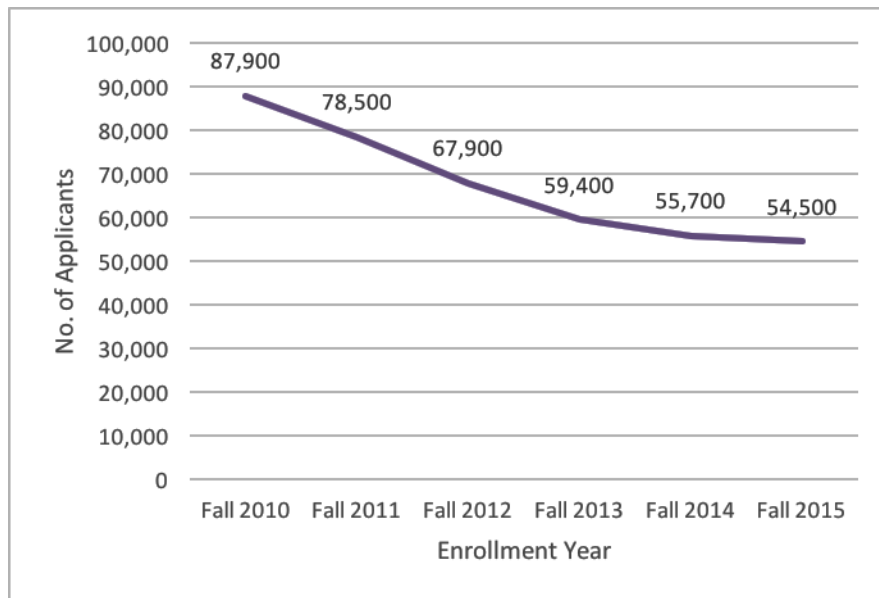


Table 5 - Admitted J.D. Applicants by Race/Ethnicity and Enrollment Year⁵

	Fall 2010	Fall 2011	Fall 2012	Fall 2013	Fall 2014	Fall 2015
All	60,400	55,800	50,600	45,700	43,500	42,300
% Change From Prior Year		-7.7%	-9.2	-9.8	-4.9	-2.8
Af Am.	4,680	4,610	4,860	4,670	4,760	4,680
% Change From Prior Year		-1.3%	5.3	-3.9	2.0	-1.8
Hisp.	4,430	4,560	4,700	4,630	4,550	4,670
% Change From Prior Year		3.0%	2.9	-1.3	-1.8	2.6
As Am.	5,310	5,450	5,050	4,620	4,650	4,320
% Change From Prior Year		2.6%	-7.3	-8.5	0.7	-7.2
Nat Am.	780	900	900	930	890	840
% Change From Prior Year		16.2%	0.0	2.7	-4.0	-6.0
Nat Haw/Pac Islander	160	180	160	200	170	180
% Change From Prior Year		10.4%	-8.9	21.3	-13.6	4.1
Puerto Rican	1,140	1,220	1,060	1,130	1,060	1,100
% Change From Prior Year		7.8%	-13.2	6.5	-6.5	4.2

5. Law Sch. Admissions Council, *Archive: 2010-2015 Admitted Applicants by Race/Ethnicity*, LSAC, <https://www.lsac.org/lsacresources/data/ethnicity-sex-admits/archive-1>. (last visited July 5, 2018).

Table 6 - Admitted J.D. Applicants by Gender and Enrollment Year⁶

	Fall 2010	Fall 2011	Fall 2012	Fall 2013	Fall 2014	Fall 2015
Female	27,610	25,750	23,950	21,990	21,160	20,900
% Change From Prior Year		-6.8%	-7.0	-8.2	-3.8	-1.2
Male	32,560	29,710	26,490	23,580	22,210	21,230
% Change From Prior Year		-8.7%	-10.8	-11.0	-5.8	-4.4
Declined to Respond	270	300	200	130	100	140
% Change From Prior Year		11.1%	-32.7	-35.1	-26.0	43.3

6. Law Sch. Admissions Council, *Archive: 2010-2015 Admitted Applicants by Gender/Sex*, LSAC, <https://www.lsac.org/lsacresources/data/ethnicity-sex-admits/archive-3>. (last visited July 5, 2018).

Table 7 – J.D. Enrollment by Gender and Minority Status⁷

	Total	Female (%)	Minority (%)
1976-77	112,401	29,343 (26.1)	9,589 (8.5)
1977-78	113,080	31,650 (28.0)	9,580 (8.5)
1978-79	116,150	35,775 (30.8)	9,952 (8.6)
1979-80	117,297	37,534 (32.0)	10,013 (8.5)
1980-81	119,501	40,834 (34.2)	10,575 (8.8)
1981-82	120,879	43,245 (35.8)	11,134 (9.2)
1982-83	121,791	45,539 (37.4)	11,611 (9.5)
1983-84	121,201	46,361 (38.3)	11,866 (9.8)
1984-85	119,847	46,897 (39.1)	11,917 (9.9)
1985-86	118,700	47,486 (40.0)	12,357 (10.4)
1986-87	117,813	47,920 (40.7)	12,550 (10.7)
1987-88	117,997	48,920 (41.5)	13,250 (11.2)
1988-89	120,694	50,932 (42.2)	14,295 (11.8)
1989-90	124,471	53,113 (42.7)	15,720 (12.6)
1990-91	127,261	54,097 (42.5)	17,330 (13.6)
1991-92	129,580	55,110 (42.5)	19,410 (15.0)
1992-93	128,212	64,644 (50.4)	21,266 (16.6)
1993-94	127,802	55,134 (43.1)	22,799 (17.8)
1994-95	128,989	55,808 (43.3)	24,611 (19.1)
1995-96	129,397	56,961 (44.0)	25,554 (19.7)
1996-97	128,623	57,123 (44.4)	25,279 (19.7)
1997-98	125,886	56,915 (45.2)	24,685 (19.6)
1998-99	125,627	57,952 (46.1)	25,266 (20.1)
1999-00	125,184	59,362 (47.4)	25,253 (20.2)
2000-01	125,173	60,633 (48.4)	25,753 (20.6)
2001-02	127,610	62,476 (49.0)	26,257 (20.6)
2002-03	132,885	65,179 (49.0)	27,175 (20.5)
2003-04	137,676	67,027 (48.7)	28,325 (20.6)
2004-05	140,376	67,438 (48.0)	29,489 (21.0)
2005-06	140,298	66,613 (47.5)	29,768 (21.2)
2006-07	141,031	66,085 (46.9)	30,557 (21.6)
2007-08	141,719	66,196 (46.7)	30,657 (21.6)
2008-09	142,922	66,968 (46.9)	31,368 (21.9)
2009-10	145,239	68,502 (47.2)	32,505 (22.4)
2010-11	147,525	69,009 (46.8)	35,045 (23.8)
2011-12	146,288	68,262 (46.7)	35,859 (24.5)
2012-13	139,055	65,387 (47.0)	35,914 (25.8)
2013-14	128,712		34,584 (26.9)

7. ABA Section of Legal Educ. & Admissions to the Bar, Enrollment and Degrees Awarded, 1963-2012 Academic Years, ABA (2013), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf (for data on female enrollment) (aggregate figures for 2013-14 and later years are not available); ABA Section of Legal Educ. & Admissions to the Bar, Resources: Legal Education Statistics: Ethnic/Gender Data: Longitudinal Charts, First-Year and Total J.D. Minority, ABA, http://www.americanbar.org/groups/legal_education/resources/statistics.html (scroll down and click “First-Year and Total J.D. Minority”) (for data on minority enrollment) (aggregate figures for 2014-15 and later years are not available). Some figures differ slightly from those previously reported by the ABA. Note that the apparent spike in female J.D. enrollment in the 1992-1993 academic year appears to be a transcription error. See ABA Section of Legal Educ. & Admissions to the Bar, First-Year & Total Enrollment by Gender, 1947-2011, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf (previously listing the 1992-1993 female J.D. enrollment as 54,572 and 42.6%).

Table 8 - J.D. Enrollment by Race/Ethnicity⁸

	Total	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	≥ 2 Races (%)
2010-11	147,525	10,352 (7.0)	10,454 (7.1)	10,215 (6.9)	1,208 (0.8)	2,048 (1.4)
2011-12	145,288	10,452 (7.2)	11,027 (7.6)	10,415 (7.2)	1,165 (0.8)	2,508 (1.7)
2012-13	139,055	10,435 (7.5)	11,328 (8.1)	9,666 (7.0)	1,063 (0.8)	3,058 (2.2)
2013-14	128,712	10,241 (8.0)	11,215 (8.7)	8,696 (6.8)	1,065 (0.8)	3,088 (2.4)

8. BA Section of Legal Educ. & Admissions to the Bar, *Resources: Legal Education Statistics: Ethnic/Gender Data: Longitudinal Charts, First-Year and Total J.D. Minority*, ABA, http://www.americanbar.org/groups/legal_education/resources/statistics.html (scroll down and click “First-Year and Total J.D. Minority”) (for total J.D. enrollment figures from 2010 to 2014); ABA Section of Legal Educ. & Admissions to the Bar, *Resources: Legal Education Statistics: Ethnic/Gender Data: Longitudinal Charts, Black or African American*, ABA, http://www.americanbar.org/groups/legal_education/resources/statistics.html (scroll down and click “Black or African American”) (for black/African American figures, 2010-2014); ABA Section of Legal Educ. & Admissions to the Bar, *Resources: Legal Education Statistics: Ethnic/Gender Data: Longitudinal Charts, All Hispanic*, ABA, http://www.americanbar.org/groups/legal_education/resources/statistics.html (scroll down and click “All Hispanic”) (for Hispanic figures, 2010-2014); ABA Section of Legal Educ. & Admissions to the Bar, *Resources: Legal Education Statistics: Ethnic/Gender Data: Longitudinal Charts, Asian*, ABA, http://www.americanbar.org/groups/legal_education/resources/statistics.html (scroll down and click “Asian”) (for Asian American figures, 2010-2014); ABA Section of Legal Educ. & Admissions to the Bar, *Resources: Legal Education Statistics: Ethnic/Gender Data: Longitudinal Charts, American Indian or Alaska Native*, ABA, http://www.americanbar.org/groups/legal_education/resources/statistics.html (scroll down and click “American Indian or Alaska Native”) (for Native American figures, 2010-2014); ABA Section of Legal Educ. & Admissions to the Bar, *Resources: Legal Education Statistics: Ethnic/Gender Data: Longitudinal Charts, Two or More Races*, http://www.americanbar.org/groups/legal_education/resources/statistics.html (scroll down and click “Two or More Races.”) (for Two or More Races figures, 2010-2014). Figures include all J.D. candidates enrolled at ABA-approved law schools, excluding Puerto Rican law schools. Figures for Hispanics include Hispanics of any race. Figures for Asian Americans do not include “Native Hawaiians or Pacific Islanders.” In 2013–14, there were 279 Hawaiian Natives or other Pacific Islanders enrolled in ABA-approved law schools. ABA Section of Legal Educ. & Admissions to the Bar, *Resources: Legal Education Statistics: Ethnic/Gender Data: Longitudinal Charts, Native Hawaiian or Other Pacific Islander*, http://www.americanbar.org/groups/legal_education/resources/statistics.html (scroll down and click “Native Hawaiian or Other Pacific Islander”).

Graphic Representation of Table 9

J.D.s Awarded by Gender

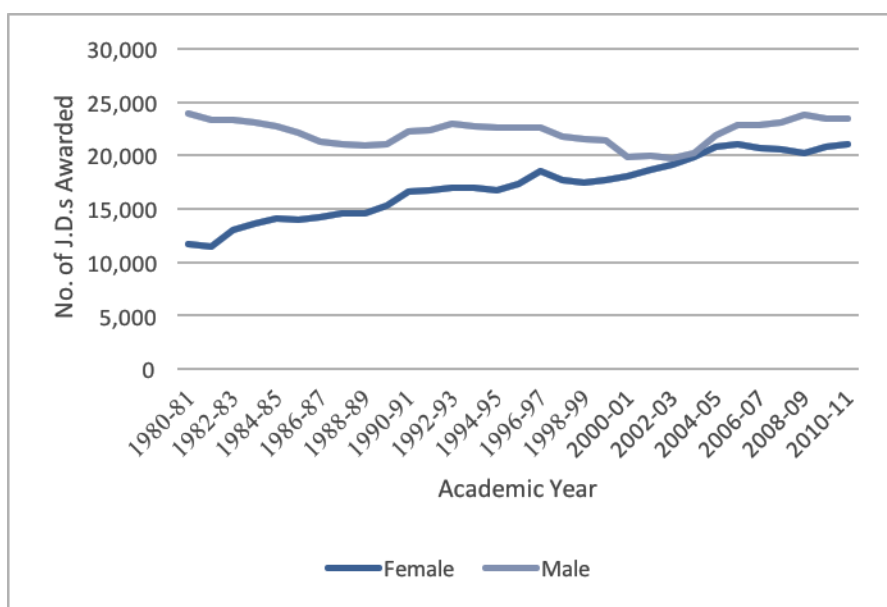


Table 9 - J.D.s Awarded by Gender⁹

	Total	Female (%)
1980-81	35,604	11,693 (32.8)
1981-82	34,847	11,494 (33.0)
1982-83	36,390	13,060 (35.9)
1983-84	36,688	13,586 (37.0)
1984-85	36,830	14,119 (38.3)
1985-86	36,122	13,980 (38.7)
1986-87	35,479	14,206 (40.0)
1987-88	35,702	14,595 (40.9)
1988-89	35,521	14,553 (41.0)
1989-90	36,386	15,345 (42.2)
1990-91	38,801	16,580 (42.7)
1991-92	39,082	16,680 (42.7)
1992-93	39,915	16,972 (42.5)
1993-94	39,711	16,997 (42.8)
1994-95	39,355	16,790 (42.7)
1995-96	39,921	17,366 (43.5)
1996-97	41,115	18,552 (45.1)
1997-98	39,456	17,662 (44.8)
1998-99	39,072	17,516 (44.8)
1999-00	39,158	17,713 (46.4)
2000-01	37,910	18,006 (47.5)
2001-02	38,606	18,644 (48.3)
2002-03	38,865	19,133 (49.2)
2003-04	40,024	19,818 (49.5)
2004-05	42,672	20,804 (48.8)
2005-06	43,883	21,074 (48.0)
2006-07	43,518	20,669 (47.5)
2007-08	43,588	20,537 (47.1)
2008-09	44,004	20,191 (45.9)
2009-10	44,258	20,852 (47.1)
2010-11	44,495	21,043 (47.3)

9. ABA Section of Legal Educ. & Admissions to the Bar, *Resources: Legal Statistics: Degrees Awarded: Longitudinal Charts, JD & LLB*, ABA, http://www.americanbar.org/groups/legal_education/resources/statistics.html/. Some figures differ slightly from those previously reported by the ABA.

Table 10 - End-of-Year J.D. Applicants by Enrollment Year¹⁰

Class of	2011	2012	2013	2014	2015	2016	2017
Total Graduates	43,979	46,364	46,776	43,832	39,984	37,124	34,992
Unemployed (%)	4,402 (9.2)	4,929 (10.6)	5,229 (11.2)	4,295 (9.8)	3,871 (9.7)	3,271 (8.8)	2,755 (7.9)
Solo Practice (%)	1,170 (2.7)	1,050 (2.3)	1,086 (2.3)	936 (2.1)	688 (1.7)	538 (1.4)	443 (1.3)
Law Firm (%)	16,734 (38.1)	18,214 (39.3)	18,545 (39.6)	17,856 (40.7)	16,282 (40.7)	16,403 (44.1)	16,021 (45.9)
Business (%)	6,578 (15.0)	6,881 (14.9)	7,130 (15.2)	6,723 (15.3)	5,854 (14.6)	5,024 (13.5)	4,252 (12.2)
Government (%)	4,324 (9.8)	4,654 (10.0)	4,953 (10.6)	5,102 (11.6)	4,655 (11.6)	4,459 (12.0)	4,204 (12.0)
Public Interest (%)	2,684 (6.1)	2,715 (5.9)	2,227 (4.8)	2,170 (5.0)	1,883 (4.7)	1,645 (4.4)	1,625 (4.7)
Clerkship (%)	3,394 (7.7)	3,389 (7.3)	3,447 (7.4)	3,379 (7.7)	3,368 (8.4)	3,327 (8.9)	3,263 (9.3)
Education (%)	1,052 (2.4)	1,031 (2.2)	973 (2.1)	784 (1.8)	645 (1.6)	601 (1.6)	493 (1.4)

10. ABA Section of Legal Educ. & Admissions to the Bar, *2012 Law Graduate Employment Data*, ABA (2013), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/law_grad_employment_data.authcheckdam.pdf (for classes of 2011 and 2012 data); ABA Section of Legal Educ. & Admissions to the Bar, *2014 Law Graduate Employment Data*, ABA (2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2014_law_graduate_employment_data_042915.authcheckdam.pdf (for classes of 2013 and 2014 data); ABA Section of Legal Educ. & Admissions to the Bar, *2016 Law Graduate Employment Data*, ABA (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2016_law_graduate_employment_data.authcheckdam.pdf (for classes of 2015 and 2016 data); ABA Section of Legal Educ. & Admissions to the Bar, *2017 Law Graduate Employment Data*, ABA (2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2017_law_graduate_employment_data.authcheckdam.pdf (for class of 2017 data). Figures exclude data for unknown employment status and law school funded positions. Data for the classes of 2011, 2012, and 2013 reflect the graduates' employment status 9 months following graduation. Starting with the class of 2014, the data reflect the graduates' employment status approximately 10 months after graduation due to a change in ABA reporting requirements.

Table 11 – Initial Employment by Minority Status and Gender¹¹

2011	White				Minority		
	Male	Female	Total		Male	Female	Total
Private Practice	52.8%	48.8	51.0		46.4	43.5	44.8
Business	18.4	16.6	17.6		21.1	19.5	20.2
Government	11.7	11.2	11.5		13.2	13.0	13.1
Judicial Clerkships	9.3	11.3	10.2		6.4	7.2	6.9
Public Interest	5.0	8.4	6.5		8.8	11.8	10.5
2012	White				Minority		
	Male	Female	Total		Male	Female	Total
Private Practice	52.7%	50.4	51.6		49.2	46.2	47.5
Business	19.4	16.0	17.9		20.5	17.5	18.8
Government	11.5	11.7	11.6		13.5	13.5	13.5
Judicial Clerkships	8.7	10.8	9.7		5.8	7.1	6.6
Public Interest	4.9	7.9	6.3		7.2	11.9	9.9

Table 11 – Initial Employment by Minority Status and Gender¹¹ (continued)

2013	White				Minority		
	Male	Female	Total		Male	Female	Total
Private Practice	53.6%	50.2	52.2		49.1	46.6	47.7
Business	19.3	16.1	17.9		22.0	18.6	20.2
Government	10.9	11.5	11.2		13.2	12.5	12.8
Judicial Clerkships	9.0	10.9	9.8		5.5	7.4	6.5
Public Interest	4.6	8.5	6.3		6.8	11.1	9.1
2014	White				Minority		
	Male	Female	Total		Male	Female	Total
Private Practice	52.8%	49.6	51.4		51.0	47.5	49.0
Business	19.0	16.1	17.7		22.1	17.4	19.4
Government	12.0	12.1	12.0		12.1	13.3	12.7
Judicial Clerkships	9.5	11.1	10.2		5.6	7.1	6.5
Public Interest	4.9	8.5	6.5		6.8	11.2	9.4
2015	White				Minority		
	Male	Female	Total		Male	Female	Total
Private Practice	53.9%	50.3	52.3		50.2	48.2	49.0
Business	17.9	15.3	16.8		19.3	17.2	18.1
Government	11.6	11.8	11.7		14.7	13.5	14.0
Judicial Clerkships	10.4	12.4	11.3		6.6	7.4	7.0
Public Interest	4.4	8.1	6.1		6.7	10.8	9.1
2016	White				Minority		
	Male	Female	Total		Male	Female	Total
Private Practice	55.0%	52.1	53.7		52.7	49.3	50.7
Business	16.0	13.7	15.0		18.7	15.6	16.9
Government	11.9	12.2	12.0		12.9	12.9	13.0
Judicial Clerkships	11.3	12.2	11.7		7.2	8.5	7.9
Public Interest	4.3	7.9	6.0		5.8	11.3	9.1

11. NAT'L ASS'N FOR LAW PLACEMENT, JOBS & JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2011 60 (2012) [hereinafter CLASS OF 2011] (for 2011 figures); NAT'L ASS'N FOR LAW PLACEMENT, JOBS & JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2012 64 (2013) [hereinafter CLASS OF 2012] (for 2012 figures); NAT'L ASS'N FOR LAW PLACEMENT, JOBS & JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2013 64 (2014) [hereinafter CLASS OF 2013] (for 2013 figures); NAT'L ASS'N FOR LAW PLACEMENT, JOBS & JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2014 64 (2015) [hereinafter CLASS OF 2014] (for 2014 figures); NAT'L ASS'N FOR LAW PLACEMENT, JOBS & JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2015 66 (2016) [hereinafter CLASS OF 2015] (for 2015 figures); NAT'L ASS'N FOR LAW PLACEMENT, JOBS & JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2016 68 (2017) [hereinafter CLASS OF 2016] (for 2016 figures). Figures for 2011-2016 exclude graduates with education jobs and unknown employer type.

Table 12 - Initial Employment by Race/Ethnicity¹²

2012	White	Af Am.	Hisp.	As Am.	Na Am.	Multi-racial
Private Practice	51.6%	36.3	52.3	52.6	43.9	49.5
Business	17.9	22.8	14.8	19.0	20.5	16.8
Government	11.6	16.0	13.7	11.2	18.7	12.9
Judicial Clerkships	9.7	7.5	4.8	6.9	7.0	7.4
Public Interest	6.3	12.3	11.5	6.6	8.2	10.6
2014	White	Af Am.	Hisp.	As Am.	Na Am.	Multi-racial
Private Practice	51.4%	37.4	53.5	55.6	46.6	48.6
Business	17.7	23.2	15.7	18.9	18.9	19.9
Government	12.0	17.4	11.4	9.4	16.2	13.5
Judicial Clerkships	10.2	7.0	5.8	6.7	4.1	6.4
Public Interest	6.5	10.7	11.6	6.9	11.5	8.4
2016	White	Af Am.	Hisp.	As Am.	Na Am.	Multi-racial
Private Practice	53.7%	38.9	54.9	57.6	41.2	50.2
Business	15.0	20.5	13.8	17.6	13.2	14.9
Government	12.0	17.4	12.7	8.1	21.1	14.6
Judicial Clerkships	11.7	7.8	6.4	8.6	11.4	10.7
Public Interest	6.0	11.4	10.8	5.8	8.8	6.8

12. CLASS OF 2012, *supra* note 11, at 65 (for 2012 figures); CLASS OF 2014, *supra* note 11, at 65 (for 2014 figures); CLASS OF 2016, *supra* note 11, at 69 (for 2016 figures). Figures for “Asian American” include Native Hawaiian/Pacific Islander graduates. Figures for 2012, 2014, and 2016 exclude graduates with education jobs and unknown employer type.

Table 13 - Initial Employment of Graduates with Disabilities¹³

	2011	2012	2013	2014	2015	2016
Private Practice	48.9%	50.7	46.2	42.2	47.9	40.9
Business	16.9	16.4	20.7	19.8	19.0	20.7
Government	13.4	10.0	14.6	13.2	10.7	13.7
Judicial Clerkships	6.5	7.0	5.3	9.4	6.9	9.6
Public Interest	9.3	11.4	8.3	12.2	11.4	11.5
Education	6.5	4.0	4.3	3.3	3.4	3.7

13. CLASS OF 2011, *supra* note 11, at 62 (for 2011 figures); CLASS OF 2012, *supra* note 11, at 66 (for 2012 figures); CLASS OF 2013, *supra* note 11, at 66 (for 2013 figures); CLASS OF 2014, *supra* note 11, at 66 (for 2014 figures); CLASS OF 2015, *supra* note 11, at 68 (for 2015 figures); CLASS OF 2016, *supra* note 11, at 70 (for 2016 figures). Figures for 2011-2016 exclude graduates with unknown employer type.

Table 14 - Initial Employment of Graduates Identifying as LGB¹⁴

	2014	2015	2016
Private Practice	41.6%	43.1	44.5
Business	16.1	16.9	13.1
Government	11.2	11.4	12.9
Judicial Clerkships	11.2	11.2	12.0
Public Interest	15.9	14.3	14.6
Education	4.2	3.0	3.0

14. CLASS OF 2014, *supra* note 11, at 66 (for 2014 figures); CLASS OF 2015, *supra* note 11, at 68 (for 2015 figures); CLASS OF 2016, *supra* note 11, at 70 (for 2016 figures). Figures for 2014-2016 exclude graduates with unknown employer type. Jobs & JDs started collecting data on LGB graduates starting for the Class of 2014.

Table 15 - Representation of Female and Minority Lawyers in Law Firms¹⁵

	Partners			Associates		
	Female	Minority	Minority F.	Female	Minority	Minority F.
2009	19.2%	6.1	1.9	45.7	19.7	11.0
2010	19.4	6.2	2.0	45.4	19.5	10.9
2011	19.5	6.7	2.0	45.4	19.9	11.0
2012	19.9	6.7	2.2	45.1	20.3	11.1
2013	20.2	7.1	2.3	44.8	20.9	11.3
2014	21.1	7.3	2.5	44.9	21.6	11.5
2015	21.5	7.5	2.6	44.7	22.0	11.8
2016	22.1	8.1	2.9	45.0	22.7	12.4
2017	22.7	8.4	2.9	45.5	23.3	12.9
2018	23.4	9.1	3.2	45.9	24.2	13.5

15. NAT'L ASS'N FOR LAW PLACEMENT, 2018 REPORT ON DIVERSITY IN U.S. LAW FIRMS 9 (Jan. 2019), https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf [hereinafter 2018 DIVERSITY REPORT]. Figures are based on statistics provided by firms in the NALP DIRECTORY OF LEGAL EMPLOYERS.

Table 16 - Associates by Gender and Race/Ethnicity¹⁶

	Af Am.		Hisp.		As Am.	
	Total	Female	Total	Female	Total	Female
2009	4.7%	2.9	3.9	2.0	9.3	5.1
2010	4.4	2.8	3.8	1.9	9.4	5.2
2011	4.3	2.6	3.8	1.9	9.7	5.3
2012	4.2	2.6	3.9	2.0	10.0	5.4
2013	4.1	2.4	3.8	1.9	10.5	5.6
2014	4.0	2.3	4.0	1.9	10.8	5.8
2015	4.0	2.3	4.3	2.0	10.9	6.0
2016	4.1	2.3	4.4	2.2	11.3	6.4
2017	4.3	2.4	4.6	2.2	11.4	6.5
2018	4.5	2.6	4.7	2.5	11.7	6.6

16. *Id.*

Table 17 - Partners by Gender and Race/Ethnicity¹⁷

	Af Am.		Hisp.		As Am.	
	Total	Female	Total	Female	Total	Female
2009	1.7%	0.6	1.7	0.4	2.2	0.8
2010	1.7	0.6	1.7	0.4	2.3	0.8
2011	1.7	0.6	1.9	0.5	2.4	0.8
2012	1.7	0.6	1.9	0.5	2.5	0.9
2013	1.8	0.6	2.0	0.5	2.7	0.9
2014	1.7	0.6	2.2	0.6	2.7	1.0
2015	1.8	0.6	2.2	0.6	2.9	1.1
2016	1.8	0.6	2.3	0.7	3.1	1.2
2017	1.8	0.7	2.4	0.7	3.3	1.2
2018	1.8	0.7	2.5	0.8	3.6	1.4

17. *Id.*

Table 18 - Equity Partners by Gender and Minority Status¹⁸

	Equity		Non-equity	
	Female	Minority	Female	Minority
2011	15.6%	4.7	27.7	8.3
2012	15.3	4.8	27.3	8.4
2013	16.5	5.4	27.6	9.1
2014	17.1	5.6	28.2	8.9
2015	17.4	5.6	28.8	9.4
2016	18.1	5.8	29.4	9.9
2017	18.7	6.1	30.7	10.4

18. Nat'l Ass'n for Law Placement, *Representation of Women and Minorities Among Equity Partners Slowly Increasing*, NAT'L ASS'N FOR LAW PLACEMENT (Apr. 2018), <https://www.nalp.org/0418research>. Figures are based on statistics provided by firms in the NALP DIRECTORY OF LEGAL EMPLOYERS.

Table 19 - Representation of LGBT Lawyers in Law Firms¹⁹

	Partners	Associates
2009	1.4%	2.3
2010	1.5	2.4
2011	1.4	2.4
2012	1.6	2.7
2013	1.7	2.8
2014	1.8	2.9
2015	1.8	3.1
2016	1.9	3.2
2017	2.0	3.5
2018	2.1	3.8

19. Nat'l Ass'n for Law Placement, *Although Most Firms Collect GLBT Lawyer Information, Overall Numbers Remain Low*, NAT'L ASS'N FOR LAW PLACEMENT (Dec. 2009), <http://www.nalp.org/dec09glbt> (for 2009 figures); Nat'l Ass'n for Law Placement, *Most Firms Collect LGBT Lawyer Information—LGBT Representation Up Slightly*, NAT'L ASS'N FOR LAW PLACEMENT (Dec. 2010), <http://www.nalp.org/dec10lgbt> (for 2010 figures); Nat'l Ass'n for Law Placement, *Most Firms Collect LGBT Lawyer Information, LGBT Representation Steady*, NAT'L ASS'N FOR LAW PLACEMENT (Dec. 2011), http://www.nalp.org/lgbt_lawyers_dec2011 (for 2011 figures); Nat'l Ass'n for Law Placement, *LGBT Representation Up in 2012*, NAT'L ASS'N FOR LAW PLACEMENT (Jan. 2013), http://www.nalp.org/lgbt_representation_up_in_2012 (for 2012 figures); Nat'l Ass'n for Law Placement, *LGBT Representation Up Again in 2013*, NAT'L ASS'N FOR LAW PLACEMENT (Jan. 2014), <http://www.nalp.org/jan14research> (for 2013 figures); Nat'l Ass'n for Law Placement, *LGBT Representation Among Lawyers in 2014*, NAT'L ASS'N FOR LAW PLACEMENT (Mar. 2015), <http://www.nalp.org/0315research> (for 2014 figures); Nat'l Ass'n for Law Placement, *LGBT Representation Among Lawyers in 2015*, NAT'L ASS'N FOR LAW PLACEMENT (Dec. 2015), <http://www.nalp.org/1215research> (for 2015 figures); Nat'l Ass'n for Law Placement, *LGBT Representation Among Lawyers in 2017*, NAT'L ASS'N FOR LAW PLACEMENT (Jan. 2018), <https://www.nalp.org/0118research> (for 2016 and 2017 figures); NAT'L ASS'N FOR LAW PLACEMENT, 2018 DIVERSITY REPORT, *supra* note 15, at 18 (for 2018 figures). Figures are based on statistics provided by firms in the NALP DIRECTORY OF LEGAL EMPLOYERS.

Table 20 – Representation of Lawyers with Disabilities in Law Firms²⁰

	Partners	Associates
2009	0.3%	0.2
2010	0.2	0.2
2011	0.2	0.2
2012	0.3	0.2
2013	0.3	0.3
2014	0.3	0.3
2015	0.4	0.3
2016	0.4	0.3
2017	0.4	0.6
2018	0.5	0.5

20. Nat'l Ass'n for Law Placement, *Reported Number of Lawyers with Disabilities Remains Small*, NAT'L ASS'N FOR LAW PLACEMENT (Dec. 2009), <http://nalp.org/dec09disabled> (for 2009 figures); Press Release, Nat'l Ass'n for Law Placement, *Law Firm Diversity Among Associates Erodes in 2010*, NAT'L ASS'N FOR LAW PLACEMENT (Nov. 4, 2010), <http://www.nalp.org/2010lawfirmdiversity?s=disabilities> (for 2010 figures); Press Release, Nat'l Ass'n for Law Placement, *Law Firm Diversity Wobbles: Minority Numbers Bounce Back While Women Associates Extend Two-Year Decline*, NAT'L ASS'N FOR LAW PLACEMENT (Nov. 3, 2011), http://www.nalp.org/2011_law_firm_diversity?s=disabilities (for 2011 figures); Press Release, Nat'l Ass'n for Law Placement, *Representation of Women Among Associates Continues to Fall, Even as Minority Associates Make Gains*, NAT'L ASS'N FOR LAW PLACEMENT (Dec. 13, 2012), <http://www.nalp.org/2012lawfirmdiversity?s=disabilities> (for 2012 figures); Press Release, Nat'l Ass'n for Law Placement, *Representation of Women Associates Falls for Fourth Straight Year as Minority Associates Continue to Make Gains - Women and Minority Partners Continue to Make Small Gains*, NAT'L ASS'N FOR LAW PLACEMENT (Dec. 11, 2013), http://www.nalp.org/lawfirmdiversity_2013 (for 2013 figures); Press Release, Nat'l Ass'n for Law Placement, *Diversity Numbers at Law Firms Eke Out Small Gains - Numbers for Women Associates Edge Up After Four Years of Decline*, NAT'L ASS'N FOR LAW PLACEMENT (Feb. 17, 2015), http://www.nalp.org/lawfirmdiversity_feb2015 (for 2014 figures); Nat'l Ass'n for Law Placement, *NALP Diversity Infographic – Disabilities*, NAT'L ASS'N FOR LAW PLACEMENT, (June 2016), <http://www.nalp.org/uploads/Membership/DiversityInfographic-Disabilities.pdf> (for 2015 figures); NAT'L ASS'N FOR LAW PLACEMENT, 2016 REPORT ON DIVERSITY IN U.S. LAW FIRMS 16 (Jan. 2017), <https://www.nalp.org/uploads/Membership/2016NALPReportonDiversityinUSLawFirms.pdf> (for 2016 figures); NAT'L ASS'N FOR LAW PLACEMENT, 2017 REPORT ON DIVERSITY IN U.S. LAW FIRMS 18 (Dec. 2017), <https://www.nalp.org/uploads/2017NALPReportonDiversityinUSLawFirms.pdf> (for 2017 figures); NAT'L ASS'N FOR LAW PLACEMENT, 2018 DIVERSITY REPORT, *supra* note 15, at 18 (for 2018 figures). Figures are based on statistics provided by firms in the NALP DIRECTORY OF LEGAL EMPLOYERS.



In general, however, the percentage of graduates with disabilities who start off in private practice has declined in recent years, whereas the percentage who start off in business or public interest has increased.

Table 21 – Partners by Gender, Minority Status, Firm Size, and City (2018)²¹

	Partners			
	Total	Female	Minority	Minority F.
Nationwide	47,625	23.4%	9.1%	3.2%
<100 lawyer firms	2,759	22.2	7.9	3.0
101-250 lawyer firms	8,497	23.2	6.6	2.4
251-500 lawyer firms	9,577	24.1	8.4	3.1
501-700 lawyer firms	5,779	22.7	8.7	2.9
701+ lawyer firms	21,013	23.5	10.8	3.7
Atlanta	1,051	22.0	8.0	2.7
Austin	301	25.6	12.0	4.3
Boston	1,563	24.3	4.5	1.7
Charlotte	430	16.1	4.7	1.4
Chicago	3,260	22.9	7.9	2.7
Cleveland	405	18.5	3.0	0.7
Columbus	378	24.1	6.9	2.9
Dallas	985	20.3	9.8	3.7
Denver	511	27.6	6.7	2.2
Detroit area	550	25.8	6.2	2.6
Houston	1,129	18.0	12.1	3.9
Indianapolis	335	24.5	3.0	1.2
Kansas City	493	24.5	3.9	1.2
Los Angeles	1,832	24.5	16.7	6.3
Miami	384	25.8	37.8	11.7
Milwaukee	631	25.0	4.0	1.9
Minneapolis	1,127	29.2	4.1	1.9
New York City	6,254	20.4	10.9	3.3
Newark area	426	19.5	5.6	1.9
Orange County	510	18.0	12.9	4.1
Philadelphia	630	19.8	5.2	1.9
Phoenix	524	22.3	6.9	1.9
Pittsburgh	325	21.2	4.3	1.5
Portland, OR	448	27.0	6.3	2.7
San Diego	277	21.7	13.4	4.3
San Francisco	1,311	28.0	15.5	5.3
San Jose area	709	23.0	19.2	6.4
Seattle area	831	28.8	10.1	3.9
St. Louis	774	24.8	5.4	1.4
Washington DC	4,558	23.6	10.1	3.9

21. NAT'L ASS'N FOR LAW PLACEMENT, 2018 DIVERSITY REPORT, *supra* note 15, at 10-11. Some city information includes one or more offices in adjacent suburbs. *Id.* at 11.

Table 22 – Partners by Race/Ethnicity, Gender, Firm Size, and City (2018)²²

	Af Am.		Hisp.		As Am.	
	Total	Female	Total	Female	Total	Female
Nationwide	1.8%	0.7	2.5	0.8	3.6	1.4
<100 lawyer firms	1.3	0.4	1.5	0.6	3.7	1.6
101-250 lawyer firms	1.3	0.5	1.8	0.6	2.7	1.1
251-500 lawyer firms	1.8	0.8	2.6	0.8	2.9	1.2
501-700 lawyer firms	1.9	0.6	2.3	0.7	3.3	1.1
701+ lawyer firms	2.1	0.8	3.0	0.9	4.4	1.7
Atlanta	3.6	1.1	0.9	0.4	2.4	0.8
Austin	3.0	1.3	6.6	2.7	1.7	0.3
Boston	0.9	0.3	1.2	0.3	2.0	1.0
Charlotte	2.3	1.2	0.9	0.0	0.9	0.2
Chicago	1.8	0.6	1.8	0.5	3.7	1.3
Cleveland	1.2	0.5	0.3	0.0	1.2	0.3
Columbus	2.9	1.1	0.5	0.0	1.9	1.3
Dallas	1.7	0.9	3.5	1.1	2.3	0.7
Denver	0.6	0.0	2.7	0.4	1.6	0.4
Detroit area	3.1	1.8	0.9	0.0	1.3	0.6
Houston	2.8	1.2	4.8	1.1	3.9	1.5
Indianapolis	0.9	0.0	0.6	0.3	1.2	0.6
Kansas City	2.0	0.2	0.6	0.2	0.8	0.4
Los Angeles	2.0	0.8	4.2	1.4	8.7	3.7
Miami	2.9	1.3	32.8	9.1	1.3	1.0
Milwaukee	0.6	0.2	2.2	1.1	0.8	0.5
Minneapolis	0.6	0.4	0.8	0.0	1.2	0.9
New York City	1.6	0.5	2.6	0.8	4.8	1.7
Newark area	1.2	0.5	1.6	0.5	2.1	0.7
Orange County	0.8	0.2	3.7	1.0	7.1	2.8
Philadelphia	1.4	0.6	0.5	0.0	2.2	0.8
Phoenix	0.0	0.0	2.7	1.0	1.7	0.8
Pittsburgh	0.9	0.3	1.2	0.6	1.9	0.6
Portland, OR	1.3	0.7	2.2	0.7	1.3	0.9
San Diego	0.7	0.4	4.7	1.1	5.8	2.5
San Francisco	1.8	0.5	2.4	1.0	9.6	3.5
San Jose area	1.1	0.4	3.0	1.0	13.5	4.5
Seattle area	1.6	0.5	1.4	0.5	5.7	2.5
St. Louis	2.5	0.8	1.3	0.5	0.9	0.0
Washington DC	2.8	1.3	2.2	0.7	4.3	1.5

22. *Id.* at 14-15. The few Native American, Native Hawaiian, and multi-racial lawyers reported are included in the overall minority percentages but are not reported separately. Some city information includes one or more offices in adjacent suburbs. *Id.* at 15.

Table 23 - Female and Minority Representation Among Corporate Counsel²³

	Female	Af Am.	Hisp.	As Am.	Na Am.	Mixed/Other	Minority
2001	31.5%						12.5
2004	37.0	2.0	3.0	3.0	0.0	2.0	10.0
2006	39.0	3.0	3.0	3.0	0.0	2.0	11.0
2011	41.0	4.0	3.0	5.0	<1.0	3.0	15.0
2015	49.5	4.0	5.0	7.0			

23. ASS'N OF CORPORATE COUNSEL, ACC 2001 CENSUS OF U.S. IN-HOUSE COUNSEL (2001) (for 2001 figures); ASS'N OF CORPORATE COUNSEL, 2011 CENSUS REPORT 72 (2012) (for 2004, 2006, and 2011 figures); ASS'N OF CORPORATE COUNSEL, 2015 ACC GLOBAL CENSUS: A PROFILE OF IN-HOUSE COUNSEL 26 (2015), http://www.acc.com/_cs_upload/v1/public/Surveys/1411922_6.pdf (for 2015 figures). Figures for 2015 are based on survey of 5,012 in-house counsel from 73 countries. *Id.* at 1. Figures include lawyers at all levels of in-house work, from entry level to chief legal officer. Race and ethnic data are based on U.S. respondents only. *Id.* at 26.

Table 24 - Federal Government Lawyers by Race/Ethnicity and Gender²⁴

2002	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Law Clerks	26 (9.4)	21 (7.6)	28 (10.1)	2 (0.7)	77 (27.9)
Male	12 (4.3)	6 (2.2)	9 (3.3)	1 (0.4)	28 (10.1)
Female	14 (5.1)	15 (5.4)	19 (6.9)	1 (0.4)	49 (17.8)
General Attorneys	2,461 (8.7)	1,141 (4.0)	1,013 (3.6)	144 (0.5)	4,759 (16.9)
Male	977 (3.5)	593 (2.1)	443 (1.6)	74 (0.3)	2,087 (7.4)
Female	1,484 (5.3)	548 (1.9)	570 (2.0)	70 (0.2)	2,672 (9.5)
Admin. Law Judges	54 (4.1)	51 (3.8)	11 (0.8)	16 (1.2)	132 (9.9)
Male	39 (2.9)	45 (3.4)	8 (0.6)	12 (0.9)	104 (7.8)
Female	15 (1.1)	6 (0.5)	3 (0.2)	4 (0.3)	28 (2.1)
2006	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Law Clerks	29 (9.4)	11 (3.6)	24 (7.8)	4 (1.3)	69 (22.5)
Male	7 (2.3)	8 (2.6)	10 (3.3)	2 (0.7)	28 (9.1)
Female	22 (7.2)	3 (1.0)	14 (4.6)	2 (0.7)	41 (13.4)
General Attorneys	2,570 (8.7)	1,218 (4.1)	1,291 (4.4)	145 (0.5)	5,237 (17.6)
Male	935 (3.2)	624 (2.1)	548 (1.8)	66 (0.2)	2,179 (7.3)
Female	1,635 (5.5)	594 (2.0)	743 (2.5)	79 (0.3)	3,058 (10.3)
Admin. Law Judges	67 (4.8)	54 (3.9)	8 (0.6)	17 (1.2)	147 (10.5)
Male	44 (3.1)	49 (3.5)	6 (0.4)	11 (0.8)	111 (7.9)
Female	23 (1.6)	5 (0.4)	2 (0.1)	6 (0.4)	36 (2.6)
2010	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	Minority (%)
Law Clerks	33 (9.0)	13 (3.5)	32 (8.7)	1 (0.3)	79 (21.5)
Male	9 (2.4)	3 (0.8)	8 (2.2)	0 (0.0)	20 (5.4)
Female	24 (6.5)	10 (2.7)	24 (6.5)	1 (0.3)	59 (16.0)
General Attorneys	3,026 (8.7)	1,391 (4.0)	1,888 (5.4)	202 (0.6)	6,507 (18.7)
Male	1,068 (3.1)	701 (2.0)	757 (2.1)	93 (0.3)	2,619 (7.5)
Female	1,958 (5.6)	690 (2.0)	1,131 (3.3)	109 (0.3)	3,888 (11.2)
Admin. Law Judges	100 (6.1)	72 (4.4)	23 (1.4)	19 (1.2)	214 (13.0)
Male	50 (3.0)	55 (3.3)	10 (.6)	13 (0.8)	128 (7.8)
Female	50 (3.0)	17 (1.0)	13 (0.8)	6 (0.4)	86 (5.2)

24. Kay Coles James, U.S. Office of Pers. Mgmt., *Demographic Profile of the Federal Workforce as of September 2002*, U.S. OFFICE OF PERS. MGMT. (2003), <http://www.opm.gov/feddata/demograp/02demo.pdf> (for 2002 figures); U.S. Office of Pers. Mgmt., *Demographic Profile of the Federal Workforce as of September 2006: Table 3*, U.S. OFFICE OF PERS. MGMT. (2007), <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/demographics/2006-demographic-profile/> (scroll down to Table 3 and click “Men and Women Combined,” “Men Only,” and “Women Only”) (for 2006 figures); U.S. Office of Pers. Mgmt., *Demographic Profile of the Federal Workforce as of September 2010: Table 3*, U.S. OFFICE OF PERS. MGMT. (2011), <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/demographics/2010-demographic-profile/> (scroll down to Table 3 and click “Men and Women Combined,” “Men Only,” and “Women Only”) (for 2010 figures). Figures for Asian Americans include “Pacific Islanders.”

Table 25 - U.S. Judges by Gender and Race/Ethnicity²⁵

	Judges	Female	Af Am.	Hisp.	As Am.	Minority
2003	59,000	54.1%	15.5	4.4	0.5	20.4
2004	64,000	56.7	12.8	7.4	2.2	22.4
2005	70,000	41.2	7.0	5.9	4.6	17.5
2006	66,000	35.5	11.3	2.0	1.9	15.2
2007	68,000	43.3	9.1	8.1	0.1	17.3
2008	54,000	43.6	6.8	3.2	0.3	10.3
2009	73,000	44.2	4.8	7.0	3.2	15.0
2010	71,000	36.4	12.5	7.8	3.9	24.2
2011	67,000	44.4	11.5	8.3	1.1	20.9
2012	67,000	39.0	12.8	4.5	0.7	18.0
2013	55,000	35.6	7.8	6.3	0.1	14.2
2014	53,000	51.7	10.9	4.8	3.2	18.9
2015	58,000	39.0	11.8	6.4	6.2	24.4
2016	59,000	34.2	11.0	3.5	1.2	15.7
2017	66,000	28.1	12.7	7.0	0.0	19.7

25. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Annual Average Data, *Table 11: Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. DEP'T OF LABOR, <http://www.bls.gov/cps/tables.htm> (follow links for individual years and scroll down to "Characteristics of the Employed," Table 11). Figures represent those reported for "judges, magistrates, and other judicial workers," available beginning in 2003. Figures for minorities are derived from aggregating the minority categories listed.

Table 26 - Article III Judicial Appointments by Gender and Race/Ethnicity²⁶

	Total	Female (%)	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)
Reagan (1981-88)	383	32 (8.8)	7 (1.8)	14 (3.6)	2 (0.5)	0 (0.0)
Bush I (1989-92)	193	36 (18.7)	13 (6.7)	8 (4.1)	0 (0.0)	0 (0.0)
Clinton (1993-00)	378	111 (29.4)	62 (16.4)	25 (6.6)	5 (1.3)	1 (0.3)
Bush II (2001-08)	327	71 (21.8)	24 (7.3)	30 (9.1)	4 (1.2)	0 (0.0)
Obama (2009-16)	329	138 (42.0)	62 (18.8)	36 (10.9)	21 (6.4)	1 (0.3)
Trump (2017-18)	44	10 (22.7)	0 (0.0)	1 (2.3)	4 (1.2)	0 (0.0)
Trump (pending)	92	23 (25.0)	4 (4.3)	4 (4.3)	2 (2.2)	0 (0.0)

26. All. for Justice, *Judicial Selection Snapshot*, ALLIANCE FOR JUSTICE (2018) (for 1981–2018 data) (On file with the ILLP). Figures for Trump (Jan. 20. 2017–July 26, 2018) include all judges confirmed along with a separate row for pending nominees. Figures for Asian Americans do not include "Native Hawaiian or other Pacific Islanders." *Id.*

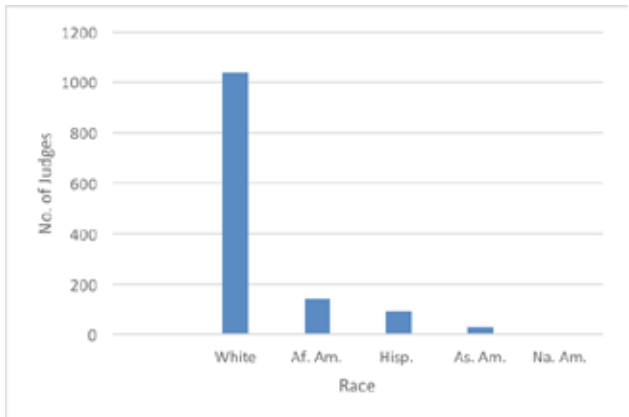
Table 27 - Article III Judicial Appointments by LGBT and Disability Status²⁷

	Total	LGBT (%)	Disabled (%)
Reagan (1981-88)	383	0 (0.0)	1 (0.3)
Bush I (1989-92)	193	0 (0.0)	1 (0.5)
Clinton (1993-00)	378	1 (0.4)	3 (0.8)
Bush II (2001-08)	327	0 (0.0)	2 (0.6)
Obama (2009-16)	329	11 (3.3)	0 (0.0)
Trump (2017-18)	39	0 (0.0)	0 (0.0)

27. *Id.* Figures for LGBT judges and judges with disabilities are not available for pending nominees. Even though the figures list the number of judges with disabilities seated by President Obama as 0, Supreme Court Justice Sonia Sotomayor, who was appointed by President Obama in 2009 and confirmed that same year, is a life-long diabetic who was diagnosed with type-1 diabetes at age seven. See Nina Totenberg, *Sotomayor Opens Up About Diabetes For Youth Group*, NPR, June 21, 2011, <https://www.npr.org/2011/06/21/137328180/sotomayor-opens-up-about-diabetes>. Justice Sotomayor, thus, seems to fall within the category of a judge with a disability. See *Questions & Answers About Diabetes in the Workplace and the Americans With Disabilities Act*, EEOC, accessed on Aug. 2, 2018, <https://www.eeoc.gov/laws/types/diabetes.cfm#fn9> (noting that “individuals who have diabetes should easily be found to have a disability within the meaning of the first part of the ADA’s definition of disability because they are substantially limited in the major life activity of endocrine function.”).

Table 28 - Article III Judges by Race/Ethnicity²⁸

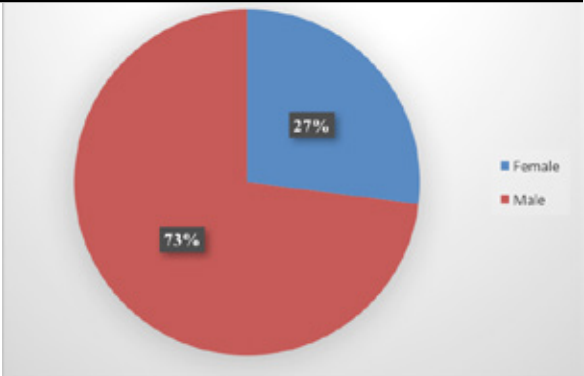
Race	No. of Judges
White	1,037
Af Am.	142
Hisp.	92
As Am.	29
Na Am.	2
Total	1,302



28. Minority Corp. Counsel Ass’n, *Tracking the Integration of the Federal Judiciary*, <https://www.mcca.com/resources/reports/federal-judiciary/> (last visited July 5, 2018). Figures are current up to October 18, 2017.

Table 29 - Article III Judges by Gender²⁹

Gender	% of Total
Female	27%
Male	73%



29. *Id.*

Table 30 - Law Faculty by Gender and Minority Status³⁰

Fall, 2013	Deans (%)	Tenured (%)	Tenure-Track (%)
Minority	42 (20.8)	907 (16.8)	460 (30.5)
Female	58 (28.7)	1,766 (32.7)	731 (48.4)

30. ABA Section of Legal Educ. & Admissions to the Bar, *Statistics: Ethnic/Gender Data: Longitudinal Charts, Law School Faculty & Staff by Ethnicity and Gender*, http://www.americanbar.org/groups/legal_education/resources/statistics.html (scroll down and click “Law School Faculty & Staff by Ethnicity and Gender”) [hereinafter *Law School Faculty Chart*] (for 2013 data). Figures are based on all full-time faculty listed in the AALS DIRECTORY OF LAW TEACHERS for whom race/ethnicity is known.

Table 31 – Law Faculty by Gender and Race/Ethnicity (2013)³¹

	Total (%)	Af Am. (%)	Hisp. (%)	As Am. (%)	Na Am. (%)	≥2 Races (%)
Deans	202 (100.0)	26 (12.9)	12 (5.9)	3 (1.5)	1 (0.5)	0 (0.0)
Male	144 (71.3)	15 (7.4)	7 (3.5)	3 (1.5)	0 (0.0)	0 (0.0)
Female	58 (28.7)	11 (5.4)	5 (2.5)	0 (0.0)	1 (0.5)	0 (0.0)
Tenured	5,398 (100.0)	464 (8.6)	222 (4.1)	181 (3.4)	28 (0.5)	12 (0.2)
Male	3,632 (67.3)	226 (4.2)	140 (2.6)	115 (2.1)	18 (0.3)	9 (0.2)
Female	1,766 (32.7)	238 (4.4)	82 (1.5)	66 (1.2)	10 (0.2)	3 (0.0)
Tenure-Track	1,509 (100.0)	200 (13.3)	97 (6.4)	129 (8.5)	15 (1.0)	19 (1.3)
Male	778 (51.6)	76 (5.0)	52 (3.4)	68 (4.5)	4 (0.3)	8 (0.5)
Female	731 (48.4)	124 (8.2)	45 (3.0)	61 (4.0)	11 (0.7)	11 (0.7)
Part-Time	8,361 (100.0)	337 (4.0)	293 (3.5)	214 (2.6)	22 (0.3)	17 (.2)
Male	5,667 (67.8)	173 (2.0)	190 (2.3)	119 (1.4)	12 (0.1)	11 (0.1)
Female	2,694 (32.2)	164 (2.0)	103 (1.2)	95 (1.1)	10 (0.1)	6 (0.1)

31. *Id.* Figures for Asian Americans do not include “Native Hawaiian or Pacific Islander.”

IILP Review 2019-2020: Diversity, Equality, and Inclusion in the Legal Profession in General

The Opportunities and Challenges of Diversity in Law

By Christina Blacklaws

President, The Law Society of England and Wales

What obstacles to diversity in the legal profession is the United Kingdom facing? Blacklaws and the Law Society show that the American legal system as well as the UK "are recognizing the merit of flexible working policies and using innovation to help drive equality in the legal profession".

The 21st century has ushered in a movement which has driven greater consideration of diversity and inclusion within organisations. The legal profession is no different, and firms across England and Wales are investing time and resources to address the way they operate, look and feel in order to reflect the society around them and, of course, those communities hold prospective clients.

Over time we have seen a shift from the moral case for diversity and inclusion to one which stresses the bottom line - just as important a driver (if not the only motivating factor) for organisations in their quest to diversify their workplaces.

The diversity and inclusion agenda is broad and can be perceived by some to lack relevance and, even with a business case, it can still take some convincing despite a well-established rationale for concentrating resources on diversity and inclusion. In the Law Society's annual report *Trends in the Solicitors' Profession* looking at diversity in the legal profession, the findings showed that despite a significant shift in the workforce demographic of England and Wales over the last 10 years, there remain a number of issues affecting the solicitors' profession.¹

The report highlighted that there was:

- A record number of new female trainees, reaching 63.6% over the year 2017, eclipsing the previous mark set in 2007-08 when trainee registrations peaked;
- For the first time in 2017 the number of female PC holders exceeded male colleagues, although this did not yet apply to all solicitors on the Roll;
- A continuous growth of the number of Black, Asian and Minority Ethnic (BAME) solicitors in the last ten years, with their share reaching 16.5% in 2017 (from 7% at the start of the millennium).²

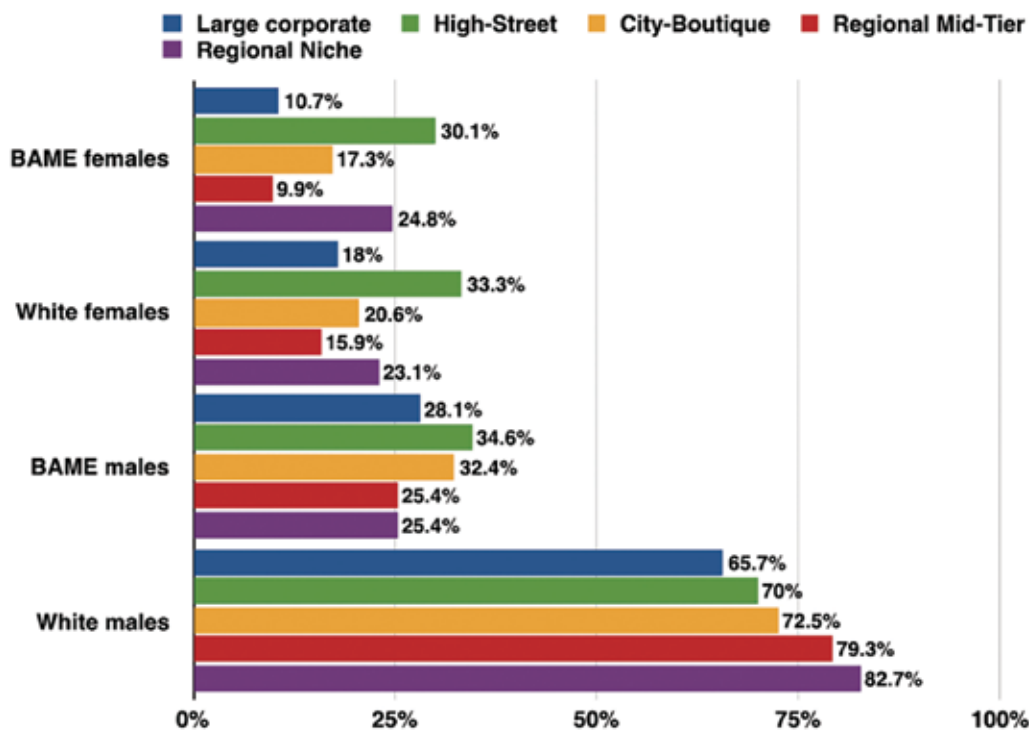
Clearly, these statistics demonstrate that over the last 20 years there has been increased access to the legal profession for diverse groups. However, our research also found that 78% of partners in private practice are men and we have a real problem that despite a predominantly female pipeline, women are not being promoted into leadership positions.

1. The Law Society, Annual Statistics Report (2017), <https://www.lawsociety.org.uk/communities/the-city/articles/annual-statistics-report-2017/>.

2. *Id.*

Leeds University Business School completed an in-depth mapping of what the data was showing and identified a number of areas that will require specific attention if it is not only to diversify its workforce but also to manage the diversity that the legal profession has gained over the last few decades.³ These are:

- Across all ethnic groups, men are more likely to become partner compared to female counterparts;
- The share of BAME males becoming partner, especially from an Asian background, has increased;
- The share of white males becoming partner has decreased;
- There is an increasing share of solicitors leaving private practice to work in-house. This is more pronounced amongst women, and especially white women;
- The reducing share of in-house male solicitors parallels an increase in BAME female solicitors moving in-house, particularly women of Asian background;
- Solicitors are increasingly concentrated in firms with headquarters based in central London, where almost half of solicitors admitted to the Roll since 2006 have worked only for central London firms over the course of their entire career;
- Male and female solicitors of African/African Caribbean and Chinese ethnic origin are the most likely to work in central London based firms;
- A higher proportion of white and Asian solicitors (both male and female) work in firms where the headquarters is in regions outside central London.⁴



The graph shows the average probability of becoming a partner by gender, ethnicity and firm type⁵

3. Sundeep Aulakh, et al., Mapping Advantages and Disadvantages: Diversity in the Solicitors' Profession in England & Wales (2017), <https://www.sra.org.uk/sra/how-we-work/reports/diversity-legal-profession.page/>.

4. Id.

5. Id.

These points indicate that there is further work required to understand why certain groups of solicitors are leaving private practice to join in-house teams. As the research suggests, the flight from private practice is particularly pronounced amongst women, so does this indicate that the needs of women are not being met in these environments?

The data also suggest that career development cannot be an equal playing field if across all ethnic groups men are more likely to become a partner than women. In addition to this, there are further issues related to the intersection of gender *and* ethnicity when considering career development in the legal profession.

As a result, partnership continues to be male dominated. Interestingly, BAME males are more likely to become a partner than white females, yet BAME females are least likely of all groups to reach this position. In relation to reaching partnership in regional mid-tier firms, BAME males, white females and BAME females are least likely to reach this position. This demonstrates that there is double disadvantage attributable to the intersection of these two characteristics and that the impact is particularly pronounced for specific solicitor cohorts.

Of course, the report does not highlight any other personal characteristic of relevance to the legal profession as our identities are constructed of multiple aspects that might facilitate or restrict our access to and experiences within any working environment. The current profile of solicitors and other lawyers within the legal profession⁶ show that 46% are aged between 25-34; 59% are female; 3% have declared a disability; 21% are from a BAME background; 3% are lesbian, gay or bisexual; 2% have declared that their gender identity is different to that assigned at birth; and that there are a multitude of religions or beliefs observed across the profession. In addition to this, the social demographic of the legal profession is changing too, with now a reported 71% of solicitors having attended state school and 49% having been the first generation within their family to attend university.

In light of all this diversity, the legal profession must break outside the boundaries of focusing primarily on the protected characteristics. Although an important first step in understanding the issues affecting specific groups, some of the areas identified above demonstrate that focusing on only one characteristic cannot highlight the potential differential outcomes experienced by those with intersecting characteristics.

There are many firms in England and Wales which have begun their journey to understanding how diversity and inclusion can benefit their practice, their work culture and the experience of their clients. Some of these firms are leading the way across a range of areas and it is undoubtedly because of these efforts that the legal profession has evolved to become a more diverse and dynamic industry.

These firms have set the pace in increasing access to the legal profession to talented individuals regardless of their background or characteristics by implementing fairer recruitment, increasing their outreach to communities not traditionally associated with the legal profession, and by implementing more agile working environments that increase productivity through flexibility. But there is more work to do. The key to embedding these types of inclusive workplace cultures and positive organisational approaches towards a diverse workforce is through the sharing of knowledge and practice so that all types of firms, regardless of size or geography, are able to contextualise those practices and approaches to their local environments.



6. Law Firm Diversity Data, Solicitors Regulation Authority, <http://www.sra.org.uk/solicitors/diversity-toolkit/law-firm-diversity-tool.page>.

The Law Society of England and Wales has a dedicated Diversity and Inclusion (D&I) Team that engages with its members across the regions to promote and advance good practice in diversity and inclusion in the legal profession. We work with communities of solicitors through our divisions that cover women lawyers (WLD); ethnic minority lawyers (EMLD); disabled lawyers (LDD); and lawyers who are gay, lesbian, bisexual or trans (LGBTLD). In addition to this, we work closely with external organisations that specialise in equality, diversity and inclusion to ensure that we support our members in a focused and effective way that builds confidence within and across the legal profession. Our networks extend throughout the country through regional Diversity and Inclusion Forums, local law societies, small firms, in-house teams and the other community groups such as junior lawyers (JLD).

One specific example of the various programmes our team is involved in is the work we are delivering around women in leadership in the law. This builds on the historical milestones of the UK centenary of some women being able to vote (2018) and to enter the profession (2019) in England and Wales, as well as the 40-year anniversary of the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

The Law Society is committed to championing gender equality and improving the position of women in society. During my Presidential year, the Law Society has embarked on an ambitious project on women in leadership in law in an attempt to ‘move the needle’. We recognise that hard data must support our efforts. Earlier this year a survey we launched in collaboration with Lexis Nexis and supported by the Women’s Interest group of the IBA received nearly 8,000 responses which makes the survey the largest international survey ever conducted on women in law.⁷

Some of the main findings include:

- Unconscious bias was perceived to be the main barrier to career progression for women.
- Almost half of the respondents said that traditional networks or routes to promotion being male orientated was a reason why, so few women reached senior positions.
- Only 16 per cent reported that visible steps had been taken to address the gender pay gap in their place of work.⁸

The next step is to gather the qualitative evidence and we are doing this by holding 100 women’s roundtables over the summer, followed by men’s roundtables in the autumn and winter. These roundtables, many of which will be hosted internationally, have a further equally important aim which is to empower women to become change makers and leaders in their organisations and for men to become champions of gender equality. To this end we have developed a toolkit for activism. We will combine the roundtable information, the survey results and our global academic literature review, which we have commissioned, into a final report scheduled for publication in spring 2019 to mark the centenary of women in the law.

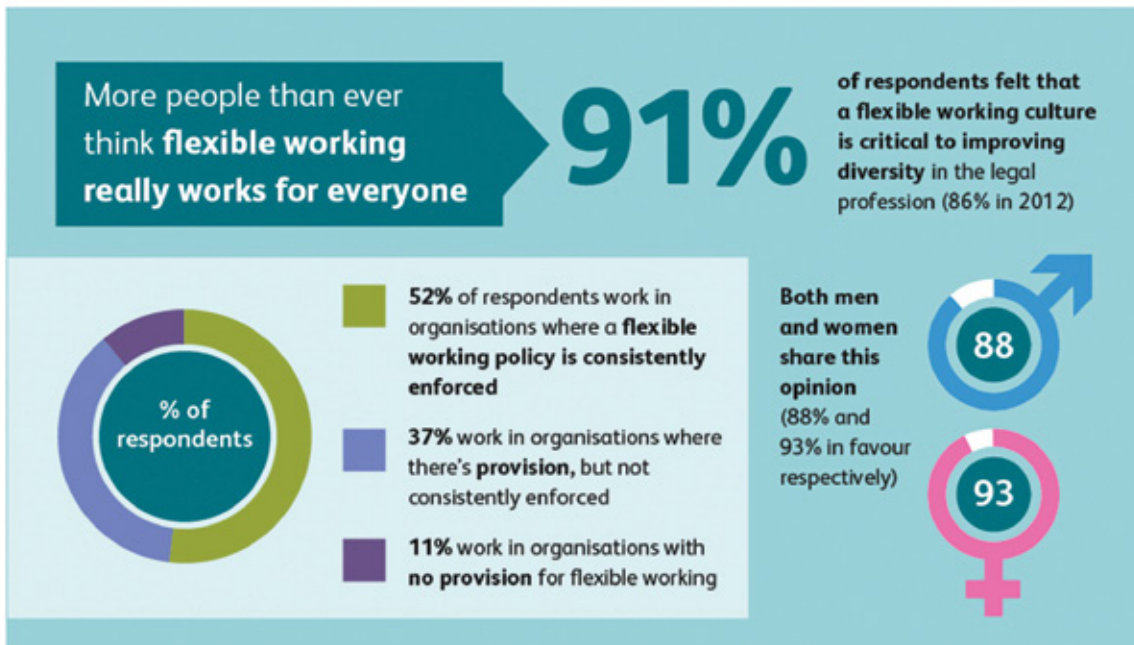
Finally, for the success of this piece of work it is crucial we promote understanding of the complexity of each individual’s identity and, therefore, of the need to look at the “intersectionality” of different diversity strands by recognising, for example, that BAME women face twice as many challenges compared to white women and this might require slightly different approaches. The same is true for disabled or LGBT people who tend to face multiple layers of discrimination.

Some of our members in England and Wales have started to adapt in response to these challenges. Many are recognising the merit of flexible working policies and using innovation to help drive equality

7. The Law Society of England and Wales, Survey on Women in Leadership in Law (2017/2018), <https://www.lawsociety.org.uk/news/press-releases/largest-ever-survey-on-gender-equality-in-legal-profession/>.

8. *Id.*

in the legal profession. We are seeing a rise in the adoption of agile working, work allocation policies, and an outputs and outcomes focussed approach rather than the more traditional billable hours model.



These are policies that can help to improve the working environment and career prospects for everyone, including women and ethnic minorities, disabled people, working fathers and others with caring responsibilities. There is much that needs to be undertaken and no room for complacency. However, we hope that this project and our work on diversity and inclusion in general, will contribute to positive change. Equality is good for business and tackling these issues will positively affect society as a whole.

If you would like more information about the work of The Law Society D&I Team, please visit <http://www.lawsociety.org.uk/support-services/practice-management/Diversity-inclusion/>.



For the success of this piece of work it is crucial we promote understanding of the complexity of each individual's identity and, therefore, of the need to look at the "intersectionality" of different diversity strands.

Incorporating Non-U.S. Nationals in Diversity and Inclusion Initiatives: Insights from Working with JD's and LLM's in Big Law.

Diego Carvajal

Consultant, VallotKarp Consulting LLC

Globalization means that not only are U.S. lawyers, law firms, and businesses working outside the U.S., but lawyers from other countries are coming to live and work in the U.S. With them, they bring their own perspectives and experiences with the concepts of diversity and inclusion. The curiosity of non-U.S. nationals serves to help the legal profession maintain an updated and critical eye to what works and what does not.

One day, as I was having coffee in the common room of a New York law firm, I was approached by one of the firm's visiting associates. He was a Mexican lawyer who had recently passed the New York bar and was working out of the New York office as part of the firm's international rotation system. He wanted to ask me about diversity. He had no idea what it meant. He did not know why affinity groups were necessary or why diversity was a topic of discussion in a major law firm. He drew a parallel to Mexican society and noted that "in Mexico, we don't have the same problems as in the United States because racism does not exist there." He believed that "in Mexico, we are all Mexican, and there are no differences and no need for diversity and inclusion initiatives."

At the time, I was a senior associate and a very visible proponent of the firm's Diversity and Inclusion ("D&I") initiatives. I was the co-chair of the Hispanic affinity group, a member of the diversity committee, and co-chair of the associates' committee. As such, I fielded many inquiries from partners and associates alike regarding diversity and inclusion. The type of question posed by the Mexican attorney was not uncommon from many non-U.S. nationals who were working at the firm as either visiting attorneys or associates. A Chinese national expressed a similar concern: "If we are all equal, then why is there a need for diversity groups?"

Any individual that is new to a country undergoes a process of cultural adjustment. I certainly did when I moved to the United States from Bolivia when I was eight years old. My experience ranged from a comedic attempt of learning how kickball is played, to learning that I was to be called a "Hispanic," to an honest bewilderment that not everyone is Catholic. Modern non-U.S. national legal professionals have undoubtedly more exposure to American culture than a Bolivian child in the 90's. However, they too undergo a cultural adjustment that includes learning U.S. concepts of identity and diversity, and understanding how those concepts are framed within U.S. law firm culture. These concepts can often clash with their own concepts of identity and diversity, which have been shaped by the cultural framework of their home country. Decidedly, concepts of diversity and inclusion are deeply rooted within the cultural background of each country and require a nuanced understanding of that country's culture. This is true anywhere, not just in the United States. During a conference regarding D&I efforts in Latin America, a group of legal and corporate professionals concluded that "diversity and inclusion efforts

must account for cultural nuances of each firm and each country. Initiatives in the United States do not work for Latin America, where countries' needs and resources are different."¹ Similarly, D&I efforts in Europe require a deep understanding of the legacy of World War II and cultural and legal norms in each country that prohibit employers from collecting data on people's race, ethnicity, sexual orientation or ability/disability.²

If a working understanding of cultural nuances is necessary for a meaningful dialogue regarding diversity and inclusion, what is the benefit of incorporating non-U.S. nationals into D&I initiatives? And how, given that some things might be lost in translation, should law firms approach this endeavor? In my experience, the perspective of the non-U.S. national who is in the process of cultural immersion, which includes an introduction to D&I law firm initiatives, unearths important issues that can be critical towards creating a global D&I strategy and improving U.S. D&I initiatives.

It is important to note that non-U.S. nationals may ask some of the same questions asked by the white partner who is frustrated that he has to attend an unconscious bias training. Yet, their perspective is very different. In my experience, questions from non-U.S. nationals about the need for D&I initiatives came from a place of curiosity, as opposed to antagonism. Almost always, there was a comparison to their home country and a sense that they were learning something unique about the United States. This is important because it changes the way diversity professionals should approach diversity questions from non-U.S. nationals. The same techniques used to approach a white U.S. national male who may ask similar questions about the necessity for D&I efforts should not be used.

I often found that gender was an accessible first point of discussion. Various corporate multinational companies have in recent years been at the forefront of global initiatives for women's empowerment. Therefore, the concept of women's initiatives is familiar to many professionals around the world. Additionally, data regarding the representation of women in the legal profession in different countries is readily available and many professionals recognize the need for change.³ In essence, because the problem is clear and similar in many different places, the need to have an initiative that addresses that problem is also clear.

Discussions about the need for women's initiatives often veered into issues about race, ethnicity, and sexual orientation. Indeed, as was echoed in the aforementioned conference on diversity and inclusion in the Latin American legal profession, "gender diversity is frequently the most comfortable access point for many lawyers in Latin America but it can quickly expand to include socioeconomic status, race/ethnicity, sexual orientation, gender identity, disabilities, and other diversity categories with which there is decidedly less comfort."⁴ The lack of comfort is understandable. Discussing race, ethnicity, sexual orientation, and other forms of diversity requires facing certain truths about one's own culture that are difficult to discuss with others not from within that culture. This is particularly true for individuals that generally do not discuss these types of issues under any circumstance or whose culture is less open to discussing these issues. In other times, the response can be defensive, as was the case with the Mexican attorney who believed that racism did not exist in Mexico.

1. Inst. For Inclusion In The Legal Profession, Diversity & Inclusion In The Latin Am. Legal Profession 2017 Event Report 13 (2017), available at http://www.theiilp.com/resources/Documents/Diversity_Inclusion_in_the_Latin_America_Legal_Profession-2017_Event_Report.pdf.

2. JENNIFER LONDON, THE COMPLEXITY OF DIVERSITY AND INCLUSION IN EUROPE: A REPORT FROM THE DBP GLOBAL MEMBER CONFERENCE IN PARIS (2014), available at <https://www.diversitybestpractices.com/news-articles/complexity-diversity-and-inclusion-europe-report-dbp-global-member-conference-paris#page-2>.

3. See HARVARD LAW SCH., WOMEN IN THE GLOBAL LEGAL PROFESSION, THE PRACTICE (2015), available at <https://thepractice.law.harvard.edu/article/women-in-the-global-legal-profession>; see also Ethan Michelson, *Women in the global legal profession, 1970-2010: A Study of the global supply of lawyers*, 20 IND. J. OF GLOB. L. STUDIES (2013).

4. INST. FOR INCLUSION IN THE LEGAL PROFESSION, *supra* note 1, at 15.



The concept of having a single identity tied by the same language and certain cultural similarities does exist in Latin America.

However, there was a willingness or openness to talk about these issues in the context of the United States. Many non-U.S. nationals did not necessarily see themselves as persons of color, but also did not see themselves as white. In many cases, they saw everyone as “American” and themselves as the outsider. As such, they took on the role of someone who was willing to learn about American multicultural society and figure out their place in all of it. On various occasions, Latin American attorneys joked with me about living their life primarily identified by their home country, and then learning that we are all lumped into one category here in the United States. The concept of having a single identity tied by the same language and certain cultural similarities does exist in Latin America, but it is true that we identify ourselves primarily by our nationality. I have also been approached by a Middle Eastern attorney who did not know how to self-identify. He looked white, lived a life of privilege, but was culturally Middle Eastern. In his words, “What the hell is a person of color?”

How does a law firm respond to this? What initiatives should be pursued by the Hispanic affinity group that includes a light-skinned Argentinian attorney who came from a wealthy family, and a dark-skinned Dominican attorney who grew up in a predominantly working-class environment in New York? How does a light-skinned individual from the Middle East identify within the U.S. law firm diversity spectrum, particularly if there is no Middle Eastern affinity group and the individual is not sure how he fits into a people-of-color employee resource group? Where does a light-skinned Brazilian fit?

Many diversity professionals allow legal professionals to self-identify and join affinity groups or attorney resource groups voluntarily. This is the right approach. No one should feel pressured to join a group that they do not wish to join. How the group is presented, the activities of the group, and the message of who can join, however, are important in the willingness of non-U.S. nationals to join. The goals of each affinity or attorney resource group will vary depending on the leadership of each group and the needs of the firm. However, presenting the group to encourage non-U.S. national participation is helpful in making the group as inclusive and welcoming as possible to everyone—including white U.S. national associates.

In general, I found that non-U.S. nationals were more likely to join groups that are (1) presented as social clubs that focus on cultural and community building events, and (2) open to people outside of the diversity category of the affinity group. For example, whether or not a light-skinned Argentinian attorney can relate to what it means to grow up as a Latina in the United States, she will feel more welcome in a group that includes social outings and community building. Similarly, the Middle Eastern attorney noted above is more likely to join a people-of-color resource group if the group is open to all individuals, including white associates. In both cases, the discomfort that exists with having to self-identify in a category, when an individual



While it can be difficult to identify how groups in a specific country should be divided into affinity or resource groups, it is easier for non-U.S. nationals to identify underrepresented groups in the legal community within their country or region.

never used that category to self-identify, is removed. Affinity groups or attorney resource groups can still, and should still, focus on pipeline, retention, and development issues that target their specific group. However, it is important that the activities of the groups include social and community building events and that the message remains as one of openness and inclusivity to all, including white associates. The message should be that you do not have to belong to a specific diversity group, but that you have to care that members in the diversity group succeed. In this manner, both the activities and the message of the group are welcoming to non-U.S. nationals and to all associates.

Another effective strategy to incorporating non-U.S. nationals in D&I discussions was using underrepresentation as the focal point of conversation. While it can be difficult to identify how groups in a specific country should be divided into affinity or resource groups, it is easier for non-U.S. nationals to identify underrepresented groups in the legal community within their country or region. For example, Paula Samper Salazar, a partner at the Colombian law firm Gomez Pinzon Zuleta, notes that the Colombian legal profession is not diverse in terms of socioeconomic status. She notes that “60 percent of lawyers from leading law firms graduate from three elite private universities and that lawyers from public universities and lower socioeconomic backgrounds are particularly underrepresented.”⁵ Similarly, in her article regarding self-identity as an Indian-American working in India, Mona Mehta Stone notes the alarming statistic that women make up 50 percent of the country’s population, yet comprise only three percent of the Indian judicial system.⁶ In both cases, a legal professional identified an underrepresented community within their country and the need to alleviate such underrepresentation. Framed in this manner, a non-U.S. national can identify underrepresentation in their society and can relate to the existence of underrepresentation in the United States. Various Latin American legal professionals were genuinely surprised when I showed them that only 4.57 percent of law firm associates and 2.40 percent of law firm partners are Hispanic.⁷ Although their experience may have been different to that of a Latino growing up in the United States, the shock of the statistic brought forth a sense of unity and got them to acknowledge that there is a problem. As one attorney commented, “I work in an office where everyone would be considered a Latino, and we are all internationally recognized lawyers – so clearly Latinos can be lawyers.”

This conversation around underrepresentation is helpful for D&I initiatives in the United States and global D&I initiatives. On one hand, it identifies a clear problem in the United States. This problem allows anyone who has a connection to a specific group, whether via culture, family, or interest, to be interested in finding

5. *Id.* at 7.

6. Mona Mehta Stone, *Self-Identity: Report From an Indian-American Working In India*, IILP REVIEW 2014 156 (2014).

7. THE NAT’L ASS’N FOR LAW PLACEMENT, 2017 REPORT ON DIVERSITY IN U.S. LAW FIRMS 9 (2017), available at <https://www.nalpo.org/uploads/2017NALPReportonDiversityinUSLawFirms.pdf>.

a solution. On the other hand, it can act as the beginning of a global D&I effort. As stated above, each country requires deep knowledge of the cultural nuances that exist in the fibers of national identity and how a nation determines who is part of a “group.” The best people to develop a D&I strategy are those who understand and are deeply embedded within the fibers of a specific culture. They should be the ones to help identify underrepresented groups. Once the underrepresented group is identified, a conversation about the reasons for such underrepresentation and a plan for increased representation and inclusion can begin. Just like in the United States, these conversations can be very uncomfortable. However, it is working through this discomfort that solutions can begin to surface. By incorporating non-U.S. nationals in the conversation, both here and abroad, law firms are not giving their non-U.S. offices solutions to their unique D&I problems, but they are providing a tool to reach those solutions.

Lastly, it is undeniable that there will be some cultural similarities between diverse U.S. national associates and non-U.S. nationals who may share a similar ethnic background. Identifying these similarities can be powerful tools to setting the course of D&I initiatives in the United States. For example, Jen C. Won, in an article regarding her challenges as a Korean national adjusting to the American legal environment, identifies how her upbringing in Korea has affected her demeanor in a professional setting.⁸ She recounts how a partner had noticed that Ms. Won tended to downplay her knowledge in meetings and withheld from expressing her opinions. She reflects, “[my] reserved demeanor may be a product of my upbringing. Korean culture conditioned me to be more timid in a professional setting compared to a social one. In Korea, good students tend to be quiet in class. Professionals typically wait for an invitation to speak when their superiors are present at a meeting.”⁹ Luckily, Ms. Won had a mentor who encouraged her to be more assertive and helped her understand that while, “these background cultural expectations may be useful in certain situations . . . they do not serve me as an associate at a large U.S.-based law firm.”¹⁰ A 2017 Yale law school study found that similar issues exist among Asian-American lawyers. In a survey of over six-hundred legal professionals, Asian-American lawyers said that they are perceived as “hard-working, responsible and careful, but not as empathetic, assertive or creative.”¹¹ The cultural similarities raised by Ms. Won’s experience and the Yale study should inform D&I initiatives for Asian-American affinity groups that include non-U.S. nationals. In particular, mentorship should be stressed and there should be a strategic approach to issues of assertiveness. This is, of course, not a one-size-fits-all approach. Each firm has to gauge the specific necessities of its affinity or employee resource groups. However, such an approach would speak to the experience raised by Ms. Won as a non-U.S. national and the U.S. survey respondents of the Yale University study.

There are clear advantages to including non-U.S. nationals in D&I initiatives. First, their input makes it evident that gender diversity and inclusion is a topic that is easily accessible and understood in many places in the world. It is therefore, a good keystone for any global D&I strategy. Second, concepts of identity that may differ from the established diversity groups in a law firm can challenge these diversity groups to become more inclusive and expand or redefine their parameters of membership. Additionally, the input from non-U.S. nationals can unearth various cultural similarities that can inform both U.S. and global D&I initiatives and can result in creating ambassadors for the global D&I of a law firm. Indeed, if a firm begins to develop a strategy for talking about diversity with a non-U.S. national working in the United States, whether through the lens of underrepresentation or otherwise, it can then begin to better tailor their strategy for global D&I.

8. Jen C. Won, *Perspective On Lawyering In Non-Native Language*, IILP REVIEW 2014 195 (2014).

9. *Id.* at 197.

10. *Id.*

11. ERIC CHUNG ET AL, A PORTRAIT OF ASIAN AMERICANS IN THE LAW 31 (2017), available at https://static1.squarespace.com/static/59556778e58c62c7db3fbe84/t/596cf0638419c2e5a0dc5766/1500311662008/170716_PortraitProject_SinglePages.pdf.

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— **E.M. Partner, Atlanta, GA**



Signposts In The Road: The Lawyer's Ethical Obligation to Promote Diversity In the Legal Profession

David L. Douglass

Managing Partner, Sheppard Mullin Richter & Hampton LLP

Amber C. Thomson

Associate, Sheppard Mullin Richter & Hampton LLP

Eliazar Chacha

Attorney, Sheppard Mullin Richter & Hampton LLP

Has the time come for the ABA to amend its model rules to codify a lawyer's ethical obligation to promote equality and diversity in the profession?

I. INTRODUCTION

The legal profession has long espoused increasing diversity in the profession,¹ but making the case for taking affirmative steps to promote diversity has proven to be an enduring challenge.² A moral case has been made: "It's the right thing to do."³ A business case has been made: "Our clients and

1. In 2009, then-ABA President H. Thomas Wells, Jr., launched a comprehensive initiative to assess the "State of Diversity in the Legal Profession." The ABA conducted a qualitative survey, held four regional hearings with testimony from representatives of all sectors of the profession, held an invitational summit in June of that year with more than two-hundred participants, and conducted a summit follow-up program at that year's ABA Annual Meeting. A team of legal scholars prepared summary reports of each stage from this year-long process. They found that Caucasians constituted about seventy percent of the working population over the age of sixteen, and they represented eighty-nine percent of all lawyers and ninety percent of all judges. This led the Chair of the Presidential Commission on Diversity, Ellen F. Rosenblum, to conclude, "In the 21st century, the legal profession faces no greater challenge than the imperative to advance diversity throughout our ranks." ABA Presidential Diversity Initiative Comm. on Diversity, *Diversity in the Legal Profession: The Next Steps, Report and Recommendations* (2009–2010), https://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf [hereinafter ABA Diversity].

2. Six years prior to the ABA's comprehensive initiative to assess the "State of Diversity in the Legal Profession," then-ABA President-Elect Dennis W. Archer acknowledged, "While there has been improvement in the numbers of [diverse] lawyers since the 1990s, they remain woefully underrepresented in the legal profession. Clearly, we have failed to promote diversity throughout our profession." Dennis W. Archer, *The Value of Diversity: What the Legal Profession Must Do To Stay Ahead of the Curve*, 12 WASH. U. J. L. & POL'Y 25, 27 (2003), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1307&context=law_journal_law_policy. Yet, not much changed in those six years nor from 2009 to 2018.

3. ABA Diversity, *supra* note 1, at 4 ("It is incumbent upon each one of us to do something that will make a real difference.")

customers demand it.”⁴ There have even been arguments based upon political,⁵ leadership,⁶ and demographic considerations.⁷

The business case for diversity has been especially successful in encouraging efforts to advance diversity in large law firms.⁸ The business case is compelling because it bypasses differences of opinion about the value of promoting diversity, i.e., whether it is the right thing to do, by refocusing on the shared business imperative of meeting client demand.⁹ To the question, “Why should we promote diversity in our organization?”, the answer is, “Because our clients and customers want it and, if we don’t meet that demand, our competitors will.”¹⁰

There is, however, another consensus value that holds the same transformative power for advancing diversity in the profession as the business case for diversity. It is the ethical case for diversity. The historical role of lawyers in this nation demonstrates lawyers have a clear and compelling ethical duty to promote diversity in the legal profession.¹¹ It is time for codified rules of ethics to acknowledge this duty. The ABA should lead this change by amending its Model Rules of Professional Responsibility (Model Rules) to acknowledge that duty. Specifically, we propose the ABA amend its Model Rules by inserting a new rule 8.5 as follows:

As a learned member of society with an ethical obligation to promote the ideal of equality for all members of society, every lawyer has a professional duty to undertake affirmative steps to remedy *de facto* and *de jure* discrimination, eliminate bias, and promote equality, diversity and inclusion in the legal profession. Every lawyer should aspire to devote at least 20 hours per year to efforts to eliminating bias and promoting equality, diversity, and inclusion in the legal profession. Examples of such efforts include but are not limited to: adopting measures to promote the identification,

4. ABA Diversity, *supra* note 1, at 5 (“Business entities are rapidly responding to the needs of global customers, suppliers, and competitors by creating workforces from many different backgrounds, perspectives, skill sets, and tastes. Ever more frequently, clients expect and sometimes demand lawyers who are culturally and linguistically proficient.”)

5. ABA Diversity, *supra* note 1, at 5 (“Lawyers and judges have a unique responsibility for sustaining a political system with broad participation by all its citizens. A diverse bar and bench create greater trust in the mechanisms of government and the rule of law.”)

6. ABA Diversity, *supra* note 1, at 5 (“Individuals with law degrees often possess the communication and interpersonal skills and the social networks to rise into civic leadership positions, both in and out of politics.”)

7. ABA Diversity, *supra* note 1, at 5 (“Our country is becoming diverse along many dimensions and we expect that the profile of LGBT lawyers and lawyers with disabilities will increase more rapidly. With respect to the nation’s racial/ethnic populations, the Census Bureau projects that by 2042 the United States will be a ‘majority minority’ country.”)

8. Archer, *supra* note 2, at 27 (“In the 1980’s, after learning about what social scientists and demographers termed the ‘browning of America,’ corporations began embracing cultural diversity. When they heard that people of color would constitute a majority of the U.S. population by 2056, corporations developed vendor and employee affirmative action programs and changed the content of their advertising.”)

9. Archer, *supra* note 2, at 27 (“Corporations knew that their bottom-line would be affected if they did not reach out to the changing consumer demographic.”)

10. This sentiment is best epitomized by the fact that, in 1999, the Chief legal Officers of nearly five-hundred major corporations signed a document entitled “Diversity in The Workplace – A Statement of Principle,” which was intended to be a mandate for law firms to make immediate and sustained improvement in the area of diversity in the legal profession. In essence, signatories pledged to end or limit their relationships with law firms whose track records reflected a lack of meaningful interest in diversity. In 2004, then-Executive Vice President, General Counsel, and Chief Compliance and Risk Management Officer of General Mills Roderick “Rick” Palmore wrote “A Call to Action – Diversity in the Legal Profession” to serve as a renewed commitment to the 1999 mandate after noticing in the five years since “Diversity In The Workplace — A Statement of Principle” that “all objective assessments show that the collective efforts and gains of law firms in diversity have reached a disappointing plateau.” Rick Palmore, *A Call to Action – Diversity in the Legal Profession* (2004), <https://www.lclldnet.org/resources/2004-call-to-action/>.

11. Archer, *supra* note 2, at 28-29 (“Our profession requires diversity because lawyers not only speak for the legal rights of citizens, but also for the Constitution, the judicial system, and the rule of law—the regulations and problem-solving mechanisms that make our heterogeneous democracy possible. As representatives of the third branch of government, we are responsible for ensuring the checks and balances that our founding fathers deemed necessary for a just society.”)

hiring, and advancement of diverse lawyers and legal professionals; attending CLE and non-CLE programs concerning issues of discrimination, explicit and implicit bias, and diversity; and active participation in and financial support of organizations and associations dedicated to remedying bias and promoting equality, diversity and inclusion in the profession.

Why would such a change matter? Because recognizing a lawyer's ethical obligation requires and empowers lawyers to act even in the absence of a business case. It bridges the gap between the moral case for diversity and the business case for diversity. It says that, as lawyers, we have the obligation and the agency to pursue liberty and justice for all, within and outside our commercial practices. It compels us to use our skills, voice and station independent of our clients' interests. Requiring lawyers to act to promote diversity in the profession has the potential to be as impactful as making *pro bono* legal services an ethical responsibility. Codifying the long-established ethical obligation to promote equality gives us jurisdiction to address existing inequality.

II. THE FOUNDATIONS OF LEGAL ETHICS

In this day and age, the importance of ongoing formal education in legal ethics is undeniable.¹² Accordingly, most states with mandatory Continuing Legal Education (CLE) rules require ongoing education on legal ethics.¹³ Yet, lawyers attending CLE courses ordinarily cannot be assumed to have a common base of knowledge about the subject.¹⁴ In this vein, to understand the case for an ethical obligation to promote diversity in the legal profession, it is necessary to first understand what ethics are and, importantly, how they differ from morals.

[Ethics and morals] are often used interchangeably. Among lawyers and other regulated professionals, "ethics" is often taken to mean the positive rules governing conduct by those professionals by virtue of their profession being state-regulated. "Morals," on the other hand, cover what a lawyer should do, all things considered, or how the lawyer should live, including norms of conduct that relate to the relationship between a person and a deity.¹⁵

Thus, while both terms relate to "right" and "wrong" conduct, morals are subjectively held beliefs or a belief system. Ethics, by contrast, are externally imposed, binding and enforceable rules that govern conduct to achieve a shared belief as to what is right.

When it comes to diversity and lawyers' duties, the distinction between ethics and morals is critical. The Reverend Dr. Martin Luther King was a Baptist minister who attained national recognition during the mid-1950's as a symbolic leader of the civil rights movement in the United States. In one of his most memorable sermons entitled "On Being a Good Neighbor," Dr. King famously said, "Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless."¹⁶ As Dr. King recognized, an ethical call to action operates as an imperative in a way that a moral call does not.

12. Martin P. Moltz, *Viewpoint: Debate Over MCLE Continues: Mandatory CLE-A Better Idea Now than Ever Before*, 11 CBA REC. 44 (1997) ("When one objectively analyzes the number and variety of [disciplinary] findings yearly against individual practitioners, it becomes exceedingly clear that a yearly 'refresher' seminar on ethics is highly desirable. No matter our area or areas of practice, we all need to be acutely aware of the pitfalls prevalent in those areas of the profession.")

13. Jack W. Lawson, *Mandatory Continuing Legal Education and the Indiana Practicing Attorney*, 40 VAL. U. L. REV. 401, 403 (2006).

14. Bruce A. Green, *Teaching Lawyers Ethics*, 51 ST. LOUIS U. L. J. 1091, 1097 (2007).

15. Dennis J. Tuchler, *Teaching Legal Profession: Ethics Under the Model Rules*, 51 ST. LOUIS U. L. J. 1161 (2007).

16. MARTIN LUTHER KING JR., *STRENGTH TO LOVE* 29 (1963).



The concept of law as a system of rules (ethics) that regulate and constrain the affairs of individuals emerged from, and is inextricably linked to, the concept of Justice (morality).

The concept of law as a system of rules (ethics) that regulate and constrain the affairs of individuals emerged from, and is inextricably linked to, the concept of Justice (morality). Marcus Tullius Cicero was a Roman statesman, lawyer, scholar, and writer who is famous for his writings that attempted to uphold republican principles in the final civil wars that destroyed the Roman Republic. In one of these time-tested writings, entitled “*De Legibus*,” Cicero said:

It is agreed, of course, that laws were invented for the safety of citizens, the preservation of States, and the tranquility and happiness of human life, and that those who first put statutes of this kind in force convinced their people that it was their intention to write down and put into effect such rules as, once accepted and adopted, would make possible for them an honourable and happy life; and when such rules were drawn up and put in force, it is clear that men called them “laws.” From this point of view, it can be readily understood that those who formulated wicked and unjust statutes for nations, thereby breaking their promises and agreements put into effect anything but “laws.” It may thus be clear that in the very definition of the term “law” there inheres the idea and principle of choosing what is just and true.¹⁷

We must then ask ourselves, “And what is our conception of the ‘just and true?’” For Americans, it is defined in our founding documents: the Declaration of Independence, the Constitution and the Bill of Rights. The Preamble to the Constitution, for example, proclaims:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The elevation of the rule of law finds its ultimate expression in Thomas Paine’s “Common Sense.”¹⁸ Thomas Paine was an English-born American political activist, philosopher, political theorist, revolutionary, and one of the Founding Fathers of the United States. Paine wrote “Common Sense” in 1775 and 1776 to advocate independence from Great Britain and to encourage common people in the Colonies to fight for egalitarian government. In support of these efforts, Paine exclaimed:

But where, says some, is the King of America? I’ll tell you. Friend, he reigns above,

17. SARA ROBBINS, *LAW: A TREASURY OF ART AND LITERATURE* 52 (1990).

18. Thomas Paine, *The Writings of Thomas Paine*, 99 (1776), http://calhum.org/files/uploads/program_related/TD-Thomas-Paine-Common-Sense.pdf.



It fell to the legal profession to make real the rights conferred in our founding documents.

and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, *that so far we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.* But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony, be demolished, and scattered among the people whose right it is.¹⁹

If, as Paine writes, in America law is king, then lawyers by virtue of training and social status, are its knights:

The original account of the American Lawyer's role was that of America's governing class. The core of this approach was that lawyers—in contrast to business people—are above self-interest, and accordingly, are uniquely able to discern and pursue the common good. As America's governing class, lawyers were obligated to manage society in the interest of promoting the rule of law.²⁰

It is important to remember that at the time of the Nation's founding, the idea of a representative government based on the consent of the governed was, with a few insignificant exceptions, virtually unprecedented.²¹ Thus, it fell to the legal profession to make real the rights conferred in our founding documents. Lawyers and the judiciary debated and ultimately defined and enforced these rights. *Marbury v. Madison*,²² which established the doctrine of Judicial Review, legitimized and endorsed the legal profession's right and obligation to enforce our social contract. The Supreme Court has continued to perform this mission over the entire course of our Nation's existence, through cases such as *Gideon v. Wainwright*²³ (Sixth Amendment right to counsel), *Brown v. Board of Education*²⁴ (declaring separate but equal unconstitutional), *Roe v. Wade*²⁵ (woman's right to privacy) and, most recently, *Obergefell v. Hodges*²⁶ (equal protection for same-sex marriage). In each of these cases, the Supreme Court enforced fundamental protections enshrined in the Constitution, sometimes even before widespread public acceptance.²⁷

19. See *id.* (emphasis added).

20. Russell Pearce, *The Lawyer and Public Service*, 9 AM. U.J. Gender Soc. PoL'y & L. 171 (2001) [hereinafter Pearce, *The Lawyer and Public Service*]. This concept is echoed in Alexis De Tocqueville's description of lawyers as the American aristocracy. See *id.* at 172 (citing Alexis De Tocqueville, *Democracy in America*, 266-270 (1969)). De Tocqueville's writings reflected the republican understanding of lawyers as "providing the enlightened political leadership that protected 'life, liberty, and property....'" *Id.*

21. See, e.g., Joseph Ellis, *Founding Brothers: The Revolutionary Generation* 6 (2000).

22. *Marbury v. Madison*, 5 U.S. 137 (1803).

23. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

24. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

25. *Roe v. Wade*, 410 U.S. 113 (1973).

26. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

27. To be clear, at the time of the Nation's founding, the realization of our founding ideals was not preordained. Public acceptance of the legal profession's authority to translate our founding and constitutional principles into a binding set

III. THE EMERGENCE OF CODIFIED ETHICAL DUTIES.

While the first role of lawyers in society was selfless pursuit of the common good,²⁸ the second role became advocacy on behalf of individual clients.²⁹ It was in this phase, as discussed below, that Rules of Professional Responsibility emerged to regulate the inherent tension between the interests of society and the interests of individuals.

The emergence of codified ethical rules followed the emergence of lawyers representing private clients. Because lawyers were previously considered an exalted class obligated to serve the social good, the notion of representing private citizens for pecuniary gain was frowned upon. As private, commercial practice on behalf of clients became more common, there arose a corresponding need for rules to regulate the competing interests and obligations of the lawyer *viz-a-viz* his client, opposing counsel, the court, and the public.

The history of codified legal ethics standards dates back to 1836 when David Hoffman, considered the grandfather of American legal ethics,³⁰ first published “Fifty Resolutions in Regard to Professional Deportment.”³¹ Hoffman’s Resolutions proposed to balance the tension between lawyer as servant for the common good and lawyer as private advocate. In doing so, however, Hoffman’s rules illustrate the tensions inherent in the then prevailing view that a lawyer’s duty to the common good transcended his duty to his client.

Hoffman’s Rule 15, for example, provided guidance as to how a lawyer should balance his duty to public service and his duty to a client accused of murder:

When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavors to arrest or to impede the course of justice, by special resorts to ingenuity, to the artifices of eloquence, to appeals to the morbid and fleeting sympathies of weak juries, or of temporizing courts, to my own personal weight of character—nor finally, to any of the overweening influences I may possess from popular manners, eminent talents, exalted learning, etc. Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honorable profession; and, indeed, to no intervention beyond securing to them a fair and dispassionate investigation of the facts of their cause, and the due application of the law. *All that goes beyond this, either in manner or substance, is unprofessional, and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy*

of external rules was necessary but by no means assured. Through public consent to legally binding judicial pronouncements, the general framework established in the Constitution was transformed into an externally imposed set of rules that guide and constrain the citizenry’s behavior. Although casually the Supreme Court is often described as establishing the law of the land, the reality is the Court’s pronouncements carry no more force than the other two branches of government and the lower courts accord them. That the Court’s pronouncements are overwhelmingly obeyed even when politically unpopular, demonstrates the force of normative pronouncements, such as ethical precepts.

28. See Pearce, *The Lawyer and Public Service*, at 171 (“The original account of the American lawyer’s role was that of America’s governing class. The core of this approach was that lawyers-in contrast to business people-are above self-interest, and accordingly, they are uniquely able to discern and pursue the common good.”) (citing Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professionalism Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1241 (1995)).

29. See *id.* at 172. However, this does not mean that governing class lawyers were not zealous advocates for their clients. Rather, their zealous advocacy occurred within the bounds of governing class obligations. *Id.* (citing Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992)).

30. Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture on Legal Ethics: Lawyer Professionalism as Moral Argument*, 26 Gonz. L. Rev. 393, 396 n.9 (1991).

31. David Hoffman, *Fifty Resolutions in Regard to Professional Deportment* (1836), <https://lonang.com/commentaries/curriculum/professional-deportment/> (last visited Sept. 6, 2018).

*and selfish motive which sets a higher value on professional display and success than on truth and justice, and the substantial interests of the community.*³²

In other words, if the lawyer adjudged the accused to have committed a murder or other heinous offense, by legal or *moral* standards, his duty to the rule of law precluded him from using the full range of his knowledge, skill or reputation to obtain his client's acquittal. But, ethical standards evolve with society.³³ Today, the pendulum has swung fully in the opposite direction; the notion that a lawyer might give his criminal client a less than zealous defense due to his belief in his client's guilt would be considered unethical.

The ABA adopted Canons of Professional Ethics in 1908.³⁴ These were subsequently revised to become the ABA Model Code of Professional Responsibility, which were further revised in 1983 to become the Model Rules of Professional Conduct.³⁵ The ABA Rules, in their various incarnations, are an authoritative source of ethical obligations for the legal profession, as are their state counterparts.³⁶

Neither the Model Rules nor individual state rules are a comprehensive compendium of a lawyer's ethical obligations, however. Rather they provide, with a few exceptions, rules of decision for lawyers representing individual clients. Codified rules emerged as the profession wrestled with the tension between lawyers as individuals who put serving the public good above self-interest and the emergence of lawyers representing clients for remuneration.³⁷ Viewed from the vantage point of the legal profession's obligation to advance the common good, rules of professional responsibility are revealed to be rules for allocating duties within that overall responsibility. Lawyers, whether prosecutor or defense attorney, advocate zealously (within the bounds of the Rules); judges decide impartially (subject to Rules of Judicial Conduct); and, collectively, the profession fulfills its duty to society.

The prominent legal ethicist Thomas Haffernce observed, "Somewhere between Hoffman's day (he died in 1854) and our own, professionalism stopped meaning that lawyers are responsible for justice."³⁸ This epitaph, however understandable, reflects the error of focusing narrowly on ethics as rules adopted to govern the private practice and disregarding the broader, preexisting yet equally binding ethical responsibility to serve the public good. Codified rules of professional conduct have not displaced pre-existing ethical obligations. Rather, they focus narrowly on representing individual clients in commercial practice. It is the undue focus on codified Rules to the exclusion of common law legal ethics that leads to frustration with, and arguably even disdain for, the profession and for lawyers. For example, another legal ethicist argued, "[T]he adversary system is justified only by the very weakest of reasons, namely, that it is not demonstrably worse than other systems."³⁹ This cynical view fails to recognize the allocative character of the adversary system by which the interests of society and the individual are simultaneously advanced and balanced. The lawyer representing

32. *See id.* (emphasis added).

33. The next milestone in the development of codified ethical rules occurred in 1854 when a series of lectures given by Judge George Sharswood, Chief Justice of the Pennsylvania Supreme court, were combined and published as Professional Ethics. These works in turn became the basis for the first formal code of ethics for lawyers adopted in the United States, the Alabama Code of Ethics, in 1887. *See* ABA, *Model Rules of Professional Conduct: Preface*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface.html (last visited Spt. 6, 2018) [hereinafter ABA, *Model Rules*].

34. *See id.*

35. *See id.*

36. *See id.* Puerto Rico is the only U.S. jurisdiction besides California to not adopt the ABA Model Rules. *See* ABA, *Jurisdictions That Have Adopted the ABA Model Rules of Professional Conduct* (previously the Model Code of Professional Responsibility), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Sept. 6, 2018).

37. *See* Pearce, *The Lawyer and Public Service*, at 174 ("At times, however, the governing class lawyer's higher duty to the law resulted in conflict with cause lawyers and activists.").

38. Shaffer, *supra* note 30, at 402-403.

39. David Luban, *Lawyers And Justice: An Ethical Study* xxiii (1988).



Thus, considered in their historical context, codified ethical rules are revealed to be neither the source nor the limit of the profession's ethical obligations.

an individual client is not obligated to balance his client's interests against the numerous competing interests she has been retained to fight because she is not alone in the fight. She acts in community with the profession, which collectively bears the burden of ensuring that each interest has an equally zealous advocate. But of course, if the profession does not zealously discharge its duty to ensure that all voices are represented, then it fails to honor its heritage or perform its role in society and as importantly, it will deserve the disdain society casts upon it.

Thus, considered in their historical context, codified ethical rules are revealed to be neither the source nor the limit of the profession's ethical obligations. Rather, they serve to regulate the roles and responsibilities of individual lawyers representing competing interests so that the profession as a whole can achieve its mission of advancing and defending our nation's founding compact. As New York's Rules of Professional Conduct explicitly acknowledge, "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."⁴⁰

IV. CODIFIED RULES EVOLVE TO REFLECT COMMON LAW ETHICAL RESPONSIBILITIES

Pearce argues, if the legal profession's first role in society was to serve the public good and the second was commercial, private practice, then recognition of pro bono lawyers represents the third phase of lawyers' role in society.⁴¹ The Canons originally made no mention of pro bono service. Their successor Model Code of Professional Responsibility, however, encouraged lawyers to donate their services on behalf of those unable to pay:

Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession.⁴²

40. New York Rules of Professional Conduct: Preamble, at ¶ 8.

41. See Pearce, *The Lawyer and Public Service*, at 175 ("The third approach of lawyers to public service is unpaid pro bono services, often referred to by the short hand 'pro bono.' It refers to lawyers who or no fee donate a limited amount of their work to public service.")

42. Model Code of Professional Conduct: EC2-25, <https://www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM> (foot-

The Model Code of Conduct was replaced by the Model Rules of Professional Conduct (the “Model Rules”) in 1983.⁴³ Model Rule 6.1, Voluntary Pro Bono Publico Services provided:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.⁴⁴

Rule 6.1 was amended in 1993 to recognize a lawyers’ ethical duty to provide *pro bono* services and to include an aspirational call to render 50 hours annually of *pro bono* legal services:

Rule 6.1 (Voluntary Pro Bono Publico Service): Every lawyer has a professional responsibility to provide legal services to those unable to pay. *A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.* In fulfilling this responsibility, the lawyer should: provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate; (2) delivery of legal services at a substantially reduced fee to persons of limited means; or (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.⁴⁵

Thus, since 1908 the ABA’s rules of professional responsibility have evolved from no recognition of a professional obligation to provide *pro bono* legal services, to general encouragement, to an established professional responsibility and a 50-hour aspirational standard.⁴⁶ In recognizing that a lawyers’ ethical obligations extend beyond the commercial practice of law, the ABA and state rules of professional conduct are evolving toward closing the gap between common law and codified rules of ethics.

notes omitted) (last visited Sept. 6, 2018).

43. See ABA, *Model Rules* (“In 1977, the American Bar Association created the Commission on Evaluation of Professional Standards to undertake a comprehensive rethinking of the ethical premises and problems of the legal profession. Upon evaluating the Model Code and determining that amendment of the Code would not achieve a comprehensive statement of the law governing the legal profession, the Commission commenced a six-year study and drafting process that produced the Model Rules of Professional Conduct. The Model Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983. At the time this edition went to press, all but eight of the jurisdictions had adopted new professional standards based on these Model Rules.”).

44. See ABA CPR Policy Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct Rule 6.1: Voluntary Pro Bono Service*, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_1.authcheckdam.pdf.

45. Model Rule 6.1 (emphasis added).

46. Although aspirational, the fifty-hour standard has affected the profession. Numerous law firms have adopted the goal of having each lawyer perform fifty-hours of *pro bono* services.



Numerous “signposts in the road”⁴⁷ indicate the time has come for bar associations to recognize and require an ethical duty to promote diversity in the profession.

V. THE ETHICAL CASE FOR DIVERSITY: IT’S TIME

In the case of diversity and equality, if serving the public good was the first stage of ethical responsibility, serving clients the second, and *pro bono* the third, then promoting the ideal of equality is the fourth. Numerous “signposts in the road”⁴⁷ indicate the time has come for bar associations to recognize and require an ethical duty to promote diversity in the profession and in society at large, in discharge of the profession’s common law ethical duty to advance and protect our Nation’s founding values.

Signpost 1: State Bar Efforts to Attack Discrimination and Promote Diversity

State bar associations for years have developed their own initiatives, rules and strategies for dealing with sensitive issues that affect their members. Prior to 2016, when the ABA declared discriminatory conduct to be professional misconduct, 24 jurisdictions had adopted some form of anti-bias, anti-prejudice and/or anti-harassment mandates in the black letter of their rules of conduct. Another 15 had adopted an official Comment in their Rules to address bias, discrimination, and prejudicial behavior by lawyers.⁴⁸

Of the 24 states that have established anti-discrimination rules on their books, there exists a wide variation in the language adopted. For example, California has incorporated a duty to refrain from discriminating “on the basis of race, national origin, sex, sexual orientation, religion, age or disability in hiring, promoting, discharging or otherwise determining the condition of employment.”⁴⁹ Indiana’s ethics rules also have dispensed with a *mens rea* element to the prohibition on discriminatory conduct. Indiana Rule of Court 8.4(g) explicitly states it is misconduct for a lawyer to “engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic

47. In *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N.Y. 369 (1927), Chief Judge Cardozo outlined the standards of promissory estoppel, a doctrine that, at that time, had yet to be fully developed in New York. In his opinion, Cardozo acknowledged that, “[w]hether [promissory estoppel] has made its way in this state to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not attempt to say.” *Id.* Still, by supporting his opinion using earlier and similar jurisprudence as “signposts in the road,” Cardozo laid the foundation for introducing the doctrine of promissory estoppel into New York courts. Likewise, our argument, that the time has come for bar associations to recognize and require an ethical duty to promote diversity in the profession and in society at large, will be supported using earlier and similar “signposts in the road.”

48. A chart outlining the jurisdictional adoption of Model Rule 8.4(g) is attached as Appendix B.

49. California Rules of Professional Conduct, Rule 2-400.



The missing element, however, continues to be the link between these established diversity initiatives and a professional obligation to promote and support diversity and inclusion in the legal profession.

status, or similar factors.”⁵⁰ Colorado⁵¹ and Missouri⁵² have similar rules addressing bias and omitting the *mens rea* requirement.⁵³

Although state bars have taken important steps toward remediating discrimination in the industry, none have taken the additional step of issuing a clear mandate regarding the lawyer’s affirmative obligation to enforce and advance equality. Many are actively tackling discrimination and disparity issues: establishing diversity committees, drafting strategic plans, and conducting benchmarking studies. The missing element, however, continues to be the link between these established diversity initiatives and a professional obligation to promote and support diversity and inclusion in the legal profession. Without this link, these rules do not have the force necessary to drive real change in the profession.

Signpost 2: International Efforts to Combat Discrimination and Promote Diversity.

The topic of diversity in the legal profession is not limited to the United States. Other countries have recognized the impact discrimination and harassment can have on lawyers, clients, and the profession. Two countries in particular – Canada and the UK – have drafted Codes of Conduct that explicitly recognize lawyers have heightened social and professional responsibilities which derive from their privileged status.

In Canada, the Ontario Rules of Professional Conduct outlines lawyers’ special responsibility to address discrimination, by setting out the special role of the profession to recognize and protect the dignity of individuals and the diversity in the community. Specifically, the Rule states:

A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other licensees or any other person.⁵⁴

50. Indiana Rules of Court, Rules of Professional Conduct, Rule 8.4(g).

51. Colorado Rules of Professional Conduct, Rule 8.4(g).

52. Missouri Rules of Professional Conduct, Rule 4-8.4(g).

53. As of March 2018, however, there are approximately twenty-one states that have no language in their Rules addressing discrimination, although three of those states are studying Rule 8.4(g). As of 2018, none of the fifty states have adopted rules contemplating the ethical obligations of attorneys to promote diversity in the workplace and beyond.

54. Law Society of Ontario, Rules of Professional Conduct, Rule 6.3.1-1.

The Commentary to the Rule explains that Ontario’s Law Society “acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.”⁵⁵ The Rule is interpreted according to the provisions of Ontario’s Human Rights Code, which includes as discrimination conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Rule places additional responsibilities on the lawyer to take reasonable steps to prevent or stop discrimination by third parties subject to the lawyer’s control or direction.

The UK Code of Conduct includes a chapter on equality and diversity, which is meant to encourage equality of opportunity and respect for diversity. It mandates that “Everyone needs to contribute to compliance with these requirements, for example by treating each other, and clients, fairly and with respect, by embedding such values in the workplace and by challenging inappropriate behaviour and processes.”⁵⁶ Taking it one step further than Canada’s Rule, the UK Code of Conduct outlines specific outcomes lawyers must achieve in order to comply with the Chapter. These include: (1) an approach to recruiting and employment that encourages equality of opportunity and respect for diversity; (2) monitoring and reporting workforce diversity data; and (3) refraining from discriminating, victimizing or harassing anyone (in the course of professional dealings).⁵⁷ The Code goes on to identify for lawyers ways in which they can determine whether they have complied with the Code. These include having a written equality and diversity policy and providing employees and managers with training and information about complying with the equality and diversity requirements. Lawyers with management responsibilities are required to take “all reasonable steps to encourage equality of opportunity and respect for diversity” in the workplace.

Perhaps most notable in these provisions is the clear connection drawn between lawyers’ moral and ethical obligations and their duty to promote diversity in the profession. Lawyers are held accountable for their conduct and the conduct of those who are under their control. In the UK, lawyers’ obligations are outlined in the black letter of the Code (not merely in the Commentary).

Signpost 3: Corporate Defense of our Founding Ideals

Corporate America is becoming increasingly vocal and engaged in promoting equality and inclusion. In a number of major Supreme Court cases, such as *Trump v. Hawaii*⁵⁸ (U.S. travel restrictions); *Obergefell v. Hodges*⁵⁹ (equal protection for same-sex marriage); *Fisher v. University of Texas*⁶⁰ (affirmative action in university application processes); and *Gloucester County School Board v. Gavin Grimm (G.G.)*⁶¹ (transgender student issues), major corporations have submitted amicus briefs in support of the underrepresented and underserved. In *Obergefell*, for example, 379 companies, ranging from Amazon to Starbucks, filed an amicus brief in which they argued that their businesses benefit from diversity and inclusion.⁶²

Recently, Brad Smith, President and Chief Legal Officer of Microsoft, forcefully expressed Microsoft’s commitment to supporting legislation giving formal legal status to the Dreamers, undocu-

55. *Id.*

56. Solicitor’s Regulation Authority Code of Conduct, Chapter 2.

57. *Id.*

58. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

59. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

60. *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013).

61. *Gloucester Cnty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016).

62. See *Obergefell v. Hodges*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/> (last visited Sept. 6, 2018).

mented individuals illegally brought to America as minors and who have lived most of their lives here. Smith issued an official statement on behalf of Microsoft, “As an employer, we appreciate that Dreamers add to the competitiveness and economic success of our company and the entire nation’s business community. In short, urgent DACA legislation is both an economic imperative and a humanitarian necessity.”⁶³ Other corporations, such as Apple⁶⁴ and IBM,⁶⁵ issued similar statements.

Similarly, in 2017, in the wake of comments by President Trump in response to the violent actions of white supremacists at a rally at the University of Virginia, three CEO’s condemned the President’s statements and resigned from his American Manufacturing Council.⁶⁶ Ken Frazier, an attorney and CEO of Merck, said, “America’s leaders must honor our fundamental values by rejecting expression of hatred, bigotry and group supremacy, which run counter to the American ideal that all people are created equal.”⁶⁷

Corporate America is not just speaking out, it is also devoting renewed efforts to drive change. In 2016, Diversity Lab, an incubator for innovative ideas and solutions that boost diversity and inclusion in law, joined with Bloomberg Law and the Stanford Law School to convene the Women in Law Hackathon.⁶⁸ The Hackathon’s goal was to generate innovative and new solutions to the lack of diversity in the legal profession.⁶⁹ One of the solutions developed during the Hackathon was the Mansfield Rule.⁷⁰ Named after Arabella Mansfield, the first woman admitted to the practice of law in the United States, the Mansfield Rule measures whether law firms have affirmatively considered women, LGBTQ+, and minority lawyers – at least 30% of the candidate pool – for promotions, senior level hiring, and significant leadership roles in the firm, including:

- Equity Partner Promotions
- Lateral Partner and Mid/Senior Level Associate Searches
- Practice Group & Office Head Leadership
- Executive Committee and/or Board of Directors
- Partner Promotions/Nominations Committee
- Compensation Committee
- Chairperson and/or Managing Partner

63. Brad Smith, *Urgent DACA Legislation is Both an Economic Imperative and Humanitarian Necessity*, MICROSOFT ON THE ISSUES (Sept. 5, 2017), <https://blogs.microsoft.com/on-the-issues/2017/09/05/urgent-daca-legislation-economic-imperative-humanitarian-necessity/>.

64. Catherine Clifford, *Apple CEO Tim Cook ‘deeply offended’ by ‘DACA situation’*, CNBC (April 6, 2018, 12:19 PM), <https://www.cnbc.com/2018/04/06/as-an-american-apple-ceo-tim-cook-is-offended-by-daca-repeal.html>.

65. Ali Breland, *IBM Pushing for DACA Legislation by the End of the Year*, THE HILL, (Oct. 09, 2017, 12:59 PM), <http://thehill.com/policy/technology/354549-ibm-is-pushing-for-daca-legislation-by-the-end-of-the-year>.

66. Michael Erman, *Three CEOs resign from Trump council over Charlottesville*, REUTERS, (Aug. 14, 2017, 8:54 AM), <https://www.reuters.com/article/us-virginia-protests-merck/three-ceos-resign-from-trump-council-over-charlottesville-idUSKC-N1AU1FM>.

67. Lucinda Shen, *Business Leaders Are Not Happy With President Trump’s Charlottesville Response*, FORTUNE (Aug. 14, 2017), <http://fortune.com/2017/08/14/ken-frazier-trump-charlottesville-response/>.

68. 2016 *Women in Law Hackathon*, DIVERSITYLAB, <http://www.diversitylab.com/hackathons/> (last visited Sept. 6, 2018).

69. *See id.*

70. *See id.*

For example, if a law firm's management has identified a short list of five candidates for an opening on the executive committee, under the Mansfield Rule guidelines two of the candidates would need to be women and/or attorneys of color.⁷¹ Firms that consider women and attorneys of color for 70% or more of their existing leadership committees/roles that exist at the firm and are open during the review period qualify to become Mansfield Certified.⁷² Mansfield Certified firms will be offered the opportunity to send their recently promoted diverse partners to a two-day Client Forum to be hosted in late 2018 to build relationships with and learn from influential in-house counsel. More than 40 firms agreed to adopt the first iteration of the Rule and many more have signed on to the 2.0 iteration. 70 legal departments have signed on to support this effort by attending the Client Forum.⁷³

Signpost 4: The ABA Recognizes the Need to Actively Combat Discrimination and Promote Diversity in the Legal Profession

Formed in 1878, the ABA Constitution proclaims:

The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote through the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public.⁷⁴

Consistent with this mission, the ABA has adopted four goals. Goal III is the elimination of bias and enhance diversity (discussed *infra*). Goal IV is to advance the rule of law which, as discussed above, includes five objectives that derive from the profession's historical obligations to promote the public interest:

1. Increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world.
2. Hold governments accountable under law.
3. Work for just laws, including human rights, and a fair legal process.
4. Assure meaningful access to justice for all persons.
5. Preserve the independence of the legal profession and the judiciary.⁷⁵

Thus, the ABA's mission has always been to advance the American legal profession's established role as guardian of the Nation's founding principles and ideals. Yet, in its formation, the ABA did

71. *See id.*

72. DiversityLab, *Mansfield Rule 2.0: 65 Law Firms Pilot Mansfield Rule 2.0 to Boost Diversity in Leadership Ranks*, <http://www.diversitylab.com/pilot-projects/mansfield-rule/> (last visited Sept. 6, 2018).

73. *See id.*

74. *ABA Constitution and Bylaws: Rules of Procedure House of Delegates 2015-2016*, https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/aba_constitution_and_bylaws_2015.authcheckdam.pdf.

75. *ABA Mission and Goals* (June 11, 2018), https://www.americanbar.org/about_the_aba/aba-mission-goals.html.

not live up to its professed ideals. Membership was initially reserved exclusively to white men.⁷⁶ The first woman member was not admitted until 1918.⁷⁷ Membership was not opened to non-whites until 1943.⁷⁸ And yet, the first African-American was not admitted to the ABA until 1950.⁷⁹

ABA rules did not address discrimination for more than a century after the ABA's founding. In 1988, the ABA adopted Comment 2 to Rule 8.4(d), which provided that discriminatory conduct in the course of representing a client violates Rule 8.4(d), conduct prejudicial to the administration of justice. Comments, however, are mere guidance, not rules, and thus unenforceable.

It would take almost another 30 years before the ABA squarely addressed the problem of discrimination, and the lack of diversity, in the profession. In 2016, the ABA amended Rule 8.4 to directly prohibit lawyers from harassing or discriminating against certain classes of persons while engaged in the practice of law.⁸⁰ The ABA did so by adding a new paragraph (g),⁸¹ so that Misconduct was defined to include discriminatory conduct:

It is professional misconduct for a lawyer to:

...

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The amendment, although a welcome step forward, was nevertheless more measured than several of the state model rules. The new rule, for example, contains a *mens rea* element. It prohibits only discriminatory conduct engaged in knowingly (including constructive knowledge).⁸² California, Indiana and New York, for example, have eliminated the *mens rea* element. California's rule also extends to discriminatory employment practices.

In recent years, however, science has revealed that all of us—regardless of race, creed, ethnicity, gender identification or sexual orientation—harbor and act on implicit biases against disfavored

76. ABA Timeline, <http://abaleaders.org/timeline/index.html> (last visited Sept. 6, 2018).

77. New York Women's Bar Ass'n, *Major Milestones in the History of Women Attorneys and Judges in the United States*, <https://web.archive.org/web/20140916055711/http://www.nywba.org/history2.shtml> (last visited Sept. 6, 2018).

78. ABA Mission and Goals, *supra* note 76.

79. *See id.*

80. Samson Habte, *ABA Ethics Committee Floats Draft Anti-Bias Rule*, BLOOMBERG (July 29, 2015), <https://www.bna.com/aba-ethics-committee-n17179934053/>.

81. Peter Geraghty, *ABA adopts new anti-discrimination Rule 8.4(g)* ABA, (Sept 2016), <https://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g-at-annual-meeting-in-.html>.

82. The inclusion of a *mens rea* element was a conscious decision of the ABA House of Delegates. "[T]he Ethics Committee was concerned that a model rule that did not include a *mens rea* would in effect impose a strict liability standard on the profession. The Ethics Committee was not convinced that this was necessary, or that prohibiting 'knowing' conduct would not adequately prevent the conduct this Rule is intended to address." ABA Standing Comm. on Ethics and Professional Responsibility Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative (June 16, 2015), <https://lalegaethics.org/wp-content/uploads/2015-07-16-ABA-Proposed-Amendment-to-Rule-8.4-re-Harassment.pdf?x16384>.

groups in society.⁸³ The ABA has recognized the problem of implicit bias and has urged action to remedy it.⁸⁴ Importantly, because implicit bias is subconscious, it is imperceptible. Consequently, Rule 8.4(g)'s focus on *knowing* discrimination fails to address the fact that we all unconsciously discriminate. In that light, linking the professional obligation to a *mens rea* element is a bit of a red herring. All lawyers unconsciously discriminate. Moreover, the science of implicit bias reveals that we are incapable of willing ourselves to non-discrimination. The best we can do is take remedial steps. However, that is Rule 8.4(g)'s second limitation; it imposes no remedial obligation, either for intentional or unintentional discrimination.

In conjunction with amending Rule 8.4, the ABA House of Delegates also passed Resolution 113, "Promoting Diversity in the Legal Profession."⁸⁵ The Resolution urged providers of legal services to "expand and create opportunities at all levels of responsibility for diverse attorneys" and urged clients "to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase ... to diverse attorneys."⁸⁶

The ABA followed this resolution with a letter to the chief legal officers of the Fortune 1000 companies seeking their commitment to supporting Resolution 113 and taking additional affirmative steps to increase diversity among the ranks of their outside counsel.⁸⁷ Responding to this call for action, 80 general counsel from Fortune 1000 companies signed the "GC Pledge," committing to support Resolution 113 and encourage their outside law firms complete a Model Diversity Survey regarding diversity in the legal profession.⁸⁸ The companies also agreed to use the results of the Model Diversity Surveys as a factor in determining which firms they would retain or terminate.⁸⁹

The Resolution was a resounding call for action directed not only at the legal community, but also toward consumers of legal services. The ABA enlisted the help of in-house counsel in promoting the Resolution because it understood that there is a "well-established business case for diversity and inclusion" and that clients, the profession and society are best served by organizations that are diverse and inclusive at every level. In fact, the Report issued by the ABA's Diversity & Inclusion 360 Commission concluded that:

The economic success of diverse attorneys would attract others into the profession, thereby building the pipeline; upend the implicit bias that stifles opportunities now; and result in the full and unhindered participation of diverse attorneys in the profession, thereby making the profession more representative of the populations it serves.⁹⁰

83. See, e.g., David L. Douglass, *The Scientific Basis For The Ethical Obligation To Require Action To Eliminate Bias And Promote Diversity In The Legal Profession*, IILP REVIEW 2017: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 66 (2017), http://theiilp.com/resources/Pictures/IILP_2016_Final_LowRes.pdf.

84. *Id.*; see also Paulette Brown, *Inclusion ≠ Exclusion: Understanding implicit bias is key to ensuring an inclusive profession* (Jan. 2016), http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring.

85. ABA, 113: *Adopted*, https://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/113.html (last visited Sept. 6, 2018).

86. *See id.*

87. Letter from Susan Alexander et al. (Sept. 7, 2016), <https://www.americanbar.org/content/dam/aba/administrative/diversity-portal/general-counsel-implementation-aba-resolution-113.authcheckdam.pdf>.

88. *Id.*

89. See ABA Diversity & Inclusion 360 Commission, *ABA Model Diversity Survey*, <https://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission/diversity-survey.html> (last visited Sept. 6, 2018).

90. ABA Diversity and Inclusion 360 Commission Report to the House of Delegates, *Report: Resolution 113*, at 2 (Sept. 7, 2016), <https://www.americanbar.org/content/dam/aba/administrative/diversity-portal/general-counsel-implementation-aba-resolution-113.authcheckdam.pdf>.

While the resolution was a constructive effort to advance diversity in the profession, it cannot escape notice that the ABA was calling for in-house law departments to take efforts the ABA itself was not committing to undertake. Further, it is ironic that the ABA, a legal association, was making a business case for diversity rather than a legal case for diversity. Viewed in the larger context of international legal associations, state associations and corporate advocacy, the ABA's recent actions appear belated and timid.

VI. THE TIME HAS COME FOR THE ABA TO AMEND ITS MODEL RULES TO CODIFY A LAWYER'S ETHICAL OBLIGATION TO PROMOTE EQUALITY AND DIVERSITY IN THE PROFESSION.

The ABA's recent initiatives to promote diversity in the legal profession are admirable. The data however, reveals that more must be done. The National Association for Law Placement's ("NALP") 2017 Report on Diversity revealed that the representation of women associates has seen a net decrease, and the percentage of Black/African-American associates declined every year from 2010 to 2015, although there were small increases in 2016 and 2017.⁹¹ James Leipold, NALP's Executive Director poignantly reflected that:

Minority women and Black/African-American men and women continue to be the least well represented in law firms, at every level, and law firms must double down to make more dramatic headway among these groups most of all. And, while the relatively high levels of diversity among the summer associate classes is always encouraging, the fact that representation falls off so dramatically for associates, and then again for partners, underscores that retention and promotion remain the primary challenges that law firms face with respect to diversity.⁹²

Beyond merely remediating discrimination, however, the Model Rules should be amended to impose an affirmative obligation to promote equality, diversity and inclusion in the profession in recognition of a lawyers' duty to fulfill his or her obligation to enforce and advance the founding principles of equality for all. Indeed, this is the mandate expressed in Model Rules' Preamble:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.

*Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.*⁹³

91. NATIONAL ASSOCIATION FOR LAW PLACEMENT (NALP), 2017 REPORT ON DIVERSITY IN U.S. LAW FIRMS, <https://www.nalp.org/uploads/2017NALPReportonDiversityinUSLawFirms.pdf>.

92. NATIONAL ASSOCIATION FOR LAW PLACEMENT (NALP), 2016 REPORT ON DIVERSITY IN U.S. LAW FIRMS 3, <https://www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf>.

93. ABA Model Rules of Professional Conduct, Preamble (emphasis added).

Through these words the Preamble evokes the concept of “lawyer as champion of the public good” that first characterized the role of lawyers in society. History and science lead us to conclude that the ABA should further amend Model Rule 8.4 to acknowledge a lawyer’s professional obligation to act affirmatively to promote equality and diversity in the profession. This could be accomplished by moving current Rule 8.5, Disciplinary Authority, to a new Rule 8.6 and drafting a new Rule 8.5 as follows:

As a learned member of society with an ethical obligation to promote the ideal of equality for all members of society, every lawyer has a professional duty to undertake affirmative steps to remedy *de facto* and *de jure* discrimination, eliminate bias, and promote equality, diversity and inclusion in the legal profession. Every lawyer should aspire to devote at least 20 hours per year to efforts to eliminating bias and promoting equality, diversity and inclusion in the legal profession. Examples of such efforts include but are not limited to: adopting measures to promote the identification, hiring, and advancement of diverse lawyers and legal professionals; attending CLE and non-CLE programs concerning issues of discrimination, explicit and implicit bias, and diversity; and active participation in and financial support of organizations and associations dedicated to remedying bias and promoting equality, diversity, and inclusion in the profession.

Amending the Model Rules in this fashion would elevate the ABA to a position of leadership in the cause of promoting equality, diversity and inclusion in the legal profession. The aspirational 20-hour commitment, like the aspirational 50-hour pro bono commitment, has the potential to mobilize law firms and legal departments to leverage current efforts to eradicating the persistent lack of diversity that plagues the legal profession in a common cause to realize the ideal of equality in our profession and in our society. The ABA should take this evolutionary and necessary step not only in recognition of the legal profession’s historic role as guardian of our founding values but out of self-preservation. In a society and profession that is becoming increasingly diverse, failure to do so will cause the ABA to cede its role as leader of the profession and risk relegating it to an anachronistic irrelevancy. Alternatively, as the Nation’s premier legal association, the ABA is uniquely positioned to speak as the voice of the legal profession. It can serve as a unifying and galvanizing voice for the numerous organizations that are currently addressing the imperative to promote diversity and inclusion in the profession. The time has come.

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Mitchell Hamline School of Law's Gateway to Legal Education Program: Trying to Move the Needle

By Mark C. Gordon

President and Dean of Mitchell Hamline School of Law

Learn how one law school took action and designed a unique and cutting-edge JD hybrid program that is dramatically increasing the number of diverse law students.

To protect student confidentiality, the names and some non-critical facts related to the stories described herein were modified. Parts of this essay borrow significantly from presentations I have made previously, including most recently at the Cleveland State University Conference: Meeting the Challenge of Inclusive Excellence.

Quincy, a freshman on the soccer team at the small Midwestern college where I was the president, walked into my office one day and asked to shut the door. He did so and looked at me with tears coming out of his eyes, and he said: "My mother hasn't spoken to me or responded to my calls for over a month now." I gave him a hug and reminded him that his mother still loved him very much, but then I talked with him about what might have been going on in his mother's life that was preventing her from calling him. We talked things through, and eventually his mother did get back in contact.

You might be asking yourself what this story has to do with an essay announcing a law school's new program to expand access to legal education. After all, Quincy was not a pre-law student, and he never expressed any interest in law school. Indeed, that is the case with most of the stories I am about to tell. But I think they are important as examples of the non-academic stresses that many students, particularly first-generation students, deal with on a regular basis. Much as they might like to immerse themselves in an ivory tower, focused entirely on their studies and future careers, real life keeps interrupting. If we really want to expand diversity in legal education (and thereby in the legal profession), it is time that we start thinking a little more aggressively outside the box, especially as it relates to how to make students from "non-traditional" backgrounds feel more welcome in law school. There are many students who may make excellent law students and wonderful attorneys but for whom law school is just not on the radar screen at any point during college. For these students, many of whom might come from traditionally under-represented ethnic or racial groups and many of whom (at least in my experience) are the first generation in their family to go to college, the system is not set up to make them think that law school can even be a realistic option.

I say this in full recognition of the fact that there are many undergraduate colleges and universities working diligently to overcome the barriers that first-generation students face. In fact, the success of a number of Historically Black Colleges and Universities (HBCUs) and other institutions in encouraging and preparing their students for future professional education has been phenomenal. But somehow we on the legal education side have missed the boat in creating a seamless transition for these students from their undergraduate studies to law school.

Imagine, if you will, a different system. Imagine a system in which even while students are getting the kinds of personalized assistance in which more and more undergraduate schools excel, they were also starting to develop a relationship with a law school. Imagine a system in which interested undergraduates could be exposed to the possibilities of a legal education as part of their undergraduate experience, and in which those students were mentored by current law students and lawyers. Imagine a system in which the individualized and holistic approach that can do so much to enable students to feel a sense of belonging in their undergraduate institutions continued without interruption as students transitioned to law school, and in which the law school classroom was demystified for them as part of the undergraduate experience. And imagine a system in which a law school could actually get to know undergraduate students as individuals throughout their sophomore to senior years, so that the law school had additional experience and data with which to assess the students applying to their school, in addition to the traditional standardized test scores and undergraduate GPA.

That is the system that we are trying to create at Mitchell Hamline School of Law through our innovative Gateway to Legal Education Program. In this program we are offering online undergraduate introduction to law courses *for free* at a range of undergraduate institutions serving students from underrepresented populations in the legal profession. This essay is intended to describe this new program. However, the thoughts that follow are also meant in part to challenge all of us to think about how the broader structural pressures within our system of higher education are standing in the way of increasing diversity in legal education. On a more personal level, this essay is also intended to explain my own individual journey as a college president and now as the president and dean of a law school at which I find myself championing the importance of diversity and inclusion and our new Gateway to Legal Education Program.

But, first, a few more stories to keep our conversation grounded.

Isaac, another freshman who was also a student athlete, came from a family in which both parents were struggling to keep finances afloat. Isaac was an engaging young man who wanted to be at college. But, he was continually racked by guilt as to how he could justify being in college which was putting an even greater financial stress on his parents. It was not at all unusual for him to break into tears when relating to me his feelings of guilt and his doubts about what was the right thing for him to do.

Or consider Jackie. She was a promising student, but she had a lot of trouble keeping her mind on her studies because she was dealing with her parents' potential bankruptcy and the fear that they might be kicked out of their home any day. Then there was Cal, a strong student, who had to drop out in the middle of the second semester because his grandmother got sick and his mother was in the hospital – so he had to go home and take care of his younger siblings.

Or how about Ishmael, who finished his first year at college, but his sister and brother-in-law both got in trouble with the law, leaving his mother to take care of their children. His mother could not do that alone because of her job, so Ishmael had to leave school and go back home to help with the grandkids.

Happily, I can balance many of these stories with others that have really happy endings.

There was Chris, who was the first in his family to go to college and who didn't return after the first semester. When I called him he said that he just couldn't do it, that the finances would never work, etc. We worked out some financial options, but I also assured him that he could do it and that I had a lot of faith in him. He came back and graduated with his BA three and a half years later.

There is also Harry, who grew up in a single-parent household amidst a lot of crime and deprivation. He was effectively homeless before the end of high school, and when he got to college, he

was really interested only in sports rather than in academics. He had a lot of fits and starts. Every time he got ahead, something would happen back home that would pull him back. His mother would call, making him feel guilty that he wasn't sending money home, so he would send home the money that should have paid for one of his textbooks. Eventually he dropped out, hit bottom, and then started up again. I kept in touch with him, pushing him, encouraging him, giving him love and support. He is on track to apply to graduate school in a year or two.

Frankly, I could relate many more stories – some of which would cause your heart to soar and others which would cause your heart to break. I realize that there is nothing that any of us individually or that any institution of higher education on its own can do to address the wide range of social and economic needs which get in the way of so many potentially promising students completing their studies. But, as we try to talk honestly about the challenges of diversifying legal education, I think we need to keep reminding ourselves that, as currently functioning, our system of legal education is not structured to address the full range of support (whether financial, emotional, social, etc.) that students from less resourced backgrounds might actually need to succeed. Too many students who might well have the ability to excel academically are falling by the wayside for lack of these broad supports. For some reason we all seem to assume that if a student has made it through college, the need for many of these “non-traditional” supports disappears at the law school level. After all, we have that traditional notion of law school as a rigorous environment in which students should not be “coddled.” But there is no reason why we cannot combine academic rigor and excellence with the full range of support, encouragement, and assistance that will enable all of our students to excel, including those from less privileged backgrounds.

Let's be honest: over the last several decades many have made very significant efforts to expand diversity in legal education and in the legal profession. I applaud those efforts, but we need to be candid in admitting that, so far, for all the hard work and all the good intentions, we just have not been able to move the needle in a truly significant way. I think part of the reason for that is because we have failed to address the most significant barriers that stand in the way for a whole group of students who could otherwise be seriously considering law school. They need a much more personalized approach, in which they are introduced to the possibilities of legal education, in which they receive mentoring from law students and lawyers, in which various financial barriers to their considering law school are removed, and in which they get opportunities throughout college to become more and more comfortable with the idea of their becoming law students.

There is no need for me to recite the statistics, as readers of this publication know them well. But, I do want to offer some ideas on how we could actually move the needle farther.

Why am I qualified to even offer an opinion? Well, I am not sure that I am. But, here is why I might be.

First, as the president of a Midwestern college in which a significant number of the entering students were the first generation in their family to go to college, I had an opportunity to witness firsthand the kinds of barriers that tend to throw many students from less privileged backgrounds off track in their undergraduate careers, preventing them from even thinking about professional or other forms of graduate education.

Second, I am now the President and Dean of Mitchell Hamline School of Law in St. Paul, Minnesota. I started at MHSL in 2015, as I was the fellow brought in to combine the two schools (William Mitchell College of Law and Hamline University School of Law) into one. I am proud to report that we are thriving as a combined institution more than anyone ever imagined. Importantly, one of the ways we are thriving is by dramatically increasing the diversity of our student body.

Many people are surprised to hear that even though we are in the somewhat less diverse state of

Minnesota, our entering 1L class in fall 2017 had over one hundred students of color and indigenous students. Yes, you read that correctly, over one hundred 1L students of color and indigenous students. In fact, if you look at the American Bar Association (“ABA”) statistics for 1L students,¹ you will discover that Mitchell Hamline School of Law was among the top 10 schools in the country during the 2017-18 academic year for the absolute number of African American 1L students. We were one of the top two in the nation for the absolute number of Native American 1L students, in the top two in the Midwest for the absolute number of Latino/a 1L students, and in the top 25 in the nation for the absolute number of Asian American students.²

Most importantly, we are embarking on a new effort which I believe might actually have some potential to move the needle in a meaningful way in terms of diversity in the legal profession on a national level.

At MHSL, we received a variance from the ABA in December, 2013, enabling us to create a hybrid program, in which we teach law to a certain cohort of students partially online and partially in class. Just over half of the classroom hours are in residence, and almost half are online. But, the program is structured in such a way that the in-class hours are condensed into very intensive shorter time periods on campus, so a student effectively spends only one or two weeks per semester on campus. What this means is that a student can live anywhere in the country or beyond while getting a JD through our MHSL hybrid program.

This has expanded access dramatically to legal education. Mid-career professionals, stay-at-home parents, Native Americans who want to continue living in their tribal communities, active-duty members of the military, and many others now have access to an ABA-accredited JD through MHSL’s program.

In implementing this program,³ we at MHSL have developed a new pedagogy for teaching law in an online environment. You don’t just put a video camera in the back of a traditional classroom. Instead, you need to think through, as MHSL’s excellent and innovative faculty has, a completely different way of presenting and interacting with the material. Students in our hybrid program have specific required learning outcomes weekly in every course, and they need to submit written work product which gets graded every week. It is incredibly rigorous, and it seems to be working.⁴

Developing this kind of online legal teaching methodology is difficult, time consuming, and expensive. But, now that we have it, we can start to apply it in other ways, and that is the impetus behind our new Gateway to Legal Education Program.

We are now in the process of developing a series of online undergraduate Introduction to Law courses. Under this program, we are reaching out to HBCUs, Hispanic-serving institutions, tribal colleges, and any undergraduate institution with a high proportion of first-generation students going to college. We are offering to these institutions that we will provide these courses for their students online for free. (The first two courses will start in 2019. One is entitled Health Care and the Law: From Tainted Food to Medical Errors. The other will be a more general survey course of first-year topics, legal writing, and important law school skills. A range of other courses are also under development.)

1. These can be somewhat less than comparable, as second-year students in part-time programs can still count as 1Ls in terms of their credit hours.

2. Unfortunately, the ABA data does not indicate LGBTQ comparable statistics. This data is from a compilation of ABA 509 disclosures by individual schools.

3. The MHSL Hybrid program is capped by the ABA at 96 students per year.

4. Our first cohort will graduate in December, 2018 (although many in the class graduated early), so by the second half of 2019 we should have bar passage and employment data for a full cohort.

So, under this program, undergraduate students can be introduced to different legal issues without paying anything beyond their normal tuition at their undergraduate institution. And the students will be receiving undergraduate credit for each of these courses.

What makes me the proudest is that this Gateway program also incorporates some of the other lessons I have learned from my previous experiences working with first-generation students. When a student signs up to take one of our undergraduate online courses, that student will also be linked with mentors, including a current MHSL law student as well as a member of the professional legal community. Participating students will also receive a deep discount on a third-party, professionally provided LSAT prep course.

As part of the program, students will be able to enroll in a week-long summer Immersion in the Law introductory course on-site at MHSL. In this course, students will learn about the study and practice of law and will meet with lawyers, judges, and law students. This course will be free to participating students – which means that travel, living expenses, food, etc. will all be covered.

Dr. Wilma Mishoe, interim President of Delaware State University, the first HBCU to sign up to participate in this program, said at the signing ceremony initiating their participation in April, 2018, that it appeared that MHSL had tried to think through every possible barrier that a first-generation student could face in thinking about and applying to law school, and that the Gateway program was structured to get around every one of those barriers.

I was, of course, gratified to hear her say that. We do have high hopes for this program. Imagine if undergraduate students around the country can start taking these introductory law courses as part of their regular undergraduate experience. Some students will discover an interest in law school that they never knew they had. Others might discover that law school really is not for them (which is better to know sooner rather than later). Of course, I expect that a portion of these students will decide to apply to MHSL for law school, but my guess is that many of them will apply to law schools in their immediate geographic areas. This means that we can through this program create some wonderful positive externalities for everyone (increasing applications by diverse students to law schools around the country).

The heart of the Gateway to Legal Education Program, however, is not just online introductions to legal training. Rather, it is beginning to work with students individually and early on, to help them figure out whether law school is right for them. The purpose of the mentors is to provide a continuing source of support for students as they go through the process. From my own experience as a college president, I know that going to law school is often not on the radar screen for most first-generation students. Once it is, they suffer many doubts and worries about whether they can actually do it. Having people who can help guide them on an individual basis is really important. This is, of course, not in place of the great support that students may get through advising, faculty, and others at their undergraduate institutions; but there is no substitute for developing direct relationships between the students and mentors already studying, teaching, or practicing law.

As should be clear from the above, I am hopeful about the impact that the Gateway program could have. But I hope it also contributes to a broader reassessment of how we think about the provision of higher education. Let me mention three areas where I think that kind of reassessment is very much in need if we are truly to achieve the diversity and inclusiveness which we claim to desire.

First, we need to start rethinking the proper role of administrators and faculty at law schools and at undergraduate institutions. We all know the traditional roles. In fact, faculty for generations have been taught that it is improper to get involved in a student's personal life, focusing on the academics and ignoring the other concerns, which are for counselors to deal with (if they are available). As you can probably infer from how I defined my job as a college president and continue to define

my role at MHSL, I reject that traditional definition of the role of faculty and administrators. It was premised historically on the assumption that family and parents of students provide both financial and emotional support for students to stay in school. As I tried to make clear with the stories at the beginning, that is just often not the case for many students. As a law school dean, I have found that even when students get to law school, they still need a range of different kinds of support based on their own particular circumstances. We cannot assume that since a first-generation student made it through college, he or she will easily make it through law school as well.

Many of the traditional practices in higher education grow out of long-standing assumptions that we deal mostly with the children of privilege, students who do not face other barriers that stand between them and their studies. It does no good to increase the number of students from diverse backgrounds if we cannot provide them with the support that they – and more of their more “traditional” classmates than you would venture to guess – truly need to succeed.

Second, since we in higher education have historically defined merit based on the most traditional presumptions, there will always be plenty of objectively fair reasons to fail disadvantaged students. The question we need to ask is whether those criteria are the right ones. We often speak about using new technology to create “flipped classrooms.” I would like to challenge my colleagues at undergraduate institutions and law schools to think about what would happen if we started to “flip” our criteria. What if we started not with the question of what a student must achieve to succeed, but instead ask what must we as an institution do to help each individual student to succeed? The answer will be different for each individual student, but maybe that is part of the solution. We should think more about customized approaches, rather than the one-size-fits-all approach that is structured to favor those from the more traditional backgrounds.

Finally, if we really want to say we believe in diversity and inclusion, we need to ask some tough questions about ourselves as institutions. One of those questions has to focus on the way that rankings have become pre-eminent in how educational institutions judge themselves. Of course, I could spend a lot of time going point by point through the reasons why rankings such as US News and World Report make no sense. But, I think that when we do the point-by-point rebuttal, we often miss the larger picture. The way the rankings are structured—and this applies to universities and law schools both—conflates excellence with exclusivity. They are premised on the idea that in order to be an excellent institution, you need to be exclusive: you are very selective, you only admit “top” students, you are judged as prestigious by the elites, etc. I think it is difficult to hold yourself up as committed to inclusion if you measure your success based on exclusion. If we truly believe in inclusion, then the measure of an educational institution should not be related to the extent to which it admits only the few, but rather to the extent to which it broadens opportunity for those who attend. Education is perhaps the single most powerful opportunity to transform the trajectory of students’ lives. Our mission is to open doors for students, not to shut them on applicants.

I would like to think that some day students with backgrounds like those mentioned earlier will find higher education structured in a way that will help them succeed. I dare to hope that the Gateway to Legal Education Program can introduce growing numbers of students from diverse backgrounds both to the skills and the support systems that can make law school and a legal career truly a reality for many.



IILP hosted Symposia based on the 2017 Review in Boston, Charlotte, Columbus and many other cities. To see if IILP is presenting a 2019-2020 Symposium on the State of Diversity & Inclusion in the Legal Profession in your city, visit www.theiilp.com/calendar for updates.



Missing: Where is the Public Sector in Discussions about Diversity in the Legal Profession?

by **Lea S. Gutierrez**

Senior Litigation Counsel and Director of Diversity and Inclusion at the Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois

Diversity and inclusion discussions often focus on law firms; public sector attorneys have been left out or sidelined in these conversations about the legal profession. Gutierrez shares what the legal profession can do to include public sector attorneys more regularly and why it's important.

The limited diversity in United States law firms, especially at the partner level, has become a popular topic of discussion in the legal profession. This is, in part, due to annual reports and other articles published by the National Association for Law Placement (“NALP”) on the representation of women, lawyers of color, lawyers with disabilities, and LGBT lawyers at various levels of law firms.¹ NALP and other organizations, like the American Bar Association, the Minority Corporate Counsel Association (“MCCA”), and the National Association of Women Lawyers (“NAWL”) periodically publish statistics on the demographic makeup of United States law firms and corporate legal departments. These publications draw the profession’s attention to the diversity of those practice settings and give law firms and corporate legal departments valuable insights into the extent of their diversity and opportunities for growth.

While addressing law firm diversity is essential to improving diversity in the legal profession, the focus on law firms and corporate legal departments has come at the cost of overshadowing diversity issues in the public sector. Addressing this deficiency is vital if we are to effectuate change in the legal profession as a whole. By examining the current discourse on legal diversity, it becomes clear that we must include the public sector in the research, discussions, and objectives about diversity and inclusion (“D&I”). Furthermore, it is important that we highlight the D&I efforts of public sector organizations, because their initiatives will help guide us in achieving broader, far-reaching goals.

I. Available Information

In order to better understand the current situation, we must first review the statistical information available to us. NALP divides the profession into seven practice settings: private practice, education, business, military, other government, judicial clerkships, and public interest.² According to NALP, as of March 15, 2017, 52.9 percent of the law school class of 2016 took jobs in private practice, which

1. See, e.g., NAT’L ASS’N FOR LAW PLACEMENT, 2016 REPORT ON DIVERSITY IN U.S. LAW FIRMS (2016) available at <https://www.nalp.org/uploads/2017NALPReportonDiversityinUSLawFirms.pdf>; see also, NAT’L ASS’N FOR LAW PLACEMENT, 2017 REPORT ON DIVERSITY IN U.S. LAW FIRMS (2017) available at <https://www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf>.

2. NAT’L ASS’N FOR LAW PLACEMENT, JOBS & JD’S | EMPLOYMENT FOR THE CLASS OF 2016 – SELECTED FINDINGS (2017), available at <https://www.nalp.org/uploads/SelectedFindingsClassof2016.pdf>.

NALP defines as law firms of all sizes and solo practitioners.³ The remaining 47.1 percent took jobs in academia, business, military or other government, judicial clerkships, or public interest.⁴ These percentages have remained relatively consistent since 2012.⁵ Given that almost half of the legal profession begins its career at law firms, a substantial portion of the research and discussion about D&I in the legal profession has understandably focused on law firm diversity. For example, NALP's website lists articles and research related to the presence of minorities and women, lawyers with disabilities, LGBT lawyers, and part-time lawyers.⁶ In 2017, all of these publications related specifically to law firms.⁷ Though the public sector comprises one-eighth of the legal profession,⁸ none of the articles addressed diversity in the public sector.⁹

II. Factors Influencing the Profession's Focus on Law Firm Diversity

In addition to the fact that approximately half of the legal profession begins its career at law firms,¹⁰ there are other potential reasons why diversity research and discussions in the profession have focused heavily on law firms. One possible factor is that data regarding law firm diversity is more readily available. In fact, many corporate clients inquire about law firm diversity on requests for proposals to law firms.¹¹ Some corporate clients even require law firms to present the corporation with a formal talent development plan, showing how the firm will advance and retain diverse lawyers.¹² In my opinion, these inquiries incentivize law firms to devote resources toward understanding and promoting their institutional diversity. Furthermore, many law firms participate in NALP, MCCA, and NAWL diversity surveys and share information about the demographics at various levels of the firm.¹³ Similar data for the legal profession's public sector is not readily available.

Another possible reason why research and discussions have focused on law firm diversity is because some assume that the public sector is more diverse.¹⁴ However, while many public-sector organizations have a mission and commitment to helping people who are members of historically marginalized groups or have felt disenfranchised, not all organizations have employment policies that reflect that commitment.¹⁵ In addition, there is evidence that some public-sector organizations that have employment policies reflecting a commitment to diversity have difficulty retaining diverse hires due

3. *Id.*

4. *Id.* at 2.

5. NAT'L ASS'N FOR LAW PLACEMENT, HIGHLIGHTS OF EMPLOYMENT OUTCOMES FOR THE CLASS OF 2015 (2016), available at <https://www.nalp.org/0916research>.

6. *Diversity & Demographics*, NAT'L ASS'N FOR LAW PLACEMENT, <https://www.nalp.org/diversity2> (last visited Feb. 26, 2018).

7. *Id.*

8. *Government and Public Sector Lawyers*, ABA, https://www.americanbar.org/portals/government_public_sector_lawyers.html (last visited Feb. 13, 2018).

9. *Diversity & Demographics*, *supra* note 6.

10. NAT'L ASS'N FOR LAW PLACEMENT, *supra* note 2.

11. *See, e.g.*, Casey Sullivan, *Deadline for Diversity Issued by Top Metlife Lawyer*, BIG LAW BUS. (Apr. 3, 2017), bit.ly/Sullivan-diversity; Melissa Maleske, *The High Cost of BigLaw's Lack of Diversity*, LAW360 (May 17, 2016), bitly/maleske-biglaw0diversity.

12. Daniel S. Wittenberg, *Corporate Clients Demand More Diversity from Law Firms*, <https://www.americanbar.org/publications/litigation-news/business-litigation/corporate-clients-demand-more-diversity-law-firms.html> (last visited Feb. 23, 2018).

13. *See, e.g.*, *Law Firm Diversity Database*, MINORITY CORPORATE COUNSEL ASS'N, <http://mcca.vault.com> (last visited Feb. 13, 2018); *See also*, 2017 Annual Survey Report, NAT'L ASS'N OF WOMEN LAWYERS, <http://www.nawl.org/p/cm/ld/fid=1163> (last visited Feb. 13, 2018).

14. Samantha McCormick, *7 Ways Government Employees Differ from Private Sector Employees* (2015), <https://www.gov-loop.com/community/blog/7-ways-government-employees-differ-private-sector-employees/>.

15. ANN LEHMAN, *NEED FOR DIVERSITY AT NONPROFITS IS MORE VITAL AFTER GARNER AND BROWN CASES* (2014), available at <https://www.philanthropy.com/article/Need-for-Diversity-at/152045>.

to factors such as lower salaries, educational costs, and burnout, leading to diversity issues at higher levels of the organization.¹⁶

Diversity research and discussions may also tend to focus on law firm diversity because public sector diversity does not lend as easily to quantifiable outcomes in service delivery. In other words, because the public sector is mission-driven, as opposed to profit-driven, the impact of public sector diversity efforts is often measured qualitatively rather than quantitatively. However, qualitative data offers insights into feelings, behaviors, and attitudes not possible through quantitative data alone. On the other hand, given that diversity in the public sector is tied to how various societal systems are performing, there may also be a concern that uncovering diversity issues in the public sector would spark concern about the quality of public services. For example, the impact of limited judicial diversity on public perceptions of the fair administration of the law has been a topic of discussion in the legal profession for decades.¹⁷ Just as limited diversity in the judiciary can impact the public's perception of the fair administration of justice, evidence of limited diversity in the ranks of public legal services organizations could also adversely impact the public's perception of how those systems are functioning. Apprehensions about undermining confidence in public sector legal services organizations may cause reluctance to explore the diversity of the legal profession's public sector.

III. Available Evidence Suggests Similar Diversity Issues in the Public Sector

Notwithstanding the reasons for focusing on law firm diversity, anecdotal evidence suggests that the legal profession's public sector may suffer the same homogeneity as the private sector.¹⁸ Given the lack of published data regarding diversity in these settings, this anecdotal evidence is extremely valuable. Research on the diversity of public sector organizations in various industries supports the anecdotal evidence that the legal profession's public sector is not exempt from diversity issues.¹⁹ In 2015, Community Wealth Partners researched the racial diversity in leadership, staff, and boards across nonprofit organizations and foundations.²⁰ They found that while people of color represented thirty percent of the American workforce, only eighteen percent of the nonprofit staff, and twenty-two percent of the foundation staff were comprised of people of color.²¹ In addition, people of color comprised eighteen percent of the leadership in nonprofits and a mere eight percent of the leadership in foundations.²²

In 2017, the executive search firm Battalia Winston conducted similar research by analyzing the leadership diversity in 315 of the largest nonprofits and foundations in the United States.²³ Battalia Winston's findings were in alignment with Community Wealth Partners' 2015 research findings.²⁴ Battalia Winston found that while forty-two percent of organizations had female executive directors,

16. CARMODY & ASSOCS., *SHAPING THE FUTURE OF JUSTICE: EFFECTIVE RECRUITMENT AND RETENTION OF CIVIL LEGAL AID ATTORNEYS IN CALIFORNIA* (2010), available at <http://laaconline.org/wp-content/uploads/2010-LAAC-Recruitment-Retention-Report-FINAL.pdf>.

17. See Ming W. Chin, *Fairness or Bias: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary*, 4 *ASIAN AM. L.J.* 181 (1997).

18. See, e.g., ABA, *DIVERSITY IN THE LEGAL PROFESSION: NEXT STEPS* (2011), 31, available at <http://apps.americanbar.org/litigation/committees/corporate/docs/2011-cle-materials/08-Staying-The-Course/08a-diversity-legal-profession%20.pdf>.

19. ALLISON BROWN, *THE STATE OF DIVERSITY IN THE NONPROFIT SECTOR* (2015), available at <http://communitywealth.com/the-state-of-diversity-in-the-nonprofit-sector>.

20. *Id.*

21. *Id.*

22. *Id.*

23. SUSAN MEDINA, *THE DIVERSITY GAP IN THE NONPROFIT SECTOR* (2017), available at http://www.battaliawinston.com/wp-content/uploads/2017/05/nonprofit_white_paper.pdf.

24. *Id.*



A necessary first step in tackling this issue is collecting demographic data at various levels of public sector organizations.

eighty-seven percent of all executive directors or presidents were white.²⁵ These findings regarding the diversity of the public sector give some insight into the diversity of the legal profession's public sector.

NALP's Directory of Legal Employers provides some additional data that is specific to the government and public interest segments of the legal profession.²⁶ The Directory of Legal Employers is an optional database to which legal employers can belong by submitting information about their organizations, including staff demographics, via an online form.²⁷ Job seekers and law schools can use this information to learn about an organization and its hiring practices.²⁸ Currently, only eighteen government and public interest legal employers participate in NALP's Directory of Legal Employers, as compared to 1,178 law firms.²⁹ Although the sample size is small, and therefore the results are not statistically significant, the race and gender data for the government and public interest legal employers participating in NALP's directory tracks Battalia Winston's 2017 findings regarding nonprofits and foundations. A total of 17,142 staff and supervising or managing attorneys were listed as employed by the eighteen government and public interest employers in NALP's directory.³⁰ While forty-seven percent of the supervising or managing attorneys in those organizations are female, eighty-three percent of the supervising or managing attorneys are white.³¹

IV. Moving Forward

Though limited, the available data on the profession's public sector suggests that it possesses similar diversity issues as the private sector, including limited racial diversity in leadership roles. This data is alarming and illustrates a need for further action, especially given the public sector's role in society.

A necessary first step in tackling this issue is collecting demographic data at various levels of public sector organizations. These demographics will not only provide a better understanding of the diversity in the profession's public sector, but will also give a more complete and accurate picture of the profession's overall diversity. Collecting demographics will also articulate and reinforce the value of diversity. Moreover, this information will further incentivize public sector organizations to devote resources to understanding and improving their diversity.

25. *Id.*

26. *For Employers*, NAT'L ASS'N FOR LAW PLACEMENT, https://www.nalpdirectory.com/employer_login (last visited Feb. 26, 2018).

27. *See Id.*

28. *Id.*

29. *Search Results*, NAT'L ASS'N FOR LAW PLACEMENT, <https://www.nalpdirectory.com/Page.cfm?PageID=34> (initial search result is formulated by selecting public interest and government in the search box on the left; second result is formulated by selecting law firm from the search box) (last visited Feb. 13, 2018).

30. *Search Results*, NAT'L ASS'N FOR LAW PLACEMENT, <https://www.nalpdirectory.com/Page.cfm?PageID=34> (search result formulated by selecting public interest and government in the search box on the left) (last visited Feb. 13, 2018).

31. *Id.*

In addition to collecting demographic data, the public sector must be included in publications and dialogue about D&I in the legal profession. One way to include public sector organizations in this dialogue is to highlight the diversity efforts of public sector organizations. Despite limited financial resources, lack of data, and lack of access to professional organizations for D&I professionals, many public-sector organizations are committed to building workforces and workplaces that reflect their diverse communities.

The Illinois Attorney Registration and Disciplinary Commission (“ARDC”) is one example of a public-sector organization that is committed to D&I. At the direction of the Illinois Supreme Court, the ARDC’s mission is to promote and protect the integrity of the legal profession in Illinois through attorney registration, education, investigation, prosecution, and remedial action.³² The ARDC views D&I as essential to fulfilling the five components of its mission in a manner that reflects, understands, and supports the community.³³ Though the ARDC has historically been committed to D&I, its efforts became more structured, strategic, and focused in 2015 when it created a formal D&I initiative, which included appointing its first Director of Diversity and Inclusion.³⁴ Since that time, the ARDC has provided D&I education to its entire staff and has committed to ongoing education.³⁵ In addition, the ARDC implemented a multi-year D&I strategic plan with both an internal and external focus.³⁶ All of these initiatives are designed to promote and support diversity within the Illinois legal community.³⁷

Another example of a public-sector organization with a commitment to diversity is the Prosecuting Attorney’s Office of Pierce County in Washington. That office believes that embracing a diverse community and deepening its understanding of differences is essential to achieving its mission of “[p]ursuing justice, representing the people and serving [its] community.”³⁸ As a result, it created a diversity committee with a goal of developing creative approaches to enhance its applicant pool and ensure that the office maintains a culture of diversity.³⁹ Another great example is the Office of the Attorney General of Washington, which has a diversity and inclusion policy that “defines [its] responsibility to recognize, respect, and appreciate all cultures and backgrounds—and to foster the inclusion of differences between people.”⁴⁰ With this in mind, Washington’s AG’s Office has created a Diversity Advisory Committee, planned and publicized diversity programs, and conducted outreach to diverse communities to improve recruiting and retention.⁴¹ The Cook County State’s Attorney’s Office, which hired its first-ever Chief Diversity Officer in 2016,⁴² the Indiana Attorney General’s Office,⁴³ and the Office of the Federal Defender, Eastern District of California⁴⁴ are just a few more examples of public

32. *Mission Statement*, ATTORNEY REGISTRATION AND DISCIPLINARY COMM’N (2010), http://www.iardc.org/mission_statement.asp (last visited July 16, 2018).

33. LEA S. GUTIERREZ, THE ARDC COMMISSIONERS APPROVE THE ARDC’S FIRST DIVERSITY AND INCLUSION STRATEGIC PLAN (2018), available at http://www.illinoiscourts.gov/Media/enews/2018/013118_ARDC.asp.

34. ANNUAL REPORT, ATTORNEY REGISTRATION AND DISCIPLINARY COMM’N 34 (2015), available at <http://www.iardc.org/AnnualReport2015.pdf>.

35. GUTIERREZ, *supra* note 33.

36. *Id.*

37. *Annual Report Highlights*, ATTORNEY REGISTRATION AND DISCIPLINARY COMM’N 6 (2017), available at <http://www.iardc.org/AnnualReport2017Highlights.pdf>.

38. *Diversity Initiative*, PIERCE COUNTY, <http://www.co.pierce.wa.us/3643/Diversity-Initiative> (last visited Mar. 12, 2018).

39. *Id.*

40. *Diversity*, WASHINGTON ATTORNEY GENERAL, <http://www.atg.wa.gov/diversity> (last visited Mar. 12, 2018).

41. *Id.*

42. *Cook County State’s Attorney Kim Foxx’s First 100 Days in Office: A Report to The Community*, COOK COUNTY STATE’S ATTORNEY OFFICE (Feb. 13, 2018), <https://www.cookcountystatesattorney.org/about/cook-county-states-attorney-kim-foxxs-first-100-days-office-report-community>.

43. *Diversity*, INDIANA ATTORNEY GENERAL, <http://www.in.gov/attorneygeneral/2489.htm> (last visited Mar. 12, 2018).

44. *Federal Defender Newsletter*, OFFICE OF THE FEDERAL DEFENDER - EASTERN DISTRICT OF CALIFORNIA (May 2017), available at <http://www.cae-fpd.org/news/may17.pdf>.



Incorporating the legal profession's public sector in the dialogue about diversity will draw more public-sector attorneys to events regarding diversity. This will encourage more public-sector organizations' involvement in D&I efforts.

sector organizations with a demonstrated commitment to D&I. Highlighting these efforts will foster a more inclusive and comprehensive discussion about D&I in the legal profession, and perhaps inspire other public sector organizations to commit to D&I or help them see examples of "how it can be done."

V. Conclusions

The state of D&I in the legal profession is a crucial topic of discussion because we recognize the value diverse perspectives and experiences bring to our organizations and the profession as a whole. Yet, in discussing and attempting to solve diversity issues within the legal profession, we often fail to encompass the perspectives and experiences of certain practice settings in the dialogue. Without these perspectives we are seeing an incomplete picture—a narrow and flawed representation of the profession. This issue can and should be corrected. Without question, there is a time and place for the profession to focus on law firm diversity. In fact, doing so is essential to advancing diversity in the profession. However, as the profession moves forward in its D&I efforts, it is imperative that we include perspectives and experiences from other sectors of the legal profession to complete the picture and provide additional insights. Given the amount of resources dedicated to addressing law firm diversity, law firms have a unique power and ability that can be used to support these inclusion initiatives. This can include structuring diversity discussions with panelists that reflect the profession's diversity of practice setting.

Broader dialogues about diversity in the legal profession can be expected to lead to greater participation from the profession. Incorporating the legal profession's public sector in the dialogue about diversity will draw more public-sector attorneys to events regarding diversity. This will encourage more public-sector organizations' involvement in D&I efforts. In addition, it will promote both the public and private sectors to learn more about one another's efforts in this space. By understanding all options for advancing diversity, we can leverage our collective knowledge to develop innovative solutions to diversity issues within our organizations. Finally, including the public sector will encourage the sectors to work together toward the common goal of improving the overall diversity of the profession, while focusing on our similarities and the important and connected roles we have in society. The public sector may be missing from the discussion, but we only need shine a light in its direction to find it again.

Bigger City v. Smaller City: Differences in Practice

Mona Mehta Stone

Sr. Vice President, General Counsel, & Chief Compliance Officer, Goodwill of Central and Northern Arizona

Geographic diversity gets short shrift when we discuss diversity and inclusion in the legal profession. Nevertheless, there are unique diversity challenges between larger and smaller cities. Stone addresses major differences she's observed in her legal practice in Chicago and Phoenix.

My first job out of law school was based in Chicago, Illinois, as sole in-house counsel for a 500-person company offering security services in Illinois, Indiana, and Wisconsin. I later worked for a boutique firm specializing in aviation defense before moving to a national law firm in Chicago. In mid-2010, I was elevated to full equity partner status at my firm where I had practiced for 10 years. This accomplishment was a career dream of mine, so I was very proud of my achievement.

However, in 2007 my parents relocated to Phoenix, Arizona, and in December 2010 my husband and I followed them west to be closer to family. Unfortunately, my law firm did not have a Phoenix office, so I transitioned to another large, international firm where I eventually was retained by Goodwill of Central and Northern Arizona (“Goodwill”) as outside counsel. In March 2016 I accepted an offer to join Goodwill as in-house counsel.

My experience as in-house counsel and my time in private practice have afforded me a unique perspective of practicing law in both a larger and smaller city. This article examines some of the surprising differences I have experienced both in private practice, as well as serving as in-house counsel, since moving to a smaller legal community.

I. Demographics and Fun Facts

A. Chicago (a/k/a “The Windy City”)

According to the City of Chicago, it is the third largest city in the United States, with approximately 2.7 million people residing in the city.¹ From a diversity standpoint, Chicago’s population is 45% White (31.7% non-Hispanic White), 32.9% Black, 5.5% Asian, 2.7% from two or more races, 0.5% American Indian, and 13.4% from another race.² In 2016 Chicago experienced a -0.32% growth rate.³

Chicago is a travel destination, with over 50 million people visit the city each year.⁴ The city is

1. *Facts and Statistics*, CITY OF CHICAGO, <https://www.cityofchicago.org/city/en/about/facts.html> (last visited Feb. 1, 2018).

2. *Quick Facts Chicago, Illinois*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045214/1714000/accessible> (last visited June 6, 2018).

3. *Id.*

4. *Facts and Statistics*, CITY OF CHICAGO, <https://www.cityofchicago.org/city/en/about/facts.html> (last visited Feb. 1, 2018).

181 years old and was incorporated in 1837.⁵ Originally nicknamed the “Windy City” for political reasons, Chicago lives up to that name literally, as well. On December 24, 1983 the coldest wind chill reached a record –82 miles per hour, and the highest gust winds hit 87 miles per hour on February 12, 1894.⁶ The lowest temperature recorded in the city was an incredible –27 degrees Fahrenheit on January 20, 1985.⁷ An average winter in Chicago yields about 38 inches of snow.⁸ The hottest day ever recorded in Chicago was 105 degrees Fahrenheit on July 24, 1934.⁹

From a business perspective, eleven Fortune 500 companies call Chicago home and twenty-three Fortune 500 companies are located in the greater Chicago area.¹⁰ According to KPMG, Chicago ranks third in large cities as being one of the most cost-effective cities in the world for doing business.¹¹ At \$609 billion, Chicago’s Gross Regional Product outranks countries such as Sweden, Poland, and Argentina.¹²

Some fun and unusual facts: Chicago is the home to the only river in the world that flows backward (the Chicago River); and the first all-color television station debuted in Chicago in 1956.¹³ The Willis Tower, formerly named the Sears Tower, has some of the fastest elevators in the world—operating as fast as 1,600 feet per minute.¹⁴ Route 66 begins at Grant Park on Adams Street just in front of the Art Institute of Chicago.¹⁵ Lastly, several popular inventions originated in Chicago: Hostess Twinkie (1930), Cracker Jacks (1893), the zipper (1896), and roller skates (1884).¹⁶

B. Phoenix (a/k/a “The Valley of the Sun”)

By comparison, Phoenix’s population is about 1.6 million people (the fifth largest in the United States), about 1.1 million less than Chicago.¹⁷ As of 2016, the estimated median household income was \$52,062, and the estimated median house value was \$213,300. Chicago was not terribly different. In Chicago, the city reported an estimated median household income in 2016 at \$53,006, with a slightly higher estimated median house value of \$243,900.¹⁸ However, the cost of living in Phoenix is twenty-six percent cheaper than the cost in Chicago.¹⁹

5. *Id.*

6. *Official Extreme Weather Records for Chicago, IL*, NATIONAL WEATHER SERVICE, https://www.weather.gov/lot/Chicago_records (last visited Feb. 1, 2018).

7. *Chicago’s Weather Extremes*, ENCYCLOPEDIA OF CHICAGO, <http://www.encyclopedia.chicagohistory.org/pages/1417.html> (last visited Feb. 1, 2018).

8. *Climate: Average Monthly Weather in Chicago, USA*, WORLD WEATHER AND CLIMATE INFORMATION, <https://weather-and-climate.com/average-monthly-Rainfall-Temperature-Sunshine,Chicago,United-States-of-America> (last visited Feb. 1, 2018).

9. *Hottest Days Ever in Chicago*, CBS CHICAGO (June 30, 2011, 8:58 AM), <http://chicago.cbslocal.com/2011/06/30/hottest-days-ever-in-chicago/>.

10. *Facts and Statistics*, CITY OF CHICAGO, <https://www.cityofchicago.org/city/en/about/facts.html> (last visited Feb. 1, 2018).

11. *Business Cost Index*, WORLD BUSINESS CHICAGO, <http://www.worldbusinesschicago.com/cost-of-doing-business> (last visited Feb. 1, 2018).

12. *Business Cost Index*, WORLD BUSINESS CHICAGO, <http://www.worldbusinesschicago.com/business-climate> (last visited July 17, 2018).

13. Lara Parker, *50 Things You Probably Didn’t Know About Chicago*, BUZZFEED (Mar. 25, 2014, 4:49 PM), https://www.buzzfeed.com/laraparker/things-you-didnt-know-about-chicago?utm_term=.ap37Z4w4Y#.qt88eEaEM.

14. *Chicago Welcome Home*, <https://www.choosechicago.com/plan-your-trip/chicago-fun-facts> (last visited Feb. 1, 2018).

15... *Id.*

16. *Id.*

17. U.S. CENSUS BUREAU, *Quick Facts Chicago, Illinois*, <https://www.census.gov/quickfacts/table/PST045214/1714000/accessible> (last visited June 6, 2018).

18. *Chicago, Illinois*, <http://www.city-data.com/city/Chicago-Illinois.html> (last visited Feb. 1, 2018).

19. *Cost of Living in Phoenix, Arizona compared to Chicago, Illinois*, <https://www.expatis.com/cost-of-living/comparison/chicago/phenix> (last visited Feb. 1, 2018).



In 2016, Phoenix added the most people numerically among big cities according to the U.S. Census Bureau.

Phoenix also is a tourist attraction, with more than twenty-two million people visiting metropolitan Phoenix annually. Phoenix is home to 22 American Indian tribes, and much land is owned by American Indian tribes.²⁰ Additionally, the city is younger than Chicago at 150 years old and was formed in 1868.²¹ Arizona averages 211 days of sunshine per year.²² Summer temperatures in Phoenix average about 87 degrees Fahrenheit,²³ and the hottest temperature ever recorded in the city was a whopping 122 degrees Fahrenheit on June 26, 1990.²⁴ The average low temperature is 63 degrees, with no average annual snowfall.²⁵

Unlike Chicago, however, Phoenix is home only to four *Fortune 500* companies, and the major industries are high-tech manufacturing, tourism, and construction.²⁶ Notably, Phoenix is growing quickly. In 2016, Phoenix added the most people numerically among big cities according to the U.S. Census Bureau.²⁷

The population in Phoenix is comprised of 65.9% White (45.6% non-Hispanic), 40.8% Hispanic or Latino of any race, 6.5% Black, 2.2% Native American, 3.2% Asian, 0.2% Pacific Islander, 3.6% two or more races, and 0.1% other race.²⁸ In 2016 Phoenix experienced a growth rate of 2.03%.²⁹

One confusing fact about Phoenix is that the city stays on Mountain Standard Time all year and does not observe daylight savings time. This means that it is either one hour ahead of the west coast and two hours behind the east coast, or it is on the same time as the west coast and three

20. *Fun Facts*, VISITPHOENIX.COM, <https://www.visitphoenix.com/media/media-kit/fun-facts> (last visited Feb 1, 2018).

21. *City of Phoenix History*, CITY OF PHOENIX, <https://www.phoenix.gov/pio/city-publications/city-history> (last visited Feb. 1, 2018).

22. *Climate Phoenix, Arizona*,

23. U.S. CLIMATE DATA, <https://www.usclimatedata.com/climate/phoenix/arizona/united-states/usaz0166> (last visited Feb. 1, 2018).

24. *Top 5 Hottest Days in Arizona*, AZFAMILY.COM (June 14, 2017, 6:17 PM), <http://www.azfamily.com/story/35667020/top-5-hottest-days-in-phoenix>.

25. *Climate Phoenix Arizona*, U.S. CLIMATE DATA, <https://www.usclimatedata.com/climate/phoenix/arizona/united-states/usaz0166> (last visited Feb. 1, 2018).

26. *Fun Facts*, VISITPHOENIX.COM, <https://www.visitphoenix.com/media/media-kit/fun-facts/> (last visited Feb. 1, 2018).

27. Jon Talton, *Seattle and Phoenix, Two Tales of Growth*, THE SEATTLE TIMES (May 25, 2017 at 11:04 AM), available at <https://www.seattletimes.com/business/economy/seattle-and-phoenix-two-tales-of-growth/>.

28. *World Population Review*, <https://worldpopulationreview.com/us-cities/phoenix-population/> (last visited Feb. 1, 2018).

29. *Id.*

hours behind the east coast. Other lesser known facts about the city are that Phoenix averages about 211 sunny days per year, and a saguaro cactus could take over 100 years before it grows an arm—anyone who tries to cut one down could face up to one year in jail.³⁰ Driver’s licenses in Arizona last a long time—I do not have to renew mine until I am sixty-five years old!³¹

II. Facts about the Legal Profession in Each City

According to one study from 2014, Chicago ranked twenty-six, out of 374, of best U.S. cities and towns for attorneys to practice law.³² In comparison, Phoenix ranked in fiftieth place. Chicago lawyers earned an average of \$126,400, while Phoenix attorneys’ average salary was not that much less at \$124,920.³³ The number of attorney jobs in Chicago was 23,280, compared to only 7,660 in Phoenix.³⁴ Some of the metrics evaluated in this study included the median annual pay, cost of living, and the number of lawyers in an area as a percentage of all jobs—location quotient.³⁵ Although statistics by city are unavailable, Arizona has only 9,910 attorneys, which pales in comparison to 30,250 lawyers in Illinois.³⁶

In terms of law schools and building a pipeline into the legal field or teaching opportunities for practicing lawyers, there are limited avenues as there are only two accredited law schools in Phoenix (Sandra Day O’Connor College of Law/ASU and the Phoenix School of Law).³⁷ Chicago is home to six law schools, including some very prestigious institutions (University of Chicago Law School, Chicago-Kent College of Law, DePaul University College of Law, The John Marshall Law School, Loyola University Chicago College of Law, Northwestern University School of Law).³⁸

At least in my law firm in Phoenix, we tended to recruit heavily from the in-state law schools and looked for top students for the summer associate program. We welcomed resumes from out-of-state applicants, but did find that—without family or some other affiliation with Arizona—it proved difficult to recruit from top law schools, especially from the East coast. From a retention standpoint, however, because of those familial or other ties, lawyers in Phoenix tend to stay here or at least maintain dual offices, e.g., Phoenix and Denver.

While some Phoenix firms still maintain a summer associate program, many no longer do and recruit lawyers out of law school or laterally. A few things law firms in the Valley do to recruit top level legal talent when competing with other cities is to (1) promote a work/life balance (e.g., some small to mid-size firms in Phoenix do not have a 2,000 billable hour per year requirement or permit flextime or telecommuting once per week), (2) offer associates the chance to work on significant matters sooner than they might in a larger city (e.g., taking depositions or court appearances within their first couple of years, being part of a team handling large transactions, or early exposure to clients), and (3) create robust mentoring and talent management programs so that associates have guidance and a clear path of development.

30. Judy Hedding, *12 Phoenix, Arizona Facts and Trivia*, TRIPSAVVY.COM, <https://www.tripsavvy.com/phoenix-facts-and-trivia-2677541> (last updated Jan. 26, 2018); Kristin Norton, *50 Facts About Arizona You Probably Didn’t Know*, MOVOTO, <https://www.movoto.com/guide/az/arizona-facts/> (last visited Feb. 1, 2018).

31. Andrea Hiland, *Asked & Answered: Arizona’s loong expiration date on driver’s licenses*, AZCENTRAL (Apr. 30, 2014, 3:14 PM), <https://www.azcentral.com/story/news/2014/04/30/arizonas-loong-expiration-date-on-drivers-licenses/8533651/>.

32. *Best Cities for Lawyers*, <https://www.valuepenguin.com/2015/05/best-cities-lawyers> (last visited Feb. 1, 2018).

33. *Id.*

34. *Id.*

35. *Id.*

36. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMP’T AND WAGES, available at <https://www.bls.gov/oes/current/oes231011.htm#st>.

37. *Every ABA Accredited Law School in the US*, <https://www.lawyeredu.org/aba-accredited-schools.html#arizona> (last visited Feb. 1, 2018).

38. *Id.*

There are fewer national or regional law firms in Phoenix, which again narrows career opportunities for those desiring to practice in a large firm. A search on the National Association for Law Placement's Directory of Legal Employers produced a listing of fifty-eight law firms in Chicago and only fifteen in Phoenix.³⁹ According to Martindale, there are 1,696 law firms in Phoenix, compared to 5,289 in Chicago.⁴⁰

III. Differences in Practice in a Smaller City

While I will expound on some differences I find practicing law in Chicago versus Phoenix, many of the same challenges remained after I moved. When I was in private practice in Phoenix, I still worried about fostering client relationships, building and maintaining a solid book of business, meeting billable hour requirements, and advancing my career—issues that all private practitioners face. I was fortunate to have a national practice in both Chicago and Phoenix. This fact helped ease the transition when moving to Phoenix. In fact, while in Phoenix, I was able to expand my practice to include fascinating international work in India for a multinational corporation.

During my time as in-house counsel, I have found that I have to be mindful of my legal budget, shield my client from risk exposures, and develop my team—challenges that all General Counsel face, regardless of location. In my current role I am focused on business within Arizona, but still interact with other Goodwill organizations and business partners throughout the country and abroad.

In terms of business development, I felt no difference in Phoenix. As when I practiced in Chicago, I still worked hard to cross-sell with my partners, attended meetings and conferences to build my network, and spoke and published frequently to brand myself. I was fortunate that a few clients followed me from Chicago to Phoenix, as I was able to counsel them remotely or visit as needed. Possibly because there are fewer large corporate clients in Phoenix, I did observe that the Phoenix office of my law firm imported a lot of work from other offices—sometimes because there was excess work or an area of expertise within the Phoenix office.

Even though law firms and businesses are not as formal in attire, the expectation of hard work is no different. My billable hour requirement in Phoenix was 2,000 hours annually, just as it was in Chicago. I also was expected to spend time expanding my book of business, mentoring junior associates, speaking and publishing, and attending firm events.

Having transitioned into an in-house role, I have found that my days are constantly busy with meetings, Board presentations, reviewing contracts, helping promote my company's brand and services, and providing sound legal and business advice. I typically do not work weekends, and I do have flexibility to adjust my calendar as needed (e.g., if I need to leave early for a personal appointment or work from home occasionally). While I admittedly work fewer hours than when in private practice, I probably average between fifty to sixty hours per week depending on what projects are active. Just as in Chicago, at my level the expectation is still that I am responsive and available as needed.

C. Things I Miss About Practicing in Chicago

When working in Chicago, I lived in the suburbs and rode the Metra train to work. That time was valuable for catching up on e-mails, completing timesheets, reading cases, reviewing memoranda, or generally finishing up the work-day. However, the public transportation in Phoenix, while expanding considerably, is not at Chicago's level. In fact, the highway system is relatively new in the metropolitan Phoenix area, having only been completely built in the

39. *Directory of Legal Employers*, <https://www.nalpdirectory.com/Page.cfm?PageID=34> (last visited Feb. 1 2018).

40. *Find an Attorney in Phoenix, AZ*, <https://www.martindale.com/by-location/phoenix-lawyers/arizona> (last visited Feb. 1, 2018).



[In] Phoenix, I found that there is less support for diversity in a smaller city.

1990s.⁴¹ I now commute to work via car, but luckily my commute time has been cut in half from just over one hour to about twenty-five minutes.

That commute increases slightly in winter, however. One interesting phenomenon I was introduced to was the concept of “snowbirds” in Phoenix. The traffic does get worse in winter because people from cold climates flock to Phoenix to escape the dreary winter weather. Phoenix does have a light rail system, but it is limited in geographic scope; as a result, the lack of a subway system or other public transportation can make it more crowded in Phoenix from about November to March.

Due to the smaller number of corporate headquarters, in-house counsel jobs are less prevalent and, therefore, highly coveted in Phoenix. As within other cities, I and many of my in-house counsel peers in Phoenix landed their positions by first serving as outside clients to their current employers. While statistics on Phoenix specifically are unavailable, the Arizona Association of Corporate Counsel (“ACC”) has nearly 450 members.⁴² Chicago, on the other hand, has its own ACC chapter, serving over 2,100 in-house counsel members in Chicago and surrounding areas.⁴³ The larger Chicago presence undoubtedly yields more opportunities for volunteering, learning and networking; entertaining and promoting change within the in-house and legal community; championing diversity issues; and practice resources.

Nevertheless, I believe the smaller network of in-house counsel in Phoenix has made it easier for me to become active in the ACC. For example, I have taken on a lead role in the In-House Counsel Pro Bono Commission and serve as lead for the Libraries Group. At least once per quarter, this group hosts a panel of private practice, in-house counsel, private practitioners, and government attorneys to present on how to start a small business at various public libraries in the Valley. I also am becoming active in our Mediations Group, where, in an effort to help maintain civil court dockets, in-house counsel are trained to serve as mediators for smaller court cases eligible for mediation. This group has also made it possible for me to make connections with members of the judiciary and learn from them.

As the demographics demonstrate, Phoenix is less diverse than Chicago. As an Indian American, for example, I have observed only a handful of fellow Indians in the Phoenix legal community. As diversity is not always top of mind in Phoenix, I found that there is less support for diversity in a smaller city. In turn, this creates less resources for diverse attorneys in terms of mentors, Bar resources, networking, educational resources, etc. In Chicago there were multiple opportunities to connect for women, minorities and members of the LGBT community within the legal profession.

By contrast, Phoenix hosts fewer coalitions, initiatives, and forums geared to fostering and promoting inclusiveness for these groups. However, there are diverse Bar organizations and

41. *AARoads*, <https://www.aaroads.com/arizona/phoenix/> (last visited Jul. 16, 2018).

42. *Ass’n of Corp. Counsel, Arizona Chapter*, <https://www.acc.com/chapters/ariz> (last visited Feb. 1, 2018).

43. *Ass’n of Corp. Counsel, Chicago Chapter*, <http://www.acc.com/chapters/chic> (last visited Feb 1, 2018).



While some people may think that the practice of law is less sophisticated in a small city compared to a big city, I found that the quality and quantity of work was no different.

Bar Associations in Phoenix that are aimed to enhance the quality of legal services to diverse communities, promote the advancement of minorities in the legal profession, and ensure adherence to ethical practices (e.g. the Los Abogados Hispanic Bar Association, Navajo Nation Bar Association, the Council on Minorities and Women in the Law at the State Bar of Arizona, Arizona Minority Bar Association, Arizona Black Bar, and the Arizona Asian American Bar Association).⁴⁴ Many of these groups are statewide, as opposed to just based in Phoenix, due to lack of a sizeable diverse population. Hopefully, as Phoenix continues its aggressive growth, there will be more diverse attorneys to warrant additional local opportunities.

D. Things I Love About Working in Phoenix

Reflecting on my practice in Chicago compared to Phoenix, I find that the Phoenix legal community is very professional and civil. Perhaps this is attributable to the fact that, as a smaller Bar, attorneys here are bound to face each other on a more regular basis. The better cooperation among attorneys also may be because many Phoenix residents are not natives and come from other parts of the country, which generates a wider array of perspectives from other experiences and areas.

Given that the Bar is smaller in Phoenix, I found it was easy to integrate into the legal community. I also have found it very easy to make connections with other lawyers and judges. I am often invited to speak on various topics—many times through my contacts within the Bar. While I did have many opportunities in Chicago to speak and publish, at least for me being a member of a smaller Bar affords more visibility. When I first moved to Phoenix, I made a concerted effort to network as much as possible and seek introductions as much as possible. I was pleasantly surprised that members of various firms and companies were more than willing to oblige meeting for coffee or lunch to help me integrate. That effort paid off because I do interact with many of the same lawyers on a regular basis and have been able to expand my brand more easily.

While some people may think that the practice of law is less sophisticated in a small city compared to a big city, I found that the quality and quantity of work was no different. Again, perhaps I was exposed to significant matters because I practiced at a global firm in Phoenix. While I did have a number of local clients who operated only in Arizona, in Phoenix I was able to work with national and international clients, and was able to travel frequently to various client sites and cities for depositions, investigations, trainings, witness interviews, etc.

⁴⁴ *Ariz. Bar Ass'ns*, <https://www.hg.org/bar-associations-arizona.asp> (last visited July 16, 2018); *Council on Minorities and Women in the Law*, STATE BAR OF ARIZ., <http://www.azbar.org/advisorygroups-committees-sections/advisorygroups/councilonminoritiesandwomeninthelaw/> (last visited July 16, 2018); *Ariz. Minority Bar Ass'n*, <https://www.azminoritybar.org> (last visited July 16, 2018); *Ariz. Black Bar* <http://www.arizonablackbar.org/discover.php> (last visited July 16, 2018); *Ariz. Asian Am. Bar Ass'n*, <http://www.azasianbar.org/about.html> (last visited July 16, 2018).

One thing I discovered shortly after moving to Phoenix is that there is a strong presence of Chicago transplants here, which made it easy to connect with colleagues. In my experience, most attorneys who move to Phoenix from Chicago cite the better winters as one of the key reasons for moving. They also appreciate that there is less congestion, a more casual lifestyle, and a relaxed professional dress code—suits and ties are reserved typically for client meetings or formal events. One other attraction to Chicagoans in moving to Phoenix is the fact that the Cubs hold their spring training sessions in Mesa at Sloan Park, just outside of Phoenix. Walking into that stadium feels like walking into Wrigley Park—the majority of fans are in full Cubs gear, and there is a Portillo’s to enjoy a Chicago-style hot dog!

Unlike Chicago, there is not a sense of “hustle and bustle” in Phoenix. In fact, while many law firms and businesses are based in downtown, the Valley is extremely widespread—Phoenix takes up 517 square miles, while Chicago is about half the size, occupying 228 square miles.⁴⁵ As a result, many offices are not centrally located.

The cost of living in Phoenix is admittedly cheaper than in Chicago, which likely means that my earning potential could be higher in Chicago. However, for me, the trade-off is higher job satisfaction, better job security, and a healthier work/life balance. I still have the same opportunities to engage in hobbies I love, such as travel and tennis, but happily even more often because of the clement weather.

IV. Conclusion

While there are similarities and differences between Phoenix and Chicago, the fact remains that, as in any legal market, it is up to the individual to maximize the resources and opportunities available. Just to recap, some of the similarities/differences of practicing in a small city versus big city, at least based on my experience, include the following:

- Smaller towns may have fewer job opportunities, with lower annual compensation.
- There may be more limited pipeline opportunities into law, as well as fewer law schools and internship openings in smaller communities.
- Public transportation is more commonplace in larger cities.
- Larger corporate headquarters are based in big cities, yielding more opportunities to cultivate clients and/or seek in-house counsel positions.
- The legal population is less diverse in smaller cities, creating fewer networking and other diversity channels.
- Given the small legal community, there is more professional civility among colleagues in smaller towns.

For me, the greatest learning was stepping out of the comfort of Chicago, where I had practiced for thirteen years, and starting a new adventure in Phoenix. From my perspective, I am glad that I had the chance to gain some very valuable experience while practicing in Chicago, but Phoenix has proven to be a great place to live and work, as well.

45. *Sperling’s Best Places*, https://www.bestplaces.net/compare-cities/chicago_il/phoenix_az/people (last visited July 16, 2018).

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The Importance of Excellence for Diverse Attorneys

Brian J. Winterfeldt

Principal, Winterfeldt IP Group, PLLC

Emily D. Murray

Chief Marketing Officer & Director of IP, Winterfeldt IP Group, PLLC

Many diverse attorneys love working on diversity and inclusion. But why is excellence especially important for diverse attorneys who want to work more effectively on diversity and inclusion? How do you become an excellent attorney? Read about how to approach law school, your colleagues, jobs, and personal attitude in order to achieve excellence and your own diversity and inclusion goals.

The need for an attorney can be one of the most stressful situations a person may encounter. Whether the situation is a personal matter, such as personal injury or the need for criminal defense representation, or a business matter requiring outside counsel such as a contract dispute, an attorney or firm may need to be selected quickly. One of the first questions the potential client will likely ask is, “Which attorney or firm will obtain the results I need?” The potential client will also want to know about billing rates, the costs associated with hiring an attorney, an estimate for the matter in terms of cost, and the estimated time it will take to resolve the matter. Particularly for an issue that will take some time to resolve, clients will also want to select as counsel an attorney who is collegial to work with. However, with the exception of a formal request for proposal (RFP) processes that requests information about diversity, in many cases the potential client will not stop to consider the attorney or firm’s diversity profile: the client simply wants the best attorney for the job, with diversity likely a secondary consideration.

Because prospective clients will likely hire primarily based on skill, rather than diversity status, becoming an excellent practitioner—and becoming well-known for excellence in one’s professional circle—are critical goals for diverse attorneys. The legal industry, according to recent studies, has the dubious honor of reflecting the least diversity of any industry in the United States.¹ The path to excellence is a complex process. That path encompasses not just honing one’s legal craft, but also developing the soft skills that make an attorney’s work relatable and impactful. These soft skills, such as ethics, corporate citizenship, and later in one’s career, mentoring and supporting junior colleagues are also important components. Based on our extensive experience in the legal industry, this article sets forth a roadmap for developing and sustaining excellence as a diverse attorney, including a suggested definition of excellence; tips for making the most of one’s time as a student and in first post-law school jobs; a guide for progressing through increasingly responsible professional positions; and investing in diversity, inclusion and leadership initiatives. It also illustrates how the pursuit and recognition of excellence is both an individual and a shared responsibility. Ultimately, excellence is a key element—and result—of a truly inclusive work culture.

1. Deborah L. Rhode, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren’t Doing Enough to Change that.*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?noredirect=on&utm_term=.d8fb904a445f.



At Winterfeldt IP Group, we have a pro bono focus of offering intellectual property services to diversity-related nonprofit organizations, including those supporting the LGBT community and persons with disabilities.

I. Defining Excellence

What does it mean to be an *excellent attorney*? In our experience, one basic foundation of excellence is having the knowledge of both general legal procedure and of one's specialized practice area needed to provide sound and correct legal advice. Being able to work at this skill-level should also result in favorable results for clients most of the time. Moving from competence to true excellence, however, requires some additional steps. In most practice areas, the ability to communicate well with clients and other parties is of great value (including, when relevant, opposing counsel), along with being able to translate the legal advice for the appropriate audience to support decision-making on the business or personal legal matters at hand. Ideally, the client should start to feel as if working with the attorney is a pleasure—rather than a stress and a chore—and look forward to receiving advice and the subsequent results.

However, true excellence requires more than being a talented practitioner and communicator. In addition to subject matter expertise and communications skills, ethics are at the core foundation of excellence. Of course, membership in the bar requires its own ethical code of conduct, and violations can result in sanctions (including suspension of one's license to practice law, or even permanent disbarment). As such, excellence means holding oneself to an even higher standard of conduct beyond codified professional requirements. Over the course of a career, attorneys are best served by being collaborative and collegial (while still being strong advocates for themselves and their clients) and by achieving results through hard work and dedication rather than taking shortcuts. As we will discuss in a later section, excellent attorneys also “pay it forward” through helping others on their own path to excellence. While excellence is not a popularity contest, attorneys with a reputation for being honest and forthright, and for balancing clients' and colleagues' needs with their own egos and ambitions, will likely find more doors open. Our experience is that highly ethical attorneys are likely to be trusted and respected not only by their clients, but by industry colleagues and even opposing counsel, resulting in more client referrals and opportunities to participate in industry leadership activities.

Along the same lines, excellence requires a personal investment in corporate social responsibility. For most attorneys, this will involve devoting time to *pro bono* service. *Pro bono* work may involve stepping outside one's usual practice area to assist those in very difficult circumstances. It may also offer the opportunity to provide services in one's regular area of expertise to those who could not otherwise afford them. For example, at Winterfeldt IP Group, we have a *pro bono* focus of offering intellectual property services to diversity-related nonprofit organizations, including those supporting the LGBT community and persons with disabilities. Our experience is that strong intellectual property protections benefit the marketplace in general, and our provision of these services allows

the organizations to save their resources for supporting their members, instead of spending their limited funds on legal services. All attorneys, whether diverse themselves or allies, are encouraged to participate in supporting these clients. *Pro bono* efforts provide an opportunity to hone one's legal craft, to develop communication skills (especially in connection with clients who may have limited subject matter knowledge themselves), and to demonstrate a spirit of collaboration, thus further strengthening the other pillars of excellence described thus far.

Finally, after firmly establishing the legal, communication, and ethical priorities detailed above, we recommend that attorneys on the path to excellence do devote some time to diversity and inclusion initiatives. For example, diverse attorneys may wish to join affinity groups, either within their organization or in their larger professional circle, in order to build a support network. Such groups can offer opportunities to share information with peers, obtain mentors, and begin to establish leadership skills, thus building the broad perspectives and strong reputation that contribute to excellence. All attorneys, whether diverse or allies, are encouraged to learn about their organization's diversity policies and initiatives, and to participate meaningfully. Attorneys with smaller organizations that do not offer diversity-related activities can likely find affinity groups within industry organizations. We would, however, underscore the importance of balancing these activities with building strong legal expertise and completing high-quality legal work, particularly if one's ultimate career goal is not a role focused specifically on diversity and inclusion.

Having provided an overview of the different elements of excellence, we will now discuss how the path to excellence can begin early in one's education, long before becoming a practicing attorney.

II. Charting a Career Path for Excellence: College, Law School, and Beyond

The path to being an excellent attorney does not begin after law school or with the first job as an attorney. Rather, it should start as early as possible in one's student years. As an undergraduate student, it is possible to lay the groundwork for many key elements of a successful legal career. There is certainly no specific major or course of study required for law school. However, we recommend that undergraduates with a potential interest in law approach their coursework with as much intellectual curiosity as possible. Undergraduates should, whenever possible, choose courses taught by challenging professors who require a lot of work from their students, rather than easy courses where they can easily obtain high grades. Having the conditioning to handle a large volume of work, with the corresponding long hours, along with the ability to receive critical feedback, will be important for many legal roles. We also suggest that students work extensively on their writing and public speaking/presentation skills. We encourage students to take on complex, long-term projects, such as an undergraduate thesis. Again, no specific major is prescribed, but in our experience students who undertook a broad curriculum requiring engagement with traditional liberal arts subjects—including literature, fine arts, history, and foreign languages—have tended to be the best prepared for law school and the intellectual rigors of a legal career. For many students, the undergraduate years may also offer a first opportunity to become engaged in diversity and inclusion initiatives, through various student groups, volunteer service, and more. We recommend taking advantage of these opportunities, where students may begin developing the communication, collaboration and leadership skills that lead to excellence as an attorney. These activities may also form the basis of a strong network of like-minded peers and mentors who, in the years to follow, may be prospective clients, employers, and industry colleagues.

In contrast to undergrad, where students may choose from hundreds of majors, law school, in its goal to prepare students for a specific career, tends to offer a more standardized curriculum. There may be some opportunities for electives, or even to specialize in a particular track such as intellectual property, but there will generally be far less flexibility. In terms of coursework, our advice is to be



Honing one's craft in order to become an excellent practitioner will be extremely difficult if one experiences discrimination, or simply feels unwelcome at the chosen organization.

as engaged as possible, while working to build strong relationships with both professors and peers who may be sources of recommendations, referrals, and professional support throughout one's career. Again, involvement in diversity activities is also recommended, particularly as this will expand one's network, offer opportunities for pro bono service, and possibly result in internship/ clerkship leads or job referrals. Our experience is that law students who have had some practical opportunities in the business world by the time they graduate are best prepared to make an impact in their first jobs as attorneys (thus continuing on the path to excellence).

As any practicing attorney knows, the real process of developing legal expertise, particularly in the sense of being able to provide advice to clients, begins in the world of work rather than in law school. As such, attorneys-in-training should, to the extent possible, take the opportunity to work while in school. Summer associate programs at large law firms can be a good fit for students who are not yet sure of their practice area focus, as summer associates tend to be able to work on a variety of projects. However, those with a clear idea of their specific areas of interest are encouraged to seek out specialty firms or organizations that are aligned with their goals in order to start building real-world skills. Diversity and inclusion should also be important considerations when selecting student jobs. Does the organization have a diverse workforce at all levels? What diversity activities or affinity groups are available? Does the organization demonstrate its commitment to diversity and inclusion in a practical way? Particularly if the part-time or summer job may lead to an offer for a permanent attorney role, it is important for a diverse attorney to consider long-term fit. Regardless of legal skill or potential, honing one's craft in order to become an excellent practitioner will be extremely difficult if one experiences discrimination, or simply feels unwelcome at the chosen organization.

Our advice for seeking a post-law school job, as a practicing attorney, is in a similar vein. In order to build their legal excellence, diverse attorneys will want to look for organizations that can provide the subject matter training, interesting projects, and general support needed for them to thrive. However, an organization's meaningful attention to diversity and inclusion is also an incredibly important consideration. For example, if a medium or large firm has very few diverse partners, and if there seems to be a great deal of attrition of diverse attorneys as they move through the associate ranks, at a minimum the diverse new attorney will want to consider whether there appears to be a commitment to changing the culture. Minority associates currently account for over twenty-three percent of total associate ranks in American firms, but minority partners account for only about eight percent of partnership ranks.² A significant disparity exists across most groups of diverse law-

2. NALP, 2017 REPORT ON DIVERSITY IN U.S. LAW FIRMS 5 (2017), available at <https://www.nalp.org/uploads/2017NALPReportonDiversityinUSLawFirms.pdf>.

yers; for example, in a recent survey, LGBT personnel accounted for 4.66% of summer associates, but under two percent of law firm partners.³ These statistics apply to “top” firms – that is, those recognized as the “best” by various industry lists – as well as lesser-known firms. As such, a firm’s ranking or prestige, on paper, does not necessarily indicate it is the right environment for a diverse attorney to succeed.

Once a diverse attorney has finished college and law school, passed the bar exam, and secured employment, several additional considerations, as detailed below, will contribute to a legal career characterized by excellence.

III. Career Progression for the Diverse Attorney

In order to enjoy distinguished careers, as briefly discussed above, attorneys will need to put in the effort to develop subject matter expertise and generally meet organizational performance criteria, as well as ensure they are reliable to their clients and internal teams. Developing relationships with mentors who can provide support and guidance, as well as knowing how to address any concerns that arise regarding harassment and discrimination, will also contribute to success at their organizations, and thus long-term excellence.

While this may seem to be an obvious recommendation, there is also truly no substitute for hard work and diligent effort. The particular performance expectations that attorneys will need to meet will depend upon the organization and practice area. Some generally offer more work-life balance than others, and others require modest hours most of the time but some intense crunch times. Other practice groups may require extended or unconventional hours, year-round. For example, at Winterfeldt IP Group, a significant portion of our practice involves work with the Internet Corporation for Assigned Names and Numbers (“ICANN”). As ICANN is a global organization, key industry calls needed to support our clients may begin anywhere between 6:00 a.m. and 11:00 p.m. Team members who are willing to adapt their schedules beyond the standard United States business day are more likely to get highly engaged with the work for our relevant clients and, correspondingly, have the opportunities to grow their expertise and advance in their careers. This sort of flexibility and dedication, especially when coupled with quality work, will allow attorneys to develop a reputation as go-to team members, bringing their excellence to the forefront. On the other hand, in our experience, it can be challenging to staff attorneys who are not flexible to adapt to client scheduling needs on many client projects. Even if these attorneys are very capable in terms of legal skill, they may miss out on opportunities to gain valuable experience that will lead to greater excellence in time. While, again, there may be a great variance in employers and practice areas in terms of what they expect from their attorneys, it is critical that attorneys understand and adapt to these expectations whenever possible.

Along the same lines, organizations need to ensure that “excellent” work translates to specific performance criteria that are communicated and executed with full transparency. All qualified attorneys should also have the opportunity to work to meet the criteria—specifically, they should be given assignments that allow them to demonstrate their excellence and growth. For example, in our experience, many private practice law firms evaluate performance largely on the number of billable hours recorded. This might seemingly be an objective metric. However, what happens if diverse attorneys are not being staffed on the hours-intensive projects that result in top evaluations and lucrative bonuses? As such, it is important to ensure that diverse attorneys have equal access to the right training and mentorship from the beginning of their careers, so that their skill sets can keep pace with managers’ and clients’ expectations.

3. NALP, LGBT REPRESENTATION AMONG LAWYERS IN 2017 (2018), available at <https://www.nalp.org/0118research>.

One of the most important ways for a new attorney to ensure a long-term future with the chosen organization after law school is to build a strong relationship with one or more mentors. Mentors can secure rigorous training for their mentees, as well as provide advice regarding navigating office politics and advocate for their mentees to be offered the challenging and interesting assignments that will build their skill sets—and ensure a full plate of billable hours, if relevant. They can also ensure that new attorneys are included, as much as appropriate, in client-facing and industry activities, rather than being relegated to behind-the-scenes tasks where even wonderful work may not be noticed and appreciated. We recommend that attorneys ask prospective employers about training and mentorship opportunities, including the process by which mentors and mentees are paired, so that they are not left to fend for themselves in a challenging and competitive environment. Whenever possible, new attorneys should also have access to diverse mentors, as this makes it easier for attorneys to see a long path forward with the organization.

In addition to providing guidance on training and professional development, mentors can also be of tremendous assistance in the event that diverse attorneys experience any harassment or discrimination. Mentors can ensure their mentees know where to report such issues, and also provide support through the complaint process. As senior members of the organization, mentors can take a stand that such behavior will not be tolerated, and provide assurances that mentees who are making claims will not experience retaliation or other career consequences. This support is especially important because attorneys who experience harassment and discrimination, particularly without recourse, may understandably not be able to do their best work in such an environment, and/or may end up leaving the organization. A firm that truly values excellence will ensure that all employees feel valued, and will provide an environment where attorneys can do their best work without being subjected to others' discriminatory behaviors.

After progressing through the initial years of one's career (for example, through the associate ranks at a private law firm, or to a management role in government or private industry), attorneys who have become subject matter experts, skilled communicators, and good citizens of their organizations and industries will be ready to take on additional leadership responsibilities. As described below, leadership, as applied to both legal/industry practice and diversity and inclusion initiatives, represents our final pillar of excellence.

IV. The Importance of Leadership for Diverse Senior Attorneys

While we will not proclaim that every attorney who has progressed to a senior role is “excellent,” in general, securing and succeeding in senior roles is a mark of excellence. Senior roles, in our experience, require a rigorous balance of subject matter expertise, soft skills such as communication, and management finesse. As such, senior attorneys are likely to have a great deal of guidance to offer to their colleagues in more junior roles. This section provides a brief overview of how diverse senior attorneys can have a significant positive impact on others, through mentorship, industry leadership, and informal guidance and support. Our viewpoint is that making this sort of impact—once one is in a position to do so—is a key element of excellence later in one's career.

Diverse attorneys who have progressed to senior roles are incredibly well-positioned to support and guide their junior colleagues. As previously indicated, the representation of diverse attorneys in the legal industry is generally poor as compared to other industries, with significant attrition between junior and senior positions. Accordingly, being a diverse person in a senior role is a remarkable achievement, one that has likely resulted in the development of many personal best practices for success. While no one is obligated to be an activist, we strongly encourage diverse senior attorneys (i.e., law firm partners, GCs and other senior in-house managers, etc.) to devote some time to



Diverse senior attorneys must stand up against discrimination and harassment, both within their organizations and in related industry activities.

this endeavor. Above, we discuss the incredible value of mentorship to up-and-coming attorneys; thus, diverse attorneys who are able to mentor others are not only improving their own leadership skills, but ensuring that future generations of attorneys have every opportunity to succeed.

Merely being visible as a diverse attorney in a senior role can be highly inspiring to junior diverse attorneys, as this visibility shows that, although representation at the senior ranks is limited, success is possible. Diverse senior attorneys can increase their visibility by speaking at conferences, participating in industry leadership activities, writing articles, and generally remaining engaged with both legal and diversity-related initiatives. These activities will not only inspire others, but provide a continued showcase for excellence, thus continuously growing the senior attorney's industry profile. Our experience is that attorneys with prominent profiles (and with significant books of business, when relevant) are more likely to be seen as decision-makers for their organizations. They can advocate for more inclusive hiring practices, ensure diverse junior attorneys are staffed on high-value projects, and steer their organizations to supporting diversity-related activities. As such, attorneys who achieve excellence and progress to senior roles—who are known as experts in their field, and also highly trusted—can have considerable influence in their organizations and the business world as a whole

In addition, diverse senior attorneys who share information about their career paths can offer a roadmap to the next generation of attorneys. We recommend that senior attorneys in a position to offer such guidance be as honest as possible about the obstacles they faced along the way, and how they were overcome. This sharing may take place in a variety of venues. As indicated above, mentorship within an organization is extremely valuable in ensuring diverse attorneys receive the right resources to succeed on substantive matters, while also feeling supported and valued. When a formal, ongoing mentorship may not be practical, taking a few minutes to speak by phone or have coffee with an up-and-coming student or diverse attorney can also have a significant impact on the new attorney's outlook and career plans.

Diverse senior attorneys must stand up against discrimination and harassment, both within their organizations and in related industry activities. Those in leadership roles, who have already been deemed to have incredible value to their organizations, are best-suited to support junior colleagues who have experienced these terrible behaviors—even if this means opposing other senior colleagues. Taking a stand, visibly, will assure diverse junior attorneys that they will not be marginalized, and that they can have a long and productive future in the organization and career path of



It is essential for all attorneys—particularly diverse attorneys—to establish themselves as excellent practitioners who will be top choices for prospective clients.

their choosing. True excellence requires speaking up for those who are still developing their own profiles, so that the next generation of diverse attorneys will face fewer obstacles on their own paths to excellence.

V. The Future of Diversity and Excellence

As we have discussed, the representation of diverse personnel in the legal industry, particularly at the senior ranks, remains very low. Improving this representation appreciably is a long process that will likely take quite a few years. However, we can all take immediate steps to ensure that today's prospective and new diverse attorneys will be able to develop the expertise and overall excellence that will make them go-to resources for the clients and legal managers of tomorrow. The steps reviewed above include: encouraging intellectual curiosity and rigor for all students who are aspiring attorneys; holding organizations accountable for supporting diversity and inclusion initiatives and for providing work environments free of discrimination and harassment (with swift consequences for violators); ensuring all developing attorneys have access to fair and equitable evaluation processes, training, and mentorship; providing meaningful time and recognition for participation in diversity and inclusion activities; and ensuring attorneys have a diverse variety of role models.

Overall, clients will hire attorneys who have the right subject matter knowledge, whom they trust will see their legal issues through to successful or satisfactory resolutions. They will rehire attorneys for new matters, as well as refer their attorneys to others needing similar services, when the attorneys reliably achieve good results, communicate well, and are generally collegial to work with. Accordingly, it is essential for all attorneys—particularly diverse attorneys—to establish themselves as excellent practitioners who will be top choices for prospective clients. By focusing on excellence as a primary goal, these attorneys can develop business and/or get promoted to senior decision-making roles. Finally, in these roles, diverse senior attorneys will have the influence to mentor others and advocate for greater diversity and inclusion, ultimately, we hope, removing from our industry the dubious honor of being the least diverse.

A Note About Diversity to In-House Lawyers

By Jennifer H. Zimmerman

Executive Director, Legal and Compliance Division, Morgan Stanley

Why do in-house counsel need to be just as concerned about the lack of diversity in law firms as the law firms themselves? Here are eight steps in-house counsel can take to increase diverse partnerships, inclusive continued education, and important diversity expectations for the law firms with which they work.

Law firm diversity programs have not been working. A ton of money has been spent in the past ten years, and measurable advancement has been elusive. A lot has been written on the flatlining of the progress of women and minorities toward reaching partnership, the upper levels of management, and the highest levels of pay at large law firms. The same applies to other diverse groups – a topic for another day.

Thankfully, that is not your problem. You are an in-house lawyer at a corporate or government legal department. Maybe your shop is not perfect, but it is bound to be a little better than the law firm world that you, and many of your in-house colleagues, probably left behind. That problem is for the private law firm world to deal with.

Or is it? Why should you care about law firm demographics and pay equity? And if you should care, what can you do about it?

It is my position that law firm diversity and inclusion is important to in-house legal departments. The first and most obvious reason is that diversity and inclusion in all spheres of business is the “right thing to do.” Second, diversity and inclusion matter for the well-researched and proven business reason that diverse and inclusive teams make better decisions.¹ This should mean that if your law firm teams are more diverse and inclusive, they can do a better job of serving you, your clients and your business. Third, a large number of in-house lawyers start out at private law firms. Law firms are, in effect, feeder firms to your in-house legal department. If the pool of lawyers from which you may one day hire is more diverse, you will have a more diverse talent pool from which to scout. Fourth, diversity among all of your service providers can support your internal corporate diversity and inclusion goals. To the extent your law firm teams include diverse lawyers who meaningfully interact and integrate with your colleagues and business leaders, you are able to substitute new (i.e., positive) mindsets for old (negative) unconscious biases. In other words, diversity in a company’s external relationships can help battle a core barrier to internal inclusion efforts: implicit bias.

Assuming that you are convinced the overwhelming number of articles and amount of data are “real facts” suggesting that you should care about the diversity of your law firms, let’s move to the real question for in-house legal departments. What can you do about it?

I. Make the Decision-Makers Diverse.

Imagine that you need to hire a law firm to handle a new deal or litigation. Imagine also that you are enlightened enough to put the matter out to bid by inviting several law firms to pitch for the

1. David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, Harv. Bus. Rev. (Nov. 4, 2016), <https://hbr.org/2016/11/why-diverse-teams-are-smarter>.

business, rather than to simply award the business to the guy who handled the last deal. You have told each of your candidate law firms that diversity and inclusion is important to your company and that you expect to see your matters staffed by the best and brightest attorneys, which should include attorneys of diverse backgrounds. Finally, imagine your team is about to begin the interviews.

Who exactly is doing the interviewing? Is it one, two or five “MAWMs”²? Is the only diverse in-house participant in the room a junior person who does not have a central role in the matter? Or does your panel of interviewers look like the panel you want your law firms to showcase?

Make sure that the team that awards the matter looks like the team your company wants handling the matter. It is now widely understood that diverse teams outperform non-diverse teams.³ To make the best outside counsel selection, bring the power of your company’s culture of diversity into the room to evaluate the candidates. In addition, do not underestimate the power of optics. Showcasing your diverse talent will demonstrate to your law firms what a strong team should look like. A law firm that has not been a diversity leader in the past may need some help to “see it” in order to “be it.” Showing the law firm that your requirements for outside counsel are no different from your requirements for your own legal team adds the power of credibility to your diversity requirement. Finally, making sure that your interviewing team is diverse and inclusive is an important check on how well you internally staff your own matters. It can help ensure that you are giving your diverse team members meaningful work.

2. Publish the Rules.

Lawyers like rules. We like to know what is expected of us, so we can ensure that we will meet and exceed expectations. If you are unclear about how to define your company’s expectations of diversity, you cannot realistically expect your law firms to meet those expectations. If you have told your law firms in advance that (1) diversity and inclusion should be a key consideration in determining who does your work, (2) what diversity and inclusion means to you, and (3) how diversity and inclusion will be considered in selecting and evaluating outside law firms, then those firms that fail to live up to your expectations have only themselves to blame.

We lawyers like our rules to be written down. We like to be able to tick off the requirements to be sure we have met them fully. If you write your expectations down, they can be readily shared among lawyers at your law firms and can be reviewed with each new assignment. Consider requiring your law firms to acknowledge receipt of your statement of diversity and inclusion requirements as a regular part of any engagement letter you enter into with them.

Publishing your diversity and inclusion expectations is also great discipline for your internal legal department. What do you really mean when you say you want diverse and inclusive teams? Do you expect a percentage of assigned lawyers to be women, racially or ethnically diverse, or otherwise diverse? Does your definition of diversity include disability, age, sexual orientation, religion or religious observation, geographic dispersion? Are you including veterans in your diversity numbers? Are you focused on headcount or hours billed? Do you expect diversity among associates, partners or both? Relationship partners or partners in charge of the matter? Do you require a percentage of attorneys on your matters to be doubly diverse—such as biracial attorneys, Hispanic women or LGBT African Americans? Do you measure only at the inception of the project, or do you expect your law firms to monitor periodically and change their teams if diversity representation slips? Are you looking for a minimum amount of diversity, or are you measuring improvement over time?

2. Middle-Age White Men.

3. VIVIAN HUNT ET AL., MCKINSEY & CO., *DELIVERING THROUGH DIVERSITY 1* (2018), available at https://www.mckinsey.com/~media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20diversity/delivering-through-diversity_full-report.ashx; Erik Larson, *New Research: Diversity + Inclusion = Better Decision Making At Work*, FORBES (Sept. 21, 2017, 2:18 PM), <https://www.forbes.com/sites/eriklarson/2017/09/21/new-research-diversity-inclusion-better-decision-making-at-work/#6258d6e4cbfa>.

These may not be comfortable or easy questions for your legal department to grapple with, particularly in the face of competing objectives such as cost containment, but if you do not know the answers, how can you realistically expect your law firms to know?

This brings me to a final point on the importance of publishing the rules. As much as lawyers are great at following rules, we are also great at finding exceptions or, if you will, ways around the rules. When you provide your law firms with simple, clear, written rules on how you expect your work to be handled, they will meet those rules. If you are unclear in any way, you are opening yourself up for “interpretations” that may be inconsistent with your diversity and inclusion expectations. I am not suggesting any nefarious motives on the part of your law firms. However, when faced with the pressure of whether to assign a task to a diverse attorney whom the partner has not worked with or a tried-and-true non-diverse lawyer, s/he might be tempted to interpret your diversity rules in a way that lets her/him follow the instinct to stick with the associate s/he knows.

3. Let there be CLE.

Larger legal departments sometimes arrange for their preferred law firms to come on-site and provide CLE programs for the in-house lawyers. This is a great way to get convenient CLE credits for your internal lawyers on topics relevant to your business, and to also gauge the expertise of your law firms on those topics. It is also an opportunity for the law firm to showcase its expertise and pitch you for future business on those topics.

Make sure your diversity and inclusion expectations apply to providers of CLE programs as well as billable matters. Even better, consider requiring *all* of your law firm CLE presenters to be gender, racially or otherwise diverse. This can give diverse attorneys a relevant introduction to your legal team in a way that may lead to further engagement in the future. The law firm will need to draw on its diverse talent in your areas of need and if the firm does not have diversity in the subject matters you need, you can try out other firms for those areas in a non-billable way.

Why might you want to require *all* of the presenters be diverse? Why not just a percentage, say at least one-third? The simple answer is affinity bias. Affinity bias is the tendency to gravitate toward people who remind us of ourselves.⁴ If you showcase some diverse folks and some non-diverse folks from a law firm, non-diverse folks from the legal department might automatically connect with the presenters who look like them, or look like lawyers they have hired in the past—*notwithstanding* that all of the presenters, diverse and non-diverse, have equal talent and expertise. Excluding non-diverse lawyers from the CLE presentation provides a “disruption” to the unconscious tendency to select the non-diverse lawyer.

4. Group Hug with Other Companies.

Take those CLE opportunities one step further by pairing with another in-house legal department in your city to host joint CLE presentations along the lines outlined above. You can become familiar with twice as many outside counsel for the same amount of time and money. And your diverse outside lawyers, who no doubt would spend a considerable amount of non-billable time preparing their CLE presentations, would have the opportunity to meet twice as many potential clients for the same amount of effort. Add a reception afterward to ensure that there are plenty of opportunities to build relationships cross-company and with outside law firms. Better yet, form a consortium with a few other companies in your industry whereby you each take a turn at hosting relevant CLE events.

4. KATHLEEN NALTY, IMPROVING THE PROFESSION - STRATEGIES FOR CONFRONTING UNCONSCIOUS BIAS, 45 THE COLORADO LAWYER 46 (May 22, 2016), available at <https://kathleennaltyconsulting.com/wp-content/uploads/2016/05/Strategies-for-Confronting-Unconscious-Bias-The-Colorado-Lawyer-May-2016.pdf>.



A firm that excels at fulfilling its diversity and inclusion promise should be rewarded.

5. Face the Music – Again and Again.

This is not an article about implicit bias. Volumes have been written about it elsewhere, and I will assume familiarity with at least the basic idea that we all have ingrained, unconscious biases that direct our actions (and our avoidances) whether or not they are consistent with what our conscious minds desire or believe. Implicit bias can be managed through education, awareness and disrupters, but it is difficult. And it is very easy to slip back into old patterns.

Require your entire legal department to undergo mandatory implicit bias training. Free implicit bias tests and training can be found from many outlets, and paid consultants can be brought in to deliver the training live. Online training can be a powerful tool to developing self-awareness of the extent to which we undermine our conscious beliefs with unconscious drivers and can teach users to disrupt their “natural” behaviors to more closely align with their conscious commitment to diversity and inclusion.

Requiring your internal team to undergo mandatory implicit bias training on an annual basis can be a powerful reminder and an agent for continued growth. Ensure that your internal teams get regular reminders that they can (and should) keep counterproductive unconscious biases at bay when selecting and engaging with outside counsel as it can have a real effect on how business is awarded and how teams are set up. Implicit biases are strong. A “set it and forget it” approach is unlikely to produce sustained change in behavior. Also consider asking your law firms whether, how, and how frequently they train their lawyers on implicit bias.

6. Use Performance Guarantees.

Your clients include performance guarantees in their relationships with their vendors. Your outside counsel are your vendors, and they too can be subject to performance guarantees. If the diversity and inclusion promise does not hold true throughout your matter, you are not getting the services you purchased, and you should get a reduction in the amount you are paying for those services. Your clients’ vendors put fees at risk in many types of service contracts; use those as a model for developing your own metrics, agree on them in advance with your outside lawyers and be sure to follow through. Having the law firm measure and report, periodically or per transaction, can not only ensure you are getting what you pay for, but it can also bring awareness back to the law firm of what it is and is not doing well.

On the other hand, a firm that excels at fulfilling its diversity and inclusion promise should be rewarded. Rewards can be monetary, but they need not be. For example, you might reward a firm that meets your diversity and inclusion expectations with a “first crack” at the next deal. Or, you might award a firm that meets expectations the ability to pitch for business in a different area of the law. The rewards can be as creative as you design them to be.

7. Measure Your Way.

Do not simply rely on your external law firms' representations about their diversity. Test it. Decide what types and measures of diversity and inclusion are important to your business and probe those. Do you want your external lawyers to reflect your customer base? Does a particular background have relevance to the products your company sells? Is there a geographic tie-in that can be additive to the services you receive from an external firm.

All of these considerations are fair game in crafting diversity and inclusion expectations for your external law firms and in measuring their success. Once you have communicated exactly what is important to your company, make sure that your law firm is measuring and meeting *your* expectations of diversity and inclusion on *your* terms, rather than simply relying on the law firm's own reports about its diversity and inclusion achievements.

Is there a particularly difficult diversity metric that you have struggled with internally? Consider focusing on that metric in your outside law firms. For example, suppose your in-house legal department has roughly equal numbers of men and women, but falls short on racial diversity. Consider emphasizing racial diversity in your outside firms. If the best results are produced by diverse and inclusive teams, look for gaps in your own company's diversity to fill in your blind spots and provide the best overall legal product to your company. Focusing on your department's own diversity shortcomings can also help address any implicit biases that may exist in your staff and can project an image that your department is friendly to underrepresented groups. And, as mentioned earlier, in-house legal departments often hire lawyers from their outside firms, so targeting areas that have been an internal diversity challenge could result in long-term hires that can help round out your department.

Finally, do not simply rely on your law firms' reported statistics or ratings by external sources. As helpful as self-reported statistics may be, they may have nothing to do with the actual teams that work on your matters, or the diversity and inclusion metrics that are important to your business.

8. Say it Loud and Proud.

One way to make sure your law firms get the D&I message is by saying it Loud and Proud. Be public in your praise of law firms that have done a great job with a diverse and inclusive team. Let your staff know, and empower your staff to tell each other which law firms have met your expectations. Praise the individuals, diverse and non-diverse, at every level, who have contributed significantly to your successful outcome, and ask for those lawyers on the next engagement. Make sure that your law firms know that you recognize their commitment to diversity and inclusion throughout the engagement and that you advertise the successful relationship to other lawyers in your legal department who may need to hire outside counsel.

Conclusion

Imagine you buy a bunch of cut flowers for yourself and one for your assistant. You and your assistant each put your flowers in a lovely vase. They look beautiful for a few days, and then yours start to fade. Your assistant's flowers still look lovely. Why?

While you were busy on that deal, managing that arbitration, and reporting to your board, your assistant took time to recut the stems on her flowers and put them in fresh water every other day. It is a simple analogy, but it rings true. If you take time to formulate and revisit your diversity and inclusion expectations, communicate to your outside lawyers, check on their progress, and pat them on the back when they do well, you can positively leverage your law firms to enhance their contributions to your legal department and your business.

IILP Review 2019-2020: Gender Diversity, Equality, and Inclusion Issues in the Legal Profession

The Chilling Effect of the #MeToo Movement on Promotion of Female Law Associates: The Case for Sponsorships

By Jeannette Espinoza

Assistant Professor, Law and Paralegal Studies, City University of New York, New York City College of Technology

Has the #MeToo movement made it more difficult for female associates to advance in their careers? Espinoza debunks the idea that the #MeToo movement is causing men in power to avoid women and shares how structured, goal oriented sponsorship programs can empower women.

The #MeToo movement has caused a whirlwind of women to become emboldened to publicly shame powerful men for sexual harassment or assault in a cross-section of professions: entertainment, politics, sports, academia, media, and business. This has been applauded by most women as empowering—by no longer bearing the shame of sexual harassment or abuse in silence. As Justice Ruth Ginsburg recently commented, “it’s about time.”¹ For so long, women were silent—thinking there was nothing to do about it. But now the law is on the side of women, or men, who encounter harassment—this is a good thing. However, the downside is that this may have a chilling effect on how women are viewed in professional capacities. The fear is that women will become un-touchables; passed over for power lunches with influential men, prestigious assignments involving travel, and other opportunities involving one-on-one male/female interaction essential to professional advancement.

How does sexual harassment affect professional advancement? The Equal Employment Opportunity Commission (“EEOC”) defines sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that explicitly or implicitly affect an individual’s employment, unreasonably interferes with an individual’s work performance; or creates an intimidating, hostile, or offensive work environment.”² While it is evident that working in a hostile environment will inevitably affect work performance, so is the *quid pro quo* implicit in the exchange of sexual favor for career opportunity. For example, the women who accused Harvey Weinstein, revealed the blatant expectation of exchange of sexual favor for a career-changing opportunity and loss of opportunity for refusal or the years of abuse suffered in silence by Olympian gymnast hopefuls. The implicit message is to stay silent because no good will come from “complaining.” No one can dispute that criminal acts of sexual abuse or sexual harassment should be exposed—and if legally possible, prosecuted. Yet there has been some backlash regarding the veracity of the accusers. The subtler backlash is that women will be excluded from participating

1. Nina Totenberg, *Justice Ruth Bader Ginsburg Reflects on the #MeToo Movement: ‘It’s About Time’*, NAT’L PUB. RADIO, INC. (Jan. 22, 2018, 4:35 AM), <https://www.npr.org/2018/01/22/579595727/justice-ginsburg-shares-her-own-metoo-story-and-says-it-s-about-time>.

2. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FACTS ABOUT SEXUAL HARASSMENT (2009), available at <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>.



Although mentoring is needed by all newly hired attorneys, it is important to assess the effectiveness of the programs.

in meaningful career-advancing opportunities—not because of sexual discrimination, but because there is a fear of creating situations where sexual harassment may occur. This article discusses steps to be implemented by professional organizations, specifically law firms, to change their approach to diversification and inclusion programs for women within their organizational structure.

Recruitment and hiring has not been a problem in the last two decades as the number of female law school graduates is evenly proportionate. However, retention of female associates and advancement of women in partnership or senior positions has been nominal.³ Much has been written about the reasons why women leave top law firms and the obstacles balancing their professional careers and personal lives.⁴ While it is imperative to have some discussion identifying the causes for leaving law firms, it is also important to look to the processes in place that have not rendered the desired results.

The American Bar Association (“ABA”) reports that 47.3% of women compared to 52.7% of men received a J.D. or LL.B. degrees from 2010 to 2011.⁵ The number of women law graduates has held steady since 2000 (47.5% women JD graduates). Women comprised 49.87% of summer interns and associates at 45.48%.⁶ While an overall picture of women in the law field appears to represent gender inclusiveness, the reality for women in the practice of law is stagnation and attrition. The New York City Bar Association in its 2016 Benchmarking Diversity reported a similar number of total women associates—45%. But when it comes to advancement, only 44% of those women are at mid-level positions, 42% are at senior level associate level, 22.7% are managing partners in law firms across the nation,⁷ and 14.3% voluntary left the firms; 135% above the rate for white males.⁸ Despite the successful recruitment efforts of the legal profession, greater effort is needed to create professional development programs that address retention and advancement of women lawyers.

Improving mentoring programs

In developing or improving existing mentoring programs, bar associations offer helpful guidelines to incorporate when designing professional development programs. It is important to note that

3. Stephanie A. Scharf, Roberta Liebenberg & Christine Amalfe, *Report of the Eighth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms*, (February 2014).

4. Timothy L. O'Brien, *Why Do So Few Women Reach the Top of Big Law Firms?*, N.Y. TIMES (Mar. 19, 2006), <http://www.nytimes.com/2006/03/19/business/yourmoney/why-do-so-few-women-reach-the-top-of-big-law-firms.html>.

5. AM. BAR ASS'N. INC., Section of Legal Education and Admission to the Bar, *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_llb_degrees_awarded.pdf

6. NAT'L ASS'N FOR LAW PLACEMENT, 2017 REPORT ON DIVERSITY IN U.S. LAW FIRMS (2017), *available at* <https://www.nalp.org/uploads/Membership/2016NALPReportonDiversityinUSLawFirms.pdf>.

7. Scharf, *supra* note 3.

8. NEW YORK CITY BAR ASS'N., DIVERSITY BENCHMARKING REPORT 2016 (2016), *available at* <http://www.nycbar.org/serving-the-community/diversity-and-inclusion/benchmarking-reports-law-firm-diversity>.



Development of an expansive mentoring and sponsoring program proves to be more successful than a cookie-cutter mentoring approach.

most medium-size to large law firms have a diversity officer or department dedicated to creating, implementing, and managing mentoring programs that focus on attorneys of color and women. While it is logical to focus on women and attorneys of color as one group which warrants special attention because of underrepresentation across most levels, notably at the senior and partner level, most mentoring programs are offered to all entry-level attorneys. Although mentoring is needed by all newly hired attorneys, it is important to assess the effectiveness of the programs. When it comes to women, the desired results, promoting women to partnership ranks, have risen in small increments. In the twenty-five years that the National Association for Law Placement (“NALP”) has been collecting this data, the increase has been from 12.27% to 22.7% in 2017.⁹ Professional development programs and mentoring programs should not utilize a one size fits all approach. A purposefully, driven mentoring program designed to meet goals at different professional levels is essential to cultivating and sponsoring women up the law firm ladder to partnership.

Formal and informal mentors at the associate level cultivates the firm’s commitment to mentoring. While informal mentoring may be positive for some junior associates, it has been found that senior managers tend to gravitate toward nurturing the professional development of junior associates who are culturally similar to themselves.¹⁰ Establishing formal mentoring programs with senior associates and partners, pairing with junior associates is essential in communicating the firm’s commitment to diversity. While most senior attorneys and partners will be white males, an inclusive mentoring program may still be achieved by stratifying the different underrepresented groups: women, Latinos, African Americans and Asian Americans. While this practice may appear to be segregating the underrepresented groups as culturally marginalizing, or benefiting one group over others, inclusiveness can be achieved with the ongoing commitment as firm policy of advancing professional development for all.

Sponsors differ from mentors in that sponsors are influential partners or senior management associates that advocate for and recommend associates for placement on prestigious committees, prime work assignments, board positions and the like to increase their professional visibility. Mentors offer career advice on work assignments, navigating corporate politics, work/life balancing and providing support overall.¹¹ While one is not necessarily more important than the other, the balance of having different mentors/sponsors at different stages of an associate’s career is key to successful retention and advancement.

9. O’Brien, *supra* note 4.

10. Matt L. Huffman, Fiona M. Kay & Elizabeth H. Gorman, *Developmental Practices, Organizational Culture, and Minority Representation in Organizational Leadership: The Case of Partners in Large U.S. Law Firms*, 639 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 91, 108 (2011).

11. CATALYST, <http://www.catalyst.org/knowledge/topics/sponsorshipmentoring> (last visited Jan. 22, 2018).



Workplace bias continues to affect women's career trajectory and pay inequality.

Development of an expansive mentoring and sponsoring program proves to be more successful than a cookie-cutter mentoring approach. The Harvard Business Review found that women who had influential senior level sponsors were more likely to advance faster in their career advancement.¹² A successful mentoring program provides assigned mentors for all entry level associates, while implementing key goals and strategies addressing the different needs of underrepresented groups is also essential.

Sponsors differ from mentors in that sponsors are influential partners or senior management associates that advocate for and recommend associates for placement on prestigious committees, prime work assignments, board positions and the like to increase their professional visibility. Mentors offer career advice on work assignments, navigating corporate politics, work/life balancing and providing support overall.¹³ While one is not necessarily more important than the other, the balance of having different mentors/sponsors at different stages of an associate's career is key to successful retention and advancement.

The ABA National Summit on Achieving Long-Term Careers for Women in Law discussed the three top reasons that women leave the practice of law: work/life balance, unconscious bias and pay inequality.¹⁴ Professional development programs for women should implement strategic initiatives to address ways for women navigate the demanding pressures of long hours and family responsibilities. Some large law firms have implemented flexible work schedules or caregiver and re-entry programs for women who have taken family leave time to ease the transition back into the workplace.¹⁵

Workplace bias continues to affect women's career trajectory and pay inequality.¹⁶ A 1993 study found that one quarter of women lawyers reported being sexually harassed by primarily other lawyers, clients and Judges.¹⁷ Women reported being treated differently when on the job, 32% reported lack of promotion, and 40% reported greater salary difference than their male counterparts as well as differential treatment in the legal assignments, settlements, courtroom, litigation and research assignments.¹⁸ These behaviors lead to inequality of women in the workplace not only in terms of salary but also career advancement.

12. Herminia Ibarra, Nancy M. Carter & Christine Silva, *Why Men Still Get More Promotions Than Women*, 88 HARV. BUS. REV. 80, 82 (2010).

13. CATALYST, <http://www.catalyst.org/knowledge/topics/sponsorshipmentoring> (last visited Jan. 22, 2018).

14. *ABA Summit Searches for Solutions to Ensure Career Longevity for Women in Law*, AM.BAR ASS'N, (Nov. 10, 2017, 7:00 AM), https://www.americanbar.org/news/abanews/aba-news-archives/2017/11/aba_summit_searches.html.

15. See Proskauer, *Women's Initiatives*, <http://www.proskauer.com/diversity/womens-initiatives>; See also Sidley, Committee on Retention and Promotion of Women, <https://www.sidley.com/en/diversitylanding/committee-on-retention-and-promotion-of-women>; *The 2017 Working Mother 50 Best Law Firms for Women: Honoring the Firms That Encourage Women to Rise to the Top*, WORKING MOTHER, (July 25, 2017), <https://www.workingmother.com/best-law-firms-for-women-2017#page-2>.

16. Janet Rosenberg, Harry Perlstadt & William Phillips, *Now That We Are Here: Discrimination, Disparagement, and Harassment at Work and The Experience of Women Lawyers*, 7 GENDER & SOCIETY 415 (1993).

17. *Id.* at 423.

18. *Id.* at 422.



The #MeToo movement has brought to the forefront the pervasiveness of sexual harassment and abuse in the workplace.

Twenty-five years later, these issues are still cited as an impediment to retaining and promoting women. However, there has been acknowledgment and a conscious effort to ameliorate these conditions in the legal profession. Implementing the ABA 2014 resolution that recommends a diversity and inclusion in their continuing legal education licensing requirement¹⁹, the NYS Continuing Legal Education (CLE) Board has changed their CLE requirement for New York attorneys, now requiring at least one credit addressing implicit and explicit bias and diversity and inclusion initiatives, among other similar topics.²⁰ Acknowledging that the legal profession is one of the least inclusive professions is the first step in changing the cultural climate of the profession.²¹ Designing purposeful mentor/sponsoring should include initiatives addressing women-specific needs. Providing mentors who identify, support, and nurture associates who are viable candidates for advancement, and who sponsors will advocate for, are effective ways to create a pipeline to partnership.

Conclusion

The #MeToo movement has brought to the forefront the pervasiveness of sexual harassment and abuse in the workplace. It is naïve to suggest that sexual harassment will be eliminated from the workplace by improving organizational diversity programs; however, changing the workplace climate by communicating the intolerance of such practices, together with a purposeful mentoring/sponsoring program, will demonstrate the commitment to change. Some recommended changes are to establish committees, independent from management that review and decide claims of sexual harassment. These committees may set clear policies, protocols and consequences for offenders, refocusing sexual harassment training to include the victim's reluctance to speak out. These changes will cultivate the commitment to change the workplace environment.²² This cultural revolution should be viewed as an opportunity to empower women, not avoid them. Men in power are needed to collaborate, support and nurture the way to a more civilized and inclusive workplace.

19. AM. BAR ASS'N, ADOPTED BY THE HOUSE OF DELEGATES FEBRUARY 8, 2016 RESOLUTION (2016), available at https://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html.

20. NY STATE UNIFIED COURT SYSTEM, OFFICE OF COURT ADMINISTRATION, MEMORANDUM (Dec. 14, 2016), available at <http://www.courts.state.ny.us/rules/comments/PDF/CLE-DiversityInclusionEliminationOfBias.pdf>. (request for public comment on proposed New York Continuing Legal Education requirement for Diversity, Inclusion and Elimination of Bias.); See also, Categories of CLE Credit as Defined in the Program Rules 22 NYCRR 1500.2(c)-(g), available at [https://www.nycourts.gov/attorneys/cle/1-1-18%20PDF%20Updates/12m%20-%20New%20Category%20of%20Credit%2022%20NYCRR%201500.2\(c\)-\(g\)%20-%20redlined.pdf](https://www.nycourts.gov/attorneys/cle/1-1-18%20PDF%20Updates/12m%20-%20New%20Category%20of%20Credit%2022%20NYCRR%201500.2(c)-(g)%20-%20redlined.pdf) (approved Diversity, Inclusion and Elimination of Bias Continuing Legal Education credit requirement).

21. Deborah L. Rhode, *Law Is The Least Diverse Profession In The Nation. And Lawyers Aren't Doing Enough To Change That*, WASH. POST (May 27, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/>.

22. *Responding to Sexual Harassment in the Workplace: A Roundtable Discussion*, LAW.COM (Jan. 9, 2018, 9:50 AM), <https://www.law.com/sites/almstaff/2018/01/09/responding-to-sexual-harassment-in-the-workplace-a-roundtable-discussion/?slreturn=20180028171456>.

A Seat at the Table: Bringing Four Pillars of Fourth Wave Feminist Strategies to the Legal Profession

Laurie A. Morin

Professor of Law, University of the District of Columbia David A. Clarke School of Law

How can the legal profession still benefit from some of the lessons of feminism? Morin uses fundamental feminist ideas to outline four provocative pillars to affect a “cultural shift in our very understanding of what it means to be a ‘good’ and ‘successful’ lawyer.”

Introduction

Once we were dreamers. We believed that if only they let us into law school, we would prove that we were just as smart, just as logical, and just as committed as male law students. We believed that if only they hired us, they would see that we were just as valuable as our male colleagues. We thought that if only they established more family-friendly work policies, they would see that it improved the lives and productivity of both women and men in the legal profession. Activist women have been putting their faith in the ability to effect positive changes in law and policy to create substantive equality for almost two centuries.¹ But now we know that we were wrong.

Women have been graduating from law school at equal rates with men since the turn of the twenty-first century.² We are hired for entry-level associate positions at nearly the same rate as men.³ Yet something happens along the way. By mid-career, our progress has sputtered or stalled out altogether.⁴ Despite decades of laws and policies designed to promote gender equity, women have not reached parity with men in compensation, promotion, or status in the legal profession.⁵

1. Gwen Hoerr Jordan, *Article: Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 NEV. L.J. 580 (2009). Jordan argues that activist women lawyers, starting right after the Civil War, led a law reform movement to establish women's rights through incremental changes in the law. *Id.* at 581. This strategy continued throughout the twentieth and beginning of the twenty-first centuries, epitomized by Senator Hillary Rodham Clinton's 2008 presidential campaign. *Id.* at 581-589. Jordan concludes that the struggle for formal equality has been only partially successful in attaining substantive equality, because it has not dismantled the structures and attitudes that lead to ongoing discrimination against women. *Id.* at 589-590.

2. A.B.A. COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 4 (2017), [HTTPS://WWW.AMERICANBAR.ORG/CONTENT/DAM/ABA/MARKETING/WOMEN/CURRENT_GLANCE_STATISTICS_JANUARY2017.PDF](https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.pdf) [HEREINAFTER CURRENT GLANCE]. In 2014-2015, women accounted for 51.3% of total J.D. enrollment, and 52.7% of J.D. degrees awarded. *Id.*

3. *Id.* at 2. In 2015, women accounted for forty-five percent of associates and 48.7% of summer associates in law firms.

4. MARC BRODHERSON, LAURA MCGEE & MARIANA PIRES DOS REIS, REPORT: WOMEN IN LAW FIRMS 1-4 (2017), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/gender%20equality/women%20in%20law%20firms/women-in-law-firms-final-103017.ashx> (representation of women decreases rapidly at the partnership level and beyond. *Id.* at 2. Fewer women than men advance to the first level of partnership (twenty-nine percent gap); women are forty-three percent more likely than men to leave the firm at the equity partner level. *Id.* at 4).

5. NAT'L ASS'ON OF WOMEN LAWYERS, 2017 ANNUAL SURVEY REPORT: THE PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS 6 (2017) [hereinafter NAWL], <http://www.nawl.org/page/2017> (despite being hired in nearly equal numbers, the likelihood that women will become equity partners has remained largely unchanged in the last ten years. The gender pay gap persists across all levels, with women earning from ninety to ninety-four percent of what men in the same position earn).

Most of us never make it to the top. We do not become equity partners in law firms, law school deans, Fortune 500 General Counsel, or Supreme Court law clerks, at nearly the same rate as our male peers.⁶ Some of us have chosen to sacrifice our personal lives, working twice as hard and twice as long to compete in a male-dominated culture.⁷ Many of us drop out of the legal profession altogether, or *downsize* to more family-friendly careers.⁸ The problem is so endemic that the American Bar Association has undertaken an initiative to increase the number of women who pursue successful long-term legal careers.⁹

Why are women still lagging so far behind in the legal profession, despite decades of laws and policies designed to support their success? This paper argues that we have reached the limitations of legal strategies based on a formal equality model to advance women's legal careers. Certainly, providing access, equal treatment, pregnancy leave, and *family-friendly* policies have led to progress for women—and some men—in the legal profession.¹⁰

However, we now know that access and formal equality are not enough to dismantle the deep structural and cultural barriers to women's advancement in the legal profession.¹¹ Access and formal equality will never change the perception that women who take advantage of flexible hours—the *Mommy Track*—are less dedicated to their work and less worthy of promotion than those who bill sixty hours a week.¹² Access and formal equality will never prevent bullying and sexual harassment by more powerful male supervisors and colleagues,¹³ and will never undo the reality that much of the profession's informal mentoring and rainmaking takes place on golf courses and *old boys* networking events.¹⁴

The legal reform tools of the feminist movement have accomplished a lot, but they are no match for entrenched power and unconscious bias. For that, we need new tools that move beyond the current structures and realities of power and privilege. This paper argues that the legal profession could benefit from the lessons and strategies of today's new leaders of the *Fourth Wave*.¹⁵

6. See NAWL 2017 ANNUAL SURVEY REPORT, *supra* note 5, at 6 (women comprise only nineteen percent of equity partners in 2017); CURRENT GLANCE, *supra* note 2, at 4 (women account for 31.1% of law school deans in 2016); *Id.* at 3 (women accounted for 24.8% of Fortune 500 General Counsel in 2016); see also, Tony Mauro, *Shut Out: SCOTUS Law Clerks Still Mostly White and Male*, NATIONAL L. J., (2017), <https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/12/11/shut-out-scotus-law-clerks-still-mostly-white-and-male/> (since 2005, eighty-five percent of Supreme Court law clerks have been white, showing “near glacial progress” since 1996).

7. See, e.g., Meghan M. Boone, *Article: Millennial Feminisms: How the Newest Generation of Lawyers May Change the Conversation about Gender Equality in the Workplace*, 45 U. BALT. L. REV. 253, 259–260 (2016). Boomer lawyers expect to work longer hours to succeed and see a preference; Millennials' preference for work-life balance as a sign of less dedication.

8. See, e.g., Meghan Tribe, *ABA Summit Examines Why Seasoned Women are Leaving the Law*, AM. LAWYER, NOV. 8, 2017, 4:22 PM, <https://www.law.com/americanlawyer/sites/americanlawyer/2017/11/08/aba-summit-examines-why-seasoned-women-are-leaving-the-law/> (although women enter the profession at the same rate as men, by the age of forty, they make up only forty percent of lawyers at law firms, while women over fifty make up only twenty-seven percent).

9. Am. Bar Ass'n, *ABA Presidential Initiative: Achieving Long-Term Careers for Women in Law*, https://www.americanbar.org/content/dam/aba/administrative/office_president/Initiative_Overview.authcheckdam.pdf.

10. Compare, DEBORAH L. RHODE, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION, A.B.A. COMM'N ON WOMEN IN THE PROFESSION 5 (2001), <http://womenlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf> [hereinafter RHODE]. In 2000, women comprised almost a third of the nation's lawyers and a majority of entering law students. Yet, they remained underrepresented in positions of greatest status: fifteen percent of federal judges and law firm partners; ten percent of law school deans and general counsels; and only five percent of managing partners. CURRENT GLANCE, *supra* note 2, at 2–5. In 2017, women had grown to thirty-six percent of the legal profession and eighteen percent of law firm partners, *id.* at 3; 24.8% of Fortune 500 General Counsel, *id.* at 4; 31.1% of law school deans, *id.* at 4; and thirty-three percent of federal judges, *id.* at 5.

11. RHODE, *supra* note 10, at 2, 6. Women suffer from a mismatch between characteristics associated with women and those associated with professional success, such as assertiveness and competitiveness. They also do not receive the same presumption of competence as men.

12. *Id.* at 6–7. Although more than ninety percent of the law firms surveyed offered part-time schedules, most women believed that taking advantage of them would jeopardize their prospects for advancement.

13. *Id.* at 7–8. Almost all law firms have sexual harassment policies, but about one-half to two-thirds of female lawyers reported experiencing or observing sexual harassment.

14. *Id.* at 6. Many female lawyers are excluded from the informal networks and mentoring that lead to high visibility assignments and career development.

15. See, e.g., Jennifer Baumgardner, *Is There a Fourth Wave? Does it Matter?*, in F'EM: GOO GOO, GAGA AND SOME THOUGHTS ON BALLS (2011). Scholars generally agree that there have been three or four “waves” of feminism defined by chronology and sensibility. *Id.* at 1. The First Wave grew out of the abolitionist movement and lasted roughly 80 years from 1840 until 1920. *Id.*

Fourth Wave feminists are leading the way in resisting entrenched misogyny in the entertainment and political arenas—developing coalitions, running for office, and using social media to demand change in the upper echelons of power.¹⁶ They are demanding a seat at the table when decisions are made about what constitutes diversity, inclusion, and equal treatment.¹⁷ The Women’s March and the #MeToo movements provide exemplars for the tools Fourth Wave feminists are deploying to bring about lasting cultural change.¹⁸

This paper lays out a framework for what it might look like to bring these Fourth Wave feminist strategies to the legal profession. Based on the Women’s March and other Fourth Wave writings, it identifies four pillars of change to the current diversity and inclusion paradigm:

1. Developing a conscious leadership model that counters deeply entrenched narratives of unconscious bias;
2. Developing strategies to make government and private legal employers more representative of the people they serve;
3. Developing new frameworks for valuing people’s intersecting identities; and
4. Developing decentralized leadership models that provide pipelines to the top levels of the profession.

But first, let’s take a look at how far we have come since the first woman entered law school in the United States in 1869.¹⁹

Background: Four Waves of Feminism in the United States

For almost two centuries, women have been coming together to advocate for legal reforms to improve their lives.²⁰ This movement has not been monolithic, and it has not been continuous. It has been marked by periods of division and unity, advancement and backlash, optimism and despair.²¹ Yet there is no doubt that women are better off today than they were when this country was founded. Understanding the history of feminist movements provides a framework for evaluating how women in the legal profession got where they are today, and what they need to do to move forward. Most scholars recognize four loosely-defined *waves* of feminist history that are briefly described below to set the foundation for the analysis that follows.

at 2. The Second Wave grew out of the civil rights movement and lasted from 1960 through the late 1980’s. The Third Wave was born when daughters of the Second Wave, who grew up with law protecting gender equality, sought to define a new notion of feminism that honored individual choice. *Id.* at 3. Some believe that the Third Wave morphed into a more tech-savvy and gender-sophisticated Fourth Wave in the late 2000’s. *Id.* at 3.

16. See, e.g., Charlotte Alter, *A Year Ago, They Marched. Now a Record Number of Women Are Running for Office*, TIME (Jan. 18, 2018), <http://time.com/5107499/record-number-of-women-are-running-for-office/>; see also, SHE SHOULD RUN, <http://www.sheshouldrun.org/> (dedicated to getting 250,000 women to run for office by 2030); EMERGE AMERICA, <https://emerge.ngpvanhost.com/home> (training program for Democratic women who want to run for office).

17. See, e.g., *Vision*, EMERGE AMERICA, <https://emerge.ngpvanhost.com/about> (“To change the face of power, politics, and leadership in this country in order to have policies that are responsive to all Americans”); *Mission*, SHE SHOULD RUN, <http://www.sheshouldrun.org/mission> (“We believe that women of all political leanings, ethnicities, and backgrounds should have an equal opportunity to lead in elected office and that our democracy will benefit from the varied perspectives and experiences that women bring to leadership”).

18. *Our Mission*, WOMEN’S MARCH, <https://www.womensmarch.com/mission/>; see also, TIME’S UP, <https://www.time-supnow.com/>.

19. *History*, N.Y. WOMEN’S BAR ASS’N, <http://www.nywba.org/history2/> (the first two women law students were admitted to the Washington University of Law in St. Louis in 1869).

20. Jordan, *supra* note 1, at 580–82.

21. See, e.g., DOROTHY S. COBBLE, LINDA GORDON & ASTRID HENRY, *FEMINISM UNFINISHED: A SHORT, SURPRISING HISTORY OF AMERICAN WOMEN’S MOVEMENTS* xiv–xxi (2014) (challenging the assumption that feminism was predominantly a homogeneous, white, middle-class movement in which progress proceeded steadily upward through time). See also, Jordan, *supra* note 1, at 585 (describing the split among suffragists in the late 1870’s).



They (women) pushed courts to interpret the 14th Amendment to provide them with the right to vote and the right to pursue a profession.

The First Wave

For the first Century of U.S. history, women were not *people* recognized by the U.S. Constitution.²² They could not vote or serve on juries. They could not own property, enter into contracts, or dispute abusive husbands.²³ They were essentially servants to their husbands and had no right to education or a career outside the home.²⁴ These intolerable conditions ushered in the First Wave of feminism—breaking down barriers to women’s full participation in the civil, political, and economic realms of society.

First Wave feminists had a dream that women should be able to pursue happiness and satisfaction in their lives. Their demands were laid out in the Declaration of Sentiments and Resolutions at the 1848 Convention at Seneca Falls, which declared that “all men *and women* are created equal.”²⁵

With the adoption of the Fourteenth Amendment to the Constitution after the Civil War, women believed that they had finally been recognized as “persons” and “citizens” under the Constitution.²⁶ They pushed courts to interpret the 14th Amendment to provide them with the right to vote and the right to pursue a profession.²⁷

Susan B. Anthony was one of the first pioneers to challenge a law that disenfranchised women by voting in the Presidential election in 1872.²⁸ For this audacity, she was criminally indicted for “knowingly voting without having a lawful right to vote.”²⁹ The judge directed a verdict of guilty and fined her \$100.³⁰ Unfortunately, Anthony did not live to see the day women’s right to vote was recognized by the U.S. Constitution.³¹

Sojourner Truth had a dream that she deserved freedom and equal rights with men despite the double jeopardy of being born a woman and an African American. Born a slave, Truth ran away and secured

22. Jordan, *supra* note 1, at 590 (early women’s rights activists struggled to ensure that the principles of liberty and equality should apply to men and women of all races).

23. *Id.* at 590–99.

24. *Id.*

25. Erin Blakemore, *Five Things to Know About the Declaration of Sentiments*, SMITHSONIAN (June 8, 2016), <https://www.smithsonianmag.com/smart-news/five-things-know-about-declaration-sentiments-180959352/>.

26. Jordan, *supra* note 1, at 584.

27. *Id.*, at 595.

28. Douglas O. Linder, *Susan Anthony Trial (1873)*, FAMOUS TRIALS, <http://www.famous-trials.com/anthony> (Anthony’s case was one of the first to urge an expansive reading of the Fourteenth Amendment. She claimed the right to vote was included among the privileges and immunities granted to her as a citizen under the Fourteenth Amendment. The judge disagreed, finding that the Fourteenth Amendment did not apply to the state’s regulation of suffrage).

29. Douglas O. Linder, *Trial Record in the Case of United States vs Susan B. Anthony on the Charge of Illegal Voting (June 17-18, 1873)*, FAMOUS TRIALS, <http://www.famous-trials.com/anthony/435-trialrecord>.

30. *Id.*

31. *Id.*

her freedom in 1827 with the help of an abolitionist family.³² She became an outspoken advocate for abolition, temperance, and civil and women's rights.³³

Myra Bradwell had a dream of breaking down barriers to enter the legal profession.³⁴ She led a group of women attorneys in a concerted strategy to enact a wide range of law reforms to secure women's equity.³⁵ They actively pursued admission to law school and the profession, then lobbied within existing legal and governmental structures, and became leaders in international women's associations pursuing women's equality.³⁶

By the end of the nineteenth century, these pioneering women had opened access to law school and the legal profession for women across the United States.³⁷ However, women lawyers still had to struggle to earn a living in their chosen profession.³⁸ They were excluded from prestigious opportunities to become judges, legislators, diplomats, and high-level attorneys.³⁹ Many started their own practices while continuing to advocate for broader legal reform for women.⁴⁰

In the meantime, the push for a Constitutional Amendment for women's suffrage continued.⁴¹ By the time the Nineteenth Amendment passed in 1920, almost a century after the Seneca Falls Convention,⁴² First Wave feminists had made enormous progress in securing formal equality for women. In addition to voting rights, they passed legislation to protect their property rights and their right to contract.⁴³ They also pursued legislation to protect women and children from physical and sexual abuse at home and at work, and to secure the right to organize.⁴⁴

Most historians view the period following the victory for women's suffrage in 1920 as the beginning of a fallow period in the legal reform movement until it was picked up again by the Second Wave in the 1960's and 1970's.⁴⁵ Women today stand on the shoulders of the pioneers who fought for the right to be equal persons and citizens under the law.

32. *Sojourner Truth*, NAT'L WOMEN'S HISTORY MUSEUM BIOGRAPHIES, <https://www.womenshistory.org/education-resources/biographies/sojourner-truth>.

33. *Id.* Most famously known for her "Ain't I a Woman" speech, Truth challenged the reasoning of male ministers who argued that women should not have the same rights as men. *Her Words*, SOJOURNER TRUTH MEMORIAL, <http://sojourner-truthmemorial.org/sojourner-truth/her-words/>.

34. Jordan, *supra* note 1, at 25. Bradwell herself was denied admission to the Illinois bar. She urged the Illinois Supreme Court to adopt an expansive definition of the Privileges and Immunities Clause of the Fourteenth Amendment. Bradwell pursued her case all the way to the United States Supreme Court, where she met the same fate as Susan B. Anthony. The court found that the state's regulation of the legal profession was a legitimate use of its police power, and thus did not violate the Privileges & Immunities clause. *Id.*

35. *Id.* at 587.

36. *Id.* at 601, n. 164. MOMENTUM STARTED BUILDING IN 1869, WHEN FIVE WOMEN ENROLLED IN LAW SCHOOL, AND ARABELLA MANSFIELD WAS GRANTED A LAW LICENSE IN IOWA. *Id.*

37. See, e.g., *History*, N.Y. WOMEN'S BAR ASS'N, <http://www.nywba.org/history/2/> (documenting a series of "firsts" for women in the legal profession).

38. JILL NORGREN, *REBELS AT THE BAR: THE FASCINATING, FORGOTTEN STORIES OF AMERICA'S FIRST WOMEN LAWYERS* (2013).

39. *Id.*

40. *Id.*

41. Jordan, *supra* note 1, at 598–600. On March 3, 1913, more than 5,000 women marched on Washington to fight for the vote. Lorraine Boissoneault, *The Original Women's March on Washington and the Suffragists Who Paved the Way*, SMITHSONIAN.COM (Jan. 21, 2017), <https://www.smithsonianmag.com/history/original-womens-march-washington-and-suffragists-who-paved-way-180961869> (the suffragists paid a high price for their activism, enduring hunger strikes, violent clashes with authorities, and jail sentences).

42. U.S. CONST. amend. XIX.

43. Jordan, *supra* note 1, at 590–98.

44. COBBLE, GORDON & HENRY, *supra* note 21, at 9–16; Jordan, *supra* note 1, at 585.

45. COBBLE, GORDON & HENRY, *supra* note 21, at xiv (challenging the prevailing view that the feminist movement came to a halt after women won the right to vote in 1920).

The Second Wave

The 1960's brought a wave of protests sparked by the Civil Rights movement and Martin Luther King, Jr.'s March in Washington, D.C. in 1963.⁴⁶ The decade that followed brought Freedom Summer, the Selma-to-Montgomery March for voting rights, Black Power and the Student Non-Violent Coordinating Committee ("SNCC"), a farmworker's strike led by Cesar Chavez, and anti-war protests.⁴⁷ Black activists rose to assert their freedom with the Black Power movement.⁴⁸

Out of all these protests emerged the Second Wave of feminism, also known as the Women's Liberation Movement.⁴⁹ It started as a cultural revolution, with women burning their bras and meeting in consciousness-raising groups to free themselves from the chains of men's expectations and oppression.⁵⁰

Second Wave feminists had a dream that law reform could be used to secure workplace equality, reproductive autonomy, and freedom from violence in the home and the workplace.⁵¹ By the 1970's, most feminists had united to push for an Equal Rights Amendment ("ERA"), as well as enforcement of women's rights under Title VII and the Fourteenth Amendment.⁵²

Gloria Steinem used her background as a journalist to found Ms. Magazine, which became the public voice of the Women's Liberation movement.⁵³ As an activist journalist, she brought "the then radical conviction that gender, race, class, age, and ethnicity were all targets of inequality, and belonged together in any over-arching struggle for human and civil rights."⁵⁴ In 1971, Steinem co-founded the National Women's Political Caucus with Betty Friedan, Bella Abzug, and Shirley Chisholm—grooming a generation of women activists to run for elected office.⁵⁵

Sonia Pressman Fuentes, the first woman attorney in the Equal Employment Opportunity Commission ("EEOC") Office of the General Counsel, used her position and legal knowledge to push for enforcement of the gender provisions of Title VII.⁵⁶ Fuentes went on to co-found the National Organization for Women (NOW) along with Betty Friedan and forty-seven other activists in 1966.⁵⁷ One of NOW's first priorities was to advocate for the EEOC to enforce Title VII for women.⁵⁸ As a result of that pressure, the EEOC began to conduct hearings and issue decisions implementing women's rights.⁵⁹

46. See generally, GAIL COLLINS, *WHEN EVERYTHING CHANGED: THE AMAZING JOURNEY OF AMERICAN WOMEN FROM 1960 TO THE PRESENT* 106–48 (2009). See also, 1960's-1970's: *Civil rights, Vietnam and protest*, NBC NEWS, http://www.nbcnews.com/id/24714290/ns/us_news-gut_check/t/s-s-civil-rights-vietnam-protest/.

47. *Id.*

48. *Black Power, African American Heritag*, NAT'L ARCHIVES, <https://www.archives.gov/research/african-americans/black-power>.

49. COLLINS, *supra* note 46, at 104–05 (2009). See also, Linda Napikoski, *The Women's Liberation Movement: A History of Feminism in the 1960s and 1970s*, THOUGHTCO. (Aug. 1, 2017), <https://www.thoughtco.com/womens-liberation-movement-3528926>.

50. COBBLE, GORDON & HENRY, *supra* note 21, at 69–70, 79–83.

51. Jordan, *supra* note 1, at 634–35.

52. *Id.* at 635.

53. Jane Kramer, *Road Warrior: After fifty years, Gloria Steinem is still at the forefront of the feminist cause*, NEW YORKER 4 (Oct. 19, 2015) <https://www.newyorker.com/magazine/2015/10/19/road-warrior-profiles-jane-kramer>.

54. *Id.* at 14.

55. Steinem and Abzug traveled around the country during the summer of 1971 "rallying America's feminists to fight with their votes" for passage of the Equal Rights Amendment. *Id.* at 15.

56. Sonia Pressman Fuentes, *The Beginning of the Second Wave of the Women's Movement and Where We Are Today: a Personal Account*, CORNELL LAW FACULTY WORKING PAPERS, Paper 54 (2009), http://scholarship.law.cornell.edu/clsops_papers/54. Fuentes raised the issue of sex discrimination so often that her boss, the General Counsel, called her a "sex maniac." *Id.* at 4.

57. *Id.* The coalition with Betty Friedan, author of *THE FEMININE MYSTIQUE*, came after Friedan visited the EEOC to interview staff for her second book. *Id.* at 5. NOW's mission statement reprised the themes first raised by the First Wave's Declaration of Sentiments, based on the premise that women's rights are human rights, and reaffirming a belief in the power of law reform to secure equality. See also, *The National Organization for Women's 1966 Statement of Purpose*, NATIONAL ORGANIZATION FOR WOMEN, <http://now.org/about/history/statement-of-purpose/>.

58. Pressman Fuentes, *supra* note 56, at 5.

59. *Id.* at 6. The initial decisions prohibited sex-segregated job advertising; prohibited employers from discriminating



Perhaps the most emblematic symbol of the dream deferred is the continuing presence of sexual harassment in the profession.

The Second Wave ushered in a period of law reform for equal economic treatment, reproductive autonomy, and freedom from workplace discrimination and harassment. It was a heady time for the women's movement. Federal laws such as Title VII,⁶⁰ the Equal Pay Act,⁶¹ and the Pregnancy Discrimination Act⁶² were passed to prohibit discrimination against women and to ensure equal access to employment, housing, and accommodations.⁶³ The United States Supreme Court held that women had a Constitutional right to choose abortion.⁶⁴ By the 1990's many believed that feminism was no longer needed, since both federal and state legislatures had passed laws prohibiting sex discrimination, and the quest for formal equality had come to an end.⁶⁵

The Limits of Formal Equality: A Dream Deferred

Throughout the Second Wave, women continued their elusive quest for equal participation in the legal profession.⁶⁶ Yet, at the turn of the 20th century, the American Bar Association Commission on Women in the Profession concluded that the agenda to improve gender equity in the profession was largely *unfinished*.⁶⁷ Women with similar qualifications, experience, and positions as men continued to face a significant pay gap.⁶⁸ Moreover, perceptions of gender bias in the legal profession persisted despite a decade of efforts to enhance diversity and inclusion.⁶⁹ The Commission concluded that women continued to suffer

against women who were pregnant or had children; and protected women from discrimination based on the preferences of her employer, co-workers, clients, or customers. *Id.*

60. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012).

61. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012).

62. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. §§ 2000e et seq. (2012)).

63. *See generally*, COBBLE, GORDON & HENRY, *supra* note 21, at 52-9 (summarizing the federal legal developments).

64. *Roe v. Wade*, 410 U.S. 113 (1973).

65. Jordan, *supra* note 1, at 636.

66. Beginning in 1986, the American Bar Association (A.B.A.) has adopted a series of goals and initiatives to increase diversity in the profession. The mission of Goal IX (which later came Goal III) was to promote full and equal participation in the legal profession. AM. BAR ASS'N, GOAL III REPORT (2016), <https://www.americanbar.org/groups/diversity/DiversityCommission/goal3.html>. In 1987, it created the Commission on Women in the Profession to identify barriers to women's advancement in the legal profession. *Commission on Women in the Profession*, AM. BAR ASS'N, [HTTPS://WWW.AMERICANBAR.ORG/GROUPS/WOMEN/ABOUT_US.HTML](https://www.americanbar.org/groups/women/about_us.html). In 1988, after nearly three decades of legal reform to secure women's equality, the Commission released a groundbreaking report, authored by Committee Chair Hillary Rodham Clinton, demonstrating that women were not advancing at a satisfactory rate in the legal profession. AM. BAR ASS'N, COMM'N ON WOMEN IN THE PROFESSION (1988), https://www.americanbar.org/content/dam/aba/administrative/women/1988_house_report.pdf ("in spite of the large number of women entering the profession, women are not increasing their representation among partnerships, judgeships and tenured law faculty positions in nearly the percentages that their numbers and class ranks would indicate. Disproportionate numbers of women lawyers enter government and legal services work but have not advanced to management positions commensurate with their numbers."). *Id.* at 2-3. The Commission found that women continued to face overt instances of bias, as well as subtle structural and attitudinal barriers to full participation. *Id.* at 3-4.

67. RHODE, *supra* note 10, at 5. Women were represented in higher numbers at entry levels in the legal profession, but they remained underrepresented in positions of greatest status, influence, and economic reward. Women with similar qualifications, experience, and positions as men continued to experience a significant pay gap. *Id.*

68. The average pay gap between female and male lawyers was about \$20,000. *Id.*

69. *Id.* at 6. Although over ninety percent of the firms surveyed offered part-time schedules, only three to four percent of attorneys used them, for fear that it would jeopardize their prospects for advancement. *Id.* A majority of female lawyers and a quarter to half of female court personnel reported experiencing or observing sexual harassment. *Id.* at 7. Women and minority attorneys continued to experience gender bias in the justice system involving disrespectful treatment (such as rac-

from unconscious stereotypes, structural barriers, sexual harassment, and bias in the justice system that limited their opportunities for advancement in the legal profession.⁷⁰

Perhaps the most emblematic symbol of the dream deferred is the continuing presence of sexual harassment in the profession.⁷¹ Anita Hill's dreams were dashed by the realities of gender discrimination on two occasions. As a young graduate of Yale Law School, her dream of a meaningful career in government service in our nation's capital was dashed when she was forced to quit her job at the Equal Employment Opportunity Commission to escape unwanted advances from her supervisor, Clarence Thomas.⁷² Eight years later, her dreams were dashed again when she appeared before the Senate Judiciary Committee to testify against the nomination of Thomas for a seat on the United States Supreme Court.⁷³

Anita Hill dared to dream that her painful recollections of sexual harassment would be seriously considered and weighed in the determination of whether Thomas was suitable for a lifetime appointment to the highest court in the land.⁷⁴ Instead, she was subjected to hostile questioning by an all-white male Senate Judiciary Committee that shifted the emphasis from Thomas' qualifications to Hill's credibility.⁷⁵ They questioned her motives, asked whether she was a "scorned woman," and inquired whether she had a "martyr complex."⁷⁶ At the conclusion of the hearing, Thomas' appointment to the Supreme Court was confirmed, and Hill went home to face the damaging consequences to her personal and professional life in Oklahoma.⁷⁷

The Hill-Thomas hearings held a mirror up to this country's attitudes and casual acceptance of workplace harassment. It also shone a light on the limitations of formal equality. During the time Hill worked for Clarence Thomas at the EEOC, she never considered filing a formal complaint against him for sexual harassment.⁷⁸ She was concerned that she would not be believed, and she did not feel society was ready to take the issue seriously.⁷⁹ In the first two decades of the twenty-first century, women in the legal profession have made only marginal gains.

In the wake of the 2016 election, social media erupted with stories of sexual harassment and abuse in the entertainment and political arenas.⁸⁰ The legal profession has not been featured in as many high-profile cases as the entertainment industry, but sexual harassment abounds behind closed doors.⁸¹ As recently as 2006, nearly half of the women surveyed by the ABA Commission on Women in the Profession reported being subjected to harassment in a law firm setting.⁸² Many cases go unreported because the power structure protects harassers and silences women; victims who do report are often ostracized and not believed.⁸³ In 2017, Judge Alex Kozinski, who retired from the 9th Circuit Court of Appeals after ten women accused

ist, sexist, or homophobic comments; stereotypical assumptions; and devaluation of credibility). *Id.* at 8.

70. *Id.* at 5.

71. *Id.*

72. ANITA HILL, *SPEAKING TRUTH TO POWER* 80-82 (1997).

73. *Id.* at 1-2, 199-200.

74. *Id.* at 2.

75. *Id.* at 189-98.

76. *Id.* at 1-2.

77. *Id.* at 243-50.

78. *Id.* at 71, 77-8. The Supreme Court first recognized sexual harassment as sex discrimination and as a violation of the Civil Rights Act in 1986 with their decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

79. *Id.*

80. See, e.g., Bill Chappell, #MeToo Movement is Person of the Year, 'Time' Says, NAT'L PUB. RADIO (Dec. 6, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/06/568773208/-metoo-movement-is-person-of-the-year-time-says> (describing the "MeToo social media campaign in the wake of high-profile accusations against Hollywood producer Harvey Weinstein).

81. See, e.g., Wendi S. Lazar, *Sexual Harassment in the Legal Profession: It's Time to Make It Stop*, L. J. NEWSLETTERS (Apr. 2016), <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2016/04/01/sexual-harassment-in-the-legal-profession-its-time-to-make-it-stop-2/?slreturn=20180104143209>.

82. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* 10 (2006), https://www.americanbar.org/content/dam/aba/migrated/women/woc/visible_invisibility.authcheckdam.pdf.

83. Lazar, *supra* note 81.

him on inappropriate sexual comments and conduct, described it as all a big *misunderstanding*.⁸⁴

Why have the laws prohibiting sexual harassment been so ineffective in curbing the problem? Some scholars question whether the *master's tools* can ever dismantle the hierarchical institutions and power dynamics that formed the foundations of inequality.⁸⁵ Having laws on the books is a necessary first step, but it takes more than laws to disrupt patterns of unconscious bias and discrimination that have existed for centuries. That is why many feminists believe that law reform alone can never lead to substantive equality.

The Shortcomings of Diversity and Inclusion Policies

Diversity and *inclusion* are well-intentioned policies that have emerged from formal equality and are subject to the same limitations. There is one simple reason that diversity and inclusion have not reached their stated goals. Power in the legal profession is concentrated at the top, and the top continues to be populated almost exclusively by white males. They control the pay, promotion, perks, and narrative. They protect one another from claims of harassment and turn a blind eye to unequal treatment of women and minorities.⁸⁶

Diversity and inclusion have been described by some experts as a two-step process. “Diversity is being invited to the party. Inclusion is being asked to dance.”⁸⁷ In the top echelons of the legal profession, some women have been invited to the party, and a few of us have been asked to dance. But most of us have been left behind when the glass slipper does not fit. We are caught in a double bind as retiring wallflowers or aggressive Sadie Hawkins.⁸⁸

The problem with *diversity* is that it perpetuates the reality that white males are the standard, and they hold all the power. The rest of us are all *diverse* and need to do our best to fit in. *Inclusion* is a step in the right direction, but all too often, being *asked to dance* also involves being asked to participate in unwanted sexual behavior.

That is why firms that institute parental leave policies and flexible hours are puzzled that so few women (and men) choose to exercise them.⁸⁹ They are rightly concerned that their decision to work shorter hours or take time off to be with their children will be seen as “diverse,” not the norm, and not worthy of making partner.⁹⁰

Women no longer want to be invited to the party. They don’t want to be asked to dance. Women are ready for a new approach that gives them a seat at the table where the party is being planned. This new sentiment is revealed in the philosophy and strategies of the next waves of young feminists who grew up in a post-formal-equality world.

84. Debra Cassens Weiss, *Kozinski announces his immediate retirement after more women accuse him of sexual misconduct*, AM. BAR ASS’N. J. (Dec. 18, 2017), http://www.abajournal.com/news/article/kozinski_announces_his_immediate_retirement_after_more_women_accuse_him_of/.

85. Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House* (1984), in *SISTER OUTSIDER: ESSAYS AND SPEECHES*, at 110, 114 (2007), https://collectiveliberation.org/wp-content/uploads/2013/01/Lorde_The_Masters_Tools.pdf.

86. See, e.g., AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS* 45 (2010), https://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.auth-checkdam.pdf (citing unconscious bias as a source of continuing discrimination). See also, RHODE, *supra* note 10, at 5–8 (citing unconscious stereotypes, inadequate support networks, inflexible workplace structures, sexual harassment, and bias in the judicial system); Lazar, *supra* note 81 (citing structural, legal and ethical impediments to ending sexual harassment).

87. *The Association of Legal Administrators Diversity Toolkit*, IILP REVIEW 40 (2017) (quoting Pauline Higgins, a leader in diversity education). The phrase was copyrighted by Verna Myers.

88. See, e.g., RHODE, *supra* note 10, at 6 (women risk criticism as being too “soft” or too “strident,” too “aggressive” or “not aggressive enough.” Sadie Hawkins is a cartoon character who gave rise to the pseudo-holiday “Sadie Hawkins Day,” when unmarried women literally chase after single men); see also Julia Plevin, *The Strange History and Uncertain Future of Sadie Hawkins Day*, ATLANTIC (Nov. 15, 2012) <https://www.theatlantic.com/sexes/archive/2012/11/the-strange-history-and-uncertain-future-of-sadie-hawkins-day/265272/>.

89. BRODHERSON, MCGEE & PIRES, *supra* note 4, at 9.

90. *Id.* at 2.

The Third and Fourth Waves

Anita Hill's treatment at the hands of the Senate Judiciary Committee did not go unnoticed by the next generation of young women. Following the hearing, Rebecca Walker, daughter of African-American poet and feminist Alice Walker, awoke from a dream in which women had already attained equality.⁹¹

Young women of her generation, many of them children of Second Wave feminists, had grown up expecting to be treated as equals.⁹² The Hill-Thomas hearings were a stark reminder that the fight was not over.⁹³ In her seminal article in *Ms. Magazine*, *I am the Third Wave*, Walker acknowledged that truth and vowed not to be silenced.⁹⁴

Third Wave feminists had a dream that young women could be free of the constraints of rigid categories, and could exercise freedom of choice with respect to such issues as parenting, work-life balance, the nature of sexuality and sexual identity, and diversity in the feminist movement.⁹⁵ They also recognized and harnessed the power of media and pop culture to promote their views that "feminism is good, feminism is fun, feminism is about expressing yourself and empowering you to make your own choices."⁹⁶

The world was moving quickly in the first decade of the twenty-first century, and the Third Wave quickly evolved into the Fourth Wave, shaped by a younger generation of feminists who grew up "tech-savvy and gender-sophisticated."⁹⁷ One of the key features of the Fourth Wave is its use of social media such as blogs and Twitter to comment on the news and create advocacy campaigns.⁹⁸ It also grew out of the frustrations of young women at the reality that decades of legal equality have not produced substantive equality.⁹⁹

The Fourth Wave took a decidedly more political turn with the election of Donald J. Trump as President of the United States. This stemmed in part from his attitudes throughout the campaign—from his stance against reproductive rights to his boasts about sexual exploits to his menacing behavior toward his rival, Hillary Clinton.¹⁰⁰

After the election, women realized that they could no longer take the formal equality and family friendly policies of the Third Wave for granted, as the new Trump Administration threatened to roll back rights on everything from reproductive health care to gay marriage.¹⁰¹ The most recent phase of the Fourth Wave is exemplified by two defining moments—the Women's March and the #MeToo Movement.

91. Rebecca Walker, *Anita Hill Woke Us Up*, HUFFINGTON POST, (Oct. 27, 2011, 11:01 AM, updated Dec. 27, 2011), https://www.huffingtonpost.com/rebecca-walker/anita-hill_b_1031311.html.

92. COBBLE, GORDON & HENRY, *supra* note 21, at 151.

93. *Id.* at 147-149.

94. Rebecca Walker, *Becoming the Third Wave*, *MS. MAGAZINE* (Spring 2002), <http://www.ms magazine.com/spring2002/BecomingThirdWaveRebeccaWalker.pdf> (Walker's essay is widely credited with launching a new era of feminism, but the movement did not really catch on until the beginning of the twenty-first century, when Jennifer Baumgardner and Amy Richards released their ground-breaking *Manifesta* for the future of feminism; see also JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* (2000)).

95. BAUMGARDNER & RICHARDS, *supra* note 94, at vi-vii. ("Prominent Third Wave issues include equal access to the Internet and technology, HIV/AIDS awareness, child sexual abuse, self-mutilation, globalization, eating disorders, and body image").

96. Barbara Ann White, *Foreword: Traversing 2nd and 3rd Waves: Feminist Legal Theory Moving Forward*, 39 U. BALT. L. FORUM i-viii (2008). Third wavers took charge of their own means of communication by writing blogs, 'zines, internet TV shows, and performance art. *Id.* Their cultural idols include the female burlesque singing group Pussycat Dolls. *Id.* at iii, ix.

97. Baumgardner, *supra* note 15, at 3.

98. *Id.*

99. Jessica Abrahams, *Everything you wanted to know about fourth wave feminism—but were afraid to ask*, PROSPECT MAGAZINE (Aug. 14, 2017), <https://www.prospectmagazine.co.uk/magazine/everything-wanted-know-fourth-wave-feminism> (feminism in the 21st century has shifted its focus from legal equality to a kind of discrimination that is harder to quantify—and harder to fight").

100. Alia E. Dastagir, *Analysis: Under President Trump, women prepare to grab back*, USA TODAY (Jan. 19, 2017), <https://www.usatoday.com/story/news/2017/01/19/trump-feminism-sexism-racism-womens-march-washington/96621634/#>.

101. *Id.*



The organizers of the Women’s March had a dream of building an encompassing movement that recognizes how women’s intersecting identities are impacted by a multitude of social justice and human rights issues.

The Women’s March

On the night of Donald Trump’s election, two women in different parts of the country—retired attorney Teresa Shook in Hawaii and fashion entrepreneur Bob Bland in New York City—independently concluded that the best response to the election was for women to march on Washington, D.C. in resistance.¹⁰² Their Facebook postings attracted thousands of interested women in just a few days, and soon a movement was born.¹⁰³

Bland soon realized that she could not plan such a massive protest on her own, and recruited three experienced organizers to co-chair the march.¹⁰⁴ The leadership team built a massive network of activists and community organizers around the country to help with everything from fundraising to logistics.¹⁰⁵ Through this elaborate web of collaborators, the Women’s March Leadership created a movement of nearly five million people from Washington, D.C. to Seoul in the single largest protest in world history on January 21, 2017.¹⁰⁶

The organizers of the Women’s March had a dream of building an encompassing movement that recognizes how women’s intersecting identities are impacted by a multitude of social justice and human rights issues.¹⁰⁷ They crafted a *Guiding Vision and Statement of Principles* that envisions a representative government based on human rights notions of liberty and justice for all.¹⁰⁸ It equates gender justice with racial justice with economic justice, and encompasses issues from gender-based violence to civil rights to worker’s rights, immigrant and refugee rights, policy brutality and LGBTQIA rights.¹⁰⁹

Fortune Magazine recognized the Women’s March organizers as “among the world’s greatest leaders”

102. THE WOMEN’S MARCH ORGANIZERS & CONDE NAST, TOGETHER WE RISE: THE WOMEN’S MARCH: BEHIND THE SCENES AT THE PROTEST HEARD AROUND THE WORLD 27-28 (2018) [hereinafter TOGETHER WE RISE]. Teresa Shook, a retired attorney in Hawaii, posted the idea on her Facebook page before she went to bed, and had 10,000 women signed on by the next morning. *Id.* at 27. Bob Bland, a fashion entrepreneur in New York City, suggested the same thing to her Facebook group comprised of a few thousand “nasty women.” *Id.* at 28.

103. *Id.* at 30-34.

104. Katherine Cusumano, *The Women of the Women’s March: Meet the Activists Who Are Planning One of the Largest Demonstrations in American History*, W MAGAZINE (Jan. 19, 2017), <https://www.wmagazine.com/story/womens-march-on-washington-activists-organizers>. See also, Sarah Ruiz-Grossman, *These are the Fierce Activists Leading the Women’s March on Washington*, HUFFINGTON POST (Feb. 1, 2016 05:48 PM), https://www.huffingtonpost.com/entry/women-march-on-washington-organizers_us_58407ee8e4b017f37fe388d1. The four co-chairs of the march were Bland; Carmen Perez, head of The Gathering for Justice; civil rights activist Tamika Mallory; and Linda Sarsour, executive director of the Arab-American Association of New York. *Id.*

105. *Id.*

106. TOGETHER WE RISE, *supra* note 102, at 11.

107. *Guiding Vision and Definition of Principles*, WOMEN’S MARCH, <https://www.womensmarch.com/principles/>.

108. *Id.*

109. *Id.*

in March 2017.¹¹⁰ “The Women’s March stands out as a remarkable example of leadership that eschews ‘command and control’ in favor of ‘connect and collaborate,’ two-way over one-way conversation, and wielding moral over formal authority.”¹¹¹ Most importantly, the Women’s March was not just a single act of resistance at a particularly low point in women’s history. It remains a vibrant, ongoing force for social justice.¹¹² During the same time frame, another movement was being birthed that would add momentum to the resistance set in motion by the Women’s March.

The #MeToo Movement

Women’s frustration with the blatant misogyny of the Trump campaign also erupted in a social media explosion of stories about rampant sexual harassment in the workplace.¹¹³ Beginning with high-profile accusations against Hollywood producer Harvey Weinstein, thousands of women began sharing their stories under the hashtag #MeToo.¹¹⁴ The accused include actors, directors, celebrity chefs, musicians, news anchors, journalists, politicians, and business executives.¹¹⁵ Dozens of the country’s most powerful men have lost their jobs or resigned from political office as a result of the scandal.¹¹⁶

On January 1, 2018, three hundred prominent women in the entertainment industry teamed up to launch Time’s Up, an ambitious initiative to fight systemic sexual harassment in Hollywood and beyond.¹¹⁷ The women started a legal defense fund with \$13 million in donations to support less privileged workers to challenge sexual misconduct at farms, factories, restaurants, and hotels.¹¹⁸

Like the Women’s March, the Time’s Up initiative is volunteer-run and has decentralized leadership made up of working groups.¹¹⁹ One group in the coalition established a commission headed by Anita Hill to “tackle the broad culture of abuse and power disparity” in the entertainment industry.¹²⁰ Another group, 50/50 by 2020, is pushing the industry to achieve gender parity in leadership positions by 2020.¹²¹ The group launched its first public appearance at the Golden Globes, when nearly every woman wore

110. Stephanie Castillo, *Why the Women’s March on Washington Organizers Are Among the World’s Greatest Leaders*, FORTUNE (Mar. 24, 2017), <http://fortune.com/2017/03/24/womens-march-washington-worlds-greatest-leaders/>. They were recognized for coordinating the massive protest in barely two months, “a testament to the leadership potential of vibrant, diverse, and self-organizing groups.” *Id.*

111. *Id.* (quoting Dov Seidman, CEO, LRN and author of “How”).

112. *Power to the Polls: We are the Leaders We Have Been Waiting For*, WOMEN’S MARCH, <http://www.powertothevotes.com/>. On the anniversary of the first march, organizers scheduled a gathering in Las Vegas, Nevada for Women’s March: Power to the Polls, to launch a national voter registration tour. Building on the momentum of the off-year elections in 2017, which brought victory to candidates of color and transgender candidates around the country, the tour will visit swing states to register voters and advocate for progressive candidates and policies. *Id.*

113. *Person of the Year 2017: The Silence Breakers*, TIME (Dec. 6, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/>. On December 6, 2017, Time Magazine named the “Silence Breakers” of the #Me Too Movement as person of the year. *Id.*

114. See, e.g., Dan Corey, *Since Weinstein, Here’s a Growing List of Men Accused of Sexual Misconduct*, NBC NEWS (Jan. 10, 2018, 4:34 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546>; see also Sarah Almukhtar, Michael Gold & Larry Buchanan, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall From Power*, NEW YORK TIMES (updated Jan. 11, 2018) <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html>; Chappell, *supra* note 80.

115. *Id.*

116. Allegations of sexual misconduct against Republican Roy Moore led to his stunning defeat in the Alabama Senate race, marking a watershed moment for the #MeToo movement. Karen Tumulty, *With Moore’s defeat, #MeToo movement forces a reckoning*, WASHINGTON POST (Dec. 13, 2017) https://www.washingtonpost.com/powerpost/with-moores-defeat-metoo-movement-forces-a-reckoning/2017/12/13/0ffa11fa-deb8-11e7-8679-a9728984779c_story.html.

117. Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018) <https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html>. See also TIME’S UP, <https://www.timesupnow.com/>.

118. In an impassioned response to the members of Alianza on behalf of more than 1,000 women in the entertainment industry, the group acknowledged their privilege and pledged to stand with working women to confront sexual harassment and support them by setting up a legal defense fund. *Open Letter From Time’s Up*, N.Y. TIMES, (Jan. 1, 2018), <https://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html>.

119. *Id.*

120. Cara Buckley, *Anita Hill to Lead Hollywood Commission on Sexual Harassment*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/movies/anita-hill-hollywood-commission-sexual-harassment.html>.

121. See, e.g., Buckley, *supra* note 120. See also 50/50 BY 2020, <https://5050by2020.com/>.



Legal employers who want to attract and retain talented women will have to find a new way of doing business to finally overcome the barriers women have faced in the legal profession.

black gowns, and many men sported Time's Up pins, as a symbol of opposition to gender and racial inequality in the industry.¹²²

Lessons from the Fourth Wave

With the election of Donald Trump, the Fourth Wave evolved into a much more political and media savvy movement. While retaining the Third Wave's emphasis on individuality and human rights, it developed a sophisticated leadership model with several key qualities that have implications for the legal profession.

The organizers of the Women's March consciously chose their leaders to be representative of the people they were trying to lead, and to give voice to women who have been traditionally missing from the table. They decentralized leadership in the form of small working groups or huddles, so that more people could take leadership roles. They recognized and integrated the intersecting identities, social justice, and civil rights issues of their constituents. Finally, they shifted the emphasis from process and policies to producing results.¹²³

Implications for the Legal Profession

Young women entering the legal profession today have a dream. They dream of a profession where they do not have to choose between work and family.¹²⁴ They dream of a profession where they will be recognized and rewarded for their contributions.¹²⁵ Both women and men of this generation dream of living a balanced life, with time not just for family, but also to pursue other interests.¹²⁶ Because they are willing to move on to other opportunities for better job advancement and work-life balance,¹²⁷ legal employers who want to attract and retain talented women will have to find a new way of doing business to finally overcome the barriers women have faced in the legal profession.

The organized bar and most legal employers recognize the need for new initiatives to increase diversity in the profession.¹²⁸ A majority of the top 200 U.S. law firms have women's initiatives as part of their diversity plans.¹²⁹ Most have targeted hiring and promotion strategies, family-friendly work policies,

122. Hilary Weaver, *Golden Globes 2018: Black Dresses, Time's Up Pins, Activist Plus-Ones, and Everything Else You Need to Know*, VANITY FAIR (Jan. 7, 2018, 4:37 PM), <https://www.vanityfair.com/style/2018/01/golden-globes-2018-red-carpet-times-up>.

123. TOGETHER WE RISE, *supra* note 102, at 107–13.

124. Meghan M. Boone, *Article: Millennial Feminisms: How the Newest Generation of Lawyers May Change the Conversation about Gender Equality in the Workplace*, 45 U. BALT. L. REV. 253, 257 (2016).

125. *Id.* at 257–67.

126. *Id.* at 268–70.

127. *Id.* at 282–83.

128. *See supra* note 65 and accompanying discussion.

129. NAWL, *supra* note 5, at 9.

specialized training programs, and mentoring programs.¹³⁰ A 2017 study found that law firms are taking important steps to increase gender equity, yet they are experiencing only limited success.¹³¹ Despite all the money, programs, and good intentions, women are still not feeling valued and respected in the legal profession. It is time for a new model.

Based on the lessons of the Fourth Wave, this article proposes a new approach to achieving gender equity in the legal profession, based on the four pillars of conscious leadership, representation, intersectionality, and decentralization of leadership.

Conscious Leadership v. Meritocracy

The default leadership model in legal institutions is based on notions of meritocracy. The theory is that people compete on a level playing field, and the best and brightest get elevated to the highest ranks of power. They become the equity partners in law firms, general counsel of corporations, federal court appellate judges, and political appointees.

The problem with this system is that it perpetuates the status quo. At the top of the profession, nearly all of the applicants are meritorious. In the absence of conscious choice, people in power generally choose to elevate people who look, think, and act like them.¹³² Whether this is the result of legacy, unconscious bias,¹³³ or innocent preferences, the results are clear. It is still exceedingly difficult for women and people of color to rise through the leadership ranks.¹³⁴

By contrast, the Women's March started as the brainchild of two white women on opposite sides of the United States.¹³⁵ They could easily have replicated the mistakes of the Second Wave feminists and developed an all-white leadership team, but fate intervened to raise their consciousness.¹³⁶ Vanessa Wruble, editor of OkayAfrica, joined the team and advised them that it would be a mistake for the March to be organized by white women alone.¹³⁷ That moment of consciousness led to a very different outcome. Bland reached out to three women of color to co-chair the event, and one of the most representative movements in history resulted.¹³⁸

Conscious leadership is a tool for addressing unconscious bias in the decision-making process. It is not a goal, but a process of examining each decision to make sure that it aligns with the institution's diversity and inclusion goals. Leaders of the Women's March had many occasions to exercise conscious leadership, beginning with a controversy about the name *Million Women March*, seen by many people of color as an appropriation of the 1997 Million Women March.¹³⁹ When women took to social media threatening to boycott the march, the leadership team listened and changed the name.¹⁴⁰

130. *Id.* at 10–11.

131. BRODHERSON, MCGEE & PIRES, *supra* note 4, at 6. Female attorneys still feel forced to make significant trade-offs between career success and their personal lives. Only forty-four percent believe they can have it all, and only thirty-six percent believe that gender diversity is a priority for their employers. A majority of women surveyed said that they did not want to make partner because of the costs to their personal and family lives.

132. Christine Riordan, *Diversity is Useless Without Inclusivity*, HARV. BUS. REV., DEMOGRAPHICS (June 4, 2015), <https://hbr.org/2014/06/diversity-is-useless-without-inclusivity> (“leaders often hire and promote those who share their own attitudes, behaviors, and traits.”)

133. *Id.* (“subtle bias” leads supervisors to favor people who are similar in terms of race, gender, and other characteristics).

134. *Id.*

135. TOGETHER WE RISE, *supra* note 102, at 28–29.

136. *Id.* at 29.

137. *Id.*; OkayAfrica is a media company that connects a global audience to the African continent through journalism and high-profile cultural events. OKAYAFRICA, <http://www.okayafrica.com/>.

138. TOGETHER WE RISE, *supra* note 102, at 29.

139. *Id.* at 37.

140. *Id.* at 38. With the blessings of Bernice King, daughter of Martin Luther King, Jr., they changed the name to Women's March on Washington in homage to the 1963 March on Washington. *Id.* at 37. To deal with ongoing issues surrounding race, gender, and identity, the leadership team created a transparent process called “daring discussions” where people could engage and examine their issues openly. *Id.* at 95.

Without conscious leadership, the Women’s March would not have succeeded in bridging the differences among the many constituent groups who became a part of the movement. The legal profession has developed “robust models of diversity training” on implicit bias, unconscious discrimination, and attitudinal and cultural opposition to diversity.¹⁴¹ However, training programs that just *check the box* for the organization’s diversity goals have not made a substantial difference in the boardrooms where important decisions get made.

Rather than requiring stand-alone courses on bias and diversity, the legal profession should incorporate conscious leadership concepts into their traditional leadership training model. The goal would be for all prospective leaders to understand that conscious awareness and transparent conversation about race and gender are integral parts of successful leadership. Leaders and power brokers in the profession must become aware of the ways in which the current system perpetuates power and privilege, and consciously choose to do something different. They must not accept their natural tendencies to hire and promote people who look like themselves, but instead ask deeper questions about access to information and decision-making power.¹⁴²

This new model of *conscious leadership* might look at the current statistics about women’s lack of progress in the profession and ask, how could we do something different to achieve a different outcome? It all begins with consciousness, which should be incorporated into every aspect of the profession’s diversity and inclusion plan, beginning with its goals.

From Diversity to Representation

As noted above, the legal profession has long been engaged in a quest to increase diversity and inclusion of women, racial and ethnic minorities, and other under-represented groups into the legal profession.¹⁴³ Although diversity and inclusion are well-intended goals, the Fourth Wave provided us with a different lens through which to view the issue. It is a representative vision based on democratic principles of liberty and justice for all.¹⁴⁴ The difference between diversity and representation is the difference between invitation and entitlement. In diversity initiatives, women and people of color are invited to the table, whereas in a representative democracy, they would be entitled to be there as representatives of the communities they serve.¹⁴⁵

The entertainment industry is leading the way with its Time’s Up 50/50 by 2020 initiative, which is calling on the entertainment industry to achieve gender equity in leadership positions by 2020.¹⁴⁶ They are also seeking proportional representation for people of color, people with disabilities, and the LGBTQIA community.¹⁴⁷ The National Association of Women Lawyers (NAWL) has issued a similar challenge, calling on the legal profession to increase representation of women to one-third in positions of leadership and prestige.¹⁴⁸

141. AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *supra* note 86, at 12.

142. Riordan, *supra* note 132, at 2.

143. AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *supra* note 86, at 9 (ABA diversity programs include racial and ethnic minorities, women, persons with disabilities, and the LGBT community).

144. WOMEN’S MARCH, *supra* note 107 (outlining “a representative vision for a government that is based on the principles of liberty and justice for all.”). The American Bar Association articulates a “democracy rationale” for creating greater diversity in the profession based on a “commitment to equality, broad political participation, social mobility, and political representation of groups that lack political clout and/or ancestral power.” AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *supra* note 86, at 9.

145. AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *supra* note 86, at 48. “Representation” is not the equivalent of affirmative action or quotas. It is a conscious consideration of how legal employers should include factors such as race, sex, and other identities in “holistic, multi-dimensional ways that differ fundamentally from the forms of affirmative action (e.g., quotas and set-asides) which courts have prohibited.” *Id.*

146. 50/50 BY 2020, <https://5050by2020.com/>.

147. *Id.*

148. NAWL, *supra* note 5, at 1. The challenge applies to General Counsels of Fortune 1000 companies, new law firm equity partners, law firm lateral hires, and law school deans. *Id.* It also calls for an increase of at least one-third in the representation of women of color and LGBTQ women in every segment of the legal profession. *See also*, ABA summit searches for solutions to ensure career longevity for women in law, AM. BAR ASS’N. NEWS (Nov. 10, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/11/aba_summit_searches.html (Forty-four law firms are piloting the “Mansfield

What might change if a new conscious leadership team viewed the “One-Third” challenge through a representational lens? Some might argue that there are a limited number of leadership positions to be filled, and an even smaller number of women and minorities who have made it to the stage in their careers to be considered for them. Rather than competing over a limited supply of leadership positions, conscious leaders could consider ways to expand the pie by creating more opportunities for leadership, along with pipeline programs to increase the pool of qualified applicants.

Decentralization of Leadership and Pipeline Programs

One of the strategies that made the Women’s March so successful was to create a *leaderful* movement by decentralizing decision-making power.¹⁴⁹ A core team of national leaders coordinated the efforts, but they worked in collaboration with literally hundreds of individuals and organizations around the country to strategize, coordinate, plan logistics, and amplify the voice of the movement.¹⁵⁰

Rather than focusing all of its attention on the top, conscious leadership might consider how to develop a pipeline through the beginning and mid-level career.¹⁵¹ Law schools and legal employers have worked hard to provide pipelines to graduation and entry-level positions, but the pipeline abruptly stops after the recruitment and hiring stage. Conscious leadership strategies to address this problem might include developing more working groups or committees where junior attorneys have the opportunity to take leadership, exercise decision-making authority, and engage with senior management in meaningful ways.

Women’s initiatives in law firms provide specialized leadership and business development training, but that does not serve the purpose of actually letting women and minorities lead.¹⁵² Creating consciously representative working groups with real decision-making power would ameliorate this situation. It would provide women and minorities with an opportunity to demonstrate their effectiveness, a pipeline to upper-level management, and would likely lead to better problem-solving.¹⁵³

University of Michigan Professor Scott E. Page has mathematically demonstrated that “diverse groups of problem solvers outperformed the groups of the best individuals at solving problems.”¹⁵⁴ That is because people from different backgrounds bring different ways of looking at things. In other words, there is value to creating a workplace where people feel comfortable “bringing their whole selves” to work.¹⁵⁵ True diversity involves more than just increased numbers. “The culture of the workplace must actively allow and respect diverse ways of being, speaking, dressing, and interacting.”¹⁵⁶

Embracing Intersectionality

Bringing one’s whole self to work requires a recognition of Fourth Wave principles that “women have intersecting identities and are therefore impacted by a multitude of social justice and human rights

Rule” which requires them to consider a candidate pool comprised of at least 30 percent women and attorneys of color for promotions, senior-level hiring, and leadership positions).

149. TOGETHER WE RISE, *supra* note 102, at 53. “A ‘leaderful’ movement is a movement where there isn’t a single person whose vision creates the strategy, but rather many people who can be visionary leaders. Ideas and power converge into something more powerful than what one leader could do on their own.” *Id.* (quoting Jenna Arnold, Women’s March Strategic Adviser and National Organizer).

150. *Id.* at 49, 75.

151. *See, e.g.*, NAWL, *supra* note 5, at 6–7. In 2017, women make up twenty-five percent of firm governance roles on prestigious committees such as the compensation committee, or as a managing or practice group partner or leader.

152. *See*, NAWL, *supra* note 5, at 11 (some women view the additional time needed to participate in Women’s Initiatives as more burdensome than helpful).

153. *See, e.g.*, Claudia Dreifus, *In Professor’s Model, Diversity = Productivity*, N.Y. TIMES (Jan. 8, 2008), <http://www.nytimes.com/2008/01/08/science/08conv.html> (SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS AND SOCIETIES (2007)).

154. *Id.*

155. AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *supra* note 86, at 43–4 (“Can You Bring Your Whole Self to Work?”).

156. *Id.* at 43.

issues.”¹⁵⁷ The ABA has identified intersectionality as an *emerging issue* in diversity programs and policies for the legal profession, noting that “[e]ngagements with any characterizations of identity must make room for these multi-faceted identifications.”¹⁵⁸

Yet, most diversity initiatives and reports continue to categorize employees along one axis of race, ethnicity, gender, or identity. Just like census check boxes that make one choose Black or White, Male or Female, diversity initiatives based on binary categories require women to privilege one identity over another. One can be Black or a Woman, but not a Black Woman.¹⁵⁹

One example of such binary choices is *woman only* or *minority only* diversity training programs.¹⁶⁰ Another example is the ABA’s recommendation that legal employers create affinity groups, town halls, retreats, and other events for attorneys from underrepresented groups.¹⁶¹ Although well-intentioned, these initiatives put women in an isolated box where they may draw strength from one another, but do nothing to change the attitudes, culture, and underlying power structure of the organization.¹⁶² What is missing in programs that isolate women and minorities is the opportunity for members of both privileged and underrepresented groups to bring their whole selves to the table and learn from one another.

Taking a lesson from the Fourth Wave, the legal profession should abandon this compartmentalized approach to diversity and inclusion, and instead create opportunities for attorneys to bring their whole selves to trainings, leadership development, and professional growth opportunities.

Conclusion

Fueled by the Women’s March and other Fourth Wave feminist movements, the legal profession must have its own reckoning with structural sexism and racism, unconscious bias, and harassment. My thesis is that creating a more conscious leadership model in the legal profession will result in better outcomes. By expanding beyond diversity to representation, and beyond inclusion to intersectionality, legal employers can make sure that women and men of multiple identities have a seat at the decision-making table. Doing so will result in better outcomes: more women, especially women of color, as partners and managers; less sexual misconduct; and a cultural shift in our very understanding of what it means to be a *good* and *successful* lawyer.

157. “When women lead, a different narrative emerges, one of collaboration—in which, rather than being divided by race, sexual orientation, ability, or other factors, we are united, bringing all our identities to bear in favor of fundamental human equality.” WOMEN’S MARCH, *supra* note 107.

158. AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *supra* note 86, at 47.

159. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex; A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139, 140 (1989). Critical feminist race scholar Crenshaw first introduced the concept of intersectionality in legal scholarship in 1989. It has recently gained currency with Fourth Wave feminists to describe the multiple identities most women navigate with respect to race, gender identity, sexual orientation, ability, and socio-economic status.

160. *See, e.g.*, NAWL, *supra* note 5, at 10 (most firms sponsor programming for women including specialized trainings, networking opportunities, formal mentorship and sponsorship programs).

161. AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, *supra* note 86, at 27.

162. Riordan, *supra* note 132, at 3 (attorneys from underrepresented populations often downplay their differences and adopt characteristics of the majority to fit in).



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Be Bold and Chart Your Own Course: Risk-Taking Across Settings in Law

Margo Wolf O'Donnell

Partner and Co-Chair Labor & Employment Group, Benesch, Friedlander, Coplan & Aronoff LLP

Meredith Emerson Ritchie

General Counsel and Chief Ethics Officer of Alliant Credit Union

It is essential that women attorneys learn to strategically take calculated risks in order to advance their careers. Here, O'Donnell and Ritchie encourage readers to strategize, be bold, and ask for what they want and tell them how to do just that.

I. Introduction¹

As law firms and corporations continue to seek pathways to building gender diversity at all levels of their organizations, experts on diversity and inclusion point to the need for more women in leadership roles.² Organizations that achieve gender diversity in entry-level positions but continue to maintain predominantly male management are falling far short of the goal they claim to be seeking to achieve. But when women occupy positions of power, their very presence signals to younger women coming up that, with hard work and careful planning, it is possible for them to reach the same heights as any of their male counterparts. As the saying goes, “You have to see it in order to be it.” In addition to forging paths for others to follow, women in leadership positions influence the culture of an organization, from the way it serves its clients to the way colleagues interact to the formation of new workplace policies that impact the work lives of men and women alike.³

Without question, law firms and corporations need more women in leadership positions.⁴ There are many ways to achieve this goal, and most of them depend on important structural changes that organizations must commit to making.⁵ But at least one method is fully within the control of individual women: their willingness to take calculated risks at critical junctures in their careers. These risks that propel women to the next level in the legal profession can take on different forms at different stages in their career, but they all come down to a willingness to boldly seek out opportunities and overcome fear of making the ask, whether it be for a promotion or higher compensation.

1. Many of the statements in this article are opinions and observations of the authors. Both authors have practiced in the legal profession for more than twenty-five years and have experienced and observed women and gender issues in the legal profession during this time both in-house and in law firms. Both authors also are experienced in leading women's initiatives both within and outside of the legal organizations where they have worked over the years and have served as mentors for many other women lawyers. Both authors also have taken on leadership roles in bar associations and other organizations with the mission of helping other women attorneys succeed. They have planned and led dozens of programs intended to help women succeed in the legal profession and both have won awards for their innovative programming on behalf of women attorneys.

2. See Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey* (Peterson Inst. for Int'l Econ., Working Paper No. 16-3, 2016), <https://piie.com/system/files/documents/wp16-3.pdf>.

3. *Id.*

4. *Id.*

5. See LAUREN STILLER RIKLEEN, *CLOSING THE GAP: A ROAD MAP FOR ACHIEVING GENDER PAY EQUITY IN LAW FIRM PARTNER COMPENSATION* (2013), https://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap_authcheckdam.pdf; see also DESTINY PEERY, *PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS* (2018).

The paths and choices faced by women attorneys differ across organizations. Below, we examine the experience of two settings, a law firm and an in-house counsel's office, to zero in on specific opportunities for women to move beyond the safe path and propel their careers forward by taking strategic risks. Based on our years of practice, we have seen and experienced ourselves that being willing to take risks has a direct correlation on the ability of women to succeed in any setting in the legal profession.

II. Risk-Taking in a Law Firm Setting

The primary demand on lawyers in a law firm setting is the need to build and maintain a book of business.⁶ With women representing only nineteen percent of equity partners, according to the National Association of Women Lawyers, it is clear that gender disparity and institutional sexism make this task more difficult for women than men.⁷ Younger associates may inherit clients from mentoring partners, who tend to be male and choose to mentor associates who remind them of themselves.⁸ In addition, women lawyers may not have access to the broader formal and informal networks through which business flows.⁹ In many cases, this means women must work harder to make connections with new clients without the benefit of these channels. It is easy to feel defeated by these circumstances, and we have observed many women lawyers choose to retreat to less ambitious positions or practice areas because putting themselves “out there” to go after new business feels like too much of a risk.

But this feeling that the deck is stacked can become a self-fulfilling prophecy, and it does not take into account something that is equally true: the world of business really is changing in terms of diversity. While law may be one of the last industries to see true gains in diversity, the rest of the business world—the source of clients seeking legal services—seems to be much further along in this evolution.¹⁰ Access and connections still count for a lot, but clients are increasingly demanding a diversity of perspectives and experience in their lawyers.¹¹ Not to mention that more than ever these clients are women themselves.¹² Women in law firms can build a sustainable book of business and succeed when they take advantage of all available avenues to them to developing business—including their own formal and informal networks and seeking new credentials. Then women must choose every day to take risks, by looking for opportunities and picking up the phone or sending the email to a potential client. These small risks taken on a daily basis lead to increased connections with client, which then leads to a larger book of business—the key to law firm equity partnership and leadership positions.

Risk-taking operates on a larger scale at particular junctures in a woman's law firm career. In the early years, the goal is to learn as much as possible on the path to becoming an expert in a given practice area in order to provide clients with the best services. As mid-career life grows more complex, with responsibilities in and outside of work, many women seem to begin to curtail their ambition and, consciously or unconsciously, hew to the safe path.

6. *Id.*

7. DESTINY PEERY, PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS (2017), <http://www.legalexecutiveinstitute.com/wp-content/uploads/2018/05/130-PM-2017-NAWL-Survey-Report.pdf>.

8. *Id.*

9. *Id.*

10. Daniel S. Wittenberg, *Corporate Clients Demand More Diversity from Law Firms*, AM. BAR ASS'N BUS. OF LAW (Aug. 1, 2017), <https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/corporate-clients-demand-more-diversity-law-firms/>.

11. Marc Brodherson, Laura McGee & Mariana Pires dos Reis, *Women in Law Firms*, MCKINSEY & Co. (Oct. 2017), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/gender%20equality/women%20in%20law%20firms/women-in-law-firms-final-103017.ashx>.

12. Cynthia Dow, *More Women Than Ever Before in General Counsel Role at Fortune 500 Companies*, LAW.COM (July 25, 2018), <https://www.law.com/corpocounsel/2018/07/25/more-women-than-ever-before-in-general-counsel-role-at-fortune-500-cos/?sreturn=20181023202603>.

However, from our experience, mid-career can also be the ideal time to begin a new chapter and tackle a challenging role. Years of working in the legal profession have built skills and wisdom younger lawyers cannot begin to imagine. Mid-career lawyers also have been around enough to see that setbacks happen to every lawyer and they are only temporary—the fear of failure no longer holds as much power as it used to. Seeking out a new opportunity by changing firms, taking on a leadership role, or altering focus in some other way could be an energizing move, both for the lawyer and for the lawyers’ clients. But these kinds of experiences are only available to women lawyers willing to leave the safety of the status quo and take bold risks.

III. Risk-Taking in an In-House Setting

While in-house lawyers do not face the same business-development pressure, they do have the constant need to prove their value to their internal customers within the organization. It might seem strange to advocate for the importance of risk-taking in a position that exists to minimize risk for the company, but forging a thriving career as an in-house counsel requires a woman to do just that. On a day-to-day basis, the counsel’s office becomes the office of “no—where new projects or ventures get stopped in their tracks. But an in-house attorney is much more valuable to her organization when she can help colleagues find elegant solutions to the challenges new ventures pose. Taking calculated risks by using the law to find a solution puts a lawyer on the winning side of innovation and growth, which is good for the company and also for that lawyer’s career.

Risk-taking also plays a role when it comes to advancement. Unlike a law firm, where all partners have the opportunity, at least in theory, to move up the ranks, there is only one general counsel spot in a corporation. Many women find themselves stuck in an assistant or associate general counsel role, unsure of how to position themselves for serious consideration for the top position.¹³ An oft-cited statistic from a Hewlett-Packard internal report claims that men will apply for positions they feel about sixty percent qualified for, while women believe they must be one-hundred percent qualified.¹⁴ Whether that is because women lack the confidence than men possess, or because they simply overemphasize on-paper qualifications at the expense of relationships or creative framing of their experience, the end result is that women tell themselves they are not ready for the next step when in fact they may be.

The truth is that no one will come knocking to deliver a promotion. Diligent preparation and quality work are not the only, or even the most important, factors in becoming visible and successful within an organization. Women must be bold.

But what does boldness look like in-house? It begins with an honest accounting of achievements and value to the corporation, as well consideration of feedback from trusted colleagues and mentors, to assess that they are ready to take a risk to move their career forward. The next phase requires strategic thinking. Women might seek out a group actively working toward grooming women for these top positions and learn as much as possible about how to advocate for themselves. And, again, as much as women must focus on skills and experience, they must also attend to strategic relationships, among peers and mentors, who will support their candidacy and get them closer to their goal. When not taking the risk is the biggest risk of all, it is time to leap.

IV. The Crucial Risk that Law Firm and In-House Attorneys Must Take to Progress in Their Careers

Whether at law firms or in-house, women attorneys must face and overcome one specific risk: asking for what they want. We, the authors, received critical promotions to law firm partner and to general counsel positions when we saw that the timing was right and made the ask. We needed to

13. *Id.*

14. Tara Sophia Mohr, *Why Women Don’t Apply for Jobs Unless They are 100% Qualified*, HARVARD BUS. REVIEW (Aug. 15, 2014), <https://hbr.org/2014/08/why-women-dont-apply-for-jobs-unless-theyre-100-qualified>.

communicate that we felt ready for that promotion, and that we were confident of our entitlement to it. That is why it is especially important that women be clear and direct when articulating what they want. Otherwise, it is only too easy to be passed over for that important promotion that is essential to progress to the next level. We knew that if we asked and did not receive the requested promotion, it could have negatively affected the positions we had at the time. But we made the ask anyway, because we knew we deserved more in our careers than the status quo.

However, after taking that risk and receiving our promotions, we now face even more “risky” communications in our day-to-day work. As a law firm partner, it is imperative to make the ask for business when you know you or your firm can provide value. Likewise, as an in-house attorney, it is essential that your company understands the important role you are playing in the success of the business. This type of self-advocacy can feel uncomfortable, but with practice, it becomes easier, and is necessary to ensure continued success and attainment of leadership roles in a legal career.

V. Impediments to Risk-Taking Are Also Opportunities for Growth

Whether they are in law firms or in-house settings, based on our experience, women seem to fear risk more than men, take setbacks more personally, and struggle to bounce back from them. Why? It is not just some ephemeral lack of confidence holding them back. Studies through Stanford’s Clayman Institute for Gender Research have shown that men tend to be judged more on their potential, while women are judged on their achievements, leading men to be seen as skilled while women are viewed as merely lucky, forced to prove themselves again and again.¹⁵ Women also must walk a tightrope between respect and likability that men do not face. Finally, some evidence even shows that women’s failures are remembered by colleagues—probably due to the skilled/lucky dichotomy—longer than men’s.¹⁶ As a result, we have observed many women consider their fear of failure before taking steps forward in their careers.

Individual women cannot change these biases. But they can begin to work smarter, not harder, and learn from what has worked for men. As a 2013 Harvard Business Review piece put it, women need to realize work is not school.¹⁷ Instead of playing by the rules and trying to please the boss, women must figure out how to influence and challenge authority.¹⁸ They must also embrace improvisation and rely on their instincts and experience to guide them. They must also recognize that performing well is not the best way to promote themselves. Instead they must perform well *and* campaign for their careers, playing office politics to their advantage, and become the kind of indispensable team members who advance.¹⁹

VI. Conclusion

Individual women cannot shoulder the burden of achieving gender parity at all levels of the legal profession. Law firms and corporations must embrace policies and practices that tackle this problem from many angles, not just because it is a matter of fairness but because more diverse legal teams deliver better service to clients. But women can make a difference in their own careers by pledging to be active champions of their own work, seeking out opportunities they have earned, and, when the time is right, taking bold risks that move them forward. There will be rewards to this risk-taking for individual women, of course, but, perhaps even more significantly, over time the cumulative effect of all these individual choices might go some way to addressing some of the larger institutional and structural challenges we face. That will place more women in the position of being leaders and role models and challenging the perception that women are less focused on achievement and advancement than their male peers.

15. Adrienne Rose Johnson, *What Works for Women at Work*, STANFORD CLAYMAN INST. FOR GENDER RESEARCH (Feb. 3, 2014), <https://gender.stanford.edu/news-publications/gender-news/what-works-women-work>.

16. *Id.*

17. Whitney Johnson & Tara Mohr, *Women Need to Realize Work Isn’t School*, HARVARD BUS. REVIEW (Jan. 11, 2013), <https://hbr.org/2013/01/women-need-to-realize-work-isnt-schol>.

18. *Id.*

19. *Id.*

IILP Review 2019-2020: Racial and Ethnic Diversity, Equality, and Inclusion Issues in the Legal Profession

Today You Are My Brother; But Tomorrow, Maybe Not (The Scourge of Tribal Disenrollment)

Lawrence R. Baca

Retired attorney and former three-term President of the National Native American Bar Association

Tribal disenrollment – when a Native American Indian tribe formally informs a family that they are no longer officially part of the tribe. Baca, an Indian attorney himself and one of the foremost experts on the Native America legal community, explains the issue and discusses the laws and policies that come into play as hundreds of Indians continue to become disenrolled largely because of tribal money issues and federal government implications.

Imagine that you've lived in your community for thirty-five years. Your parents have lived there for almost sixty years. You have been a part of this community for a lifetime. Then a letter arrives in the mail stating that you are no longer a member of that community. You are told that you must leave. You are told that the land on which you live is someone else's and the home in which you live is no longer yours.

No, you are not an immigrant being deported, you are a Native to America—an enrolled member of an Indian tribe—and your tribe has just informed you that you and your family have been *disenrolled*. It is not another nation telling you that the welcome mat is not out. It is your own nation telling you that you are no longer welcome and that your citizenship has been revoked.

The concept of tribal enrollment is a construct of the federal government. When Indian tribes were placed on reservations, the United States government wanted to know how many Indians were being assigned to those lands and who they were. So they created lists of the names of members of each tribe. These became known as tribal rolls. Over time the tribes themselves adopted these rolls to identify who are the members of the tribe. For political purposes the enrolled members are citizens of the tribes. Citizenship grants to you certain rights including rights to some federal programs such as housing, healthcare and education. A loss of tribal citizenship is also a loss of those rights.

Disenrollment of tribal members by other tribal members who are in positions of tribal governmental authority is an epidemic across America among federally recognized Indian tribes.¹ This article will attempt to explain some very complex and convoluted laws and policies that make up what is known as federal Indian law that come into play in both the causes and potential solutions to this problem. My approach here is to paint with a broad brush in introducing you to these complex issues and refer you to the many other scholarly works that address this matter for lengthier discussions of this issue. Those guys get into the weeds—I am just going to describe the front lawn.² If you want citations for the propositions I put forward in this paper, read the articles to which I cite and cite to them. This article is intended to be informative on the subject of disenrollment but not to be a definitive text on the subject.

1. *Federally recognized tribe* is a legal term of art. It can be referenced to a list published by the Department of the Interior of tribes eligible to receive services from the Bureau of Indian Affairs. The list is published at 83 CFR § 4235 (2018).

2. Much of the research for this article was conducted by others. I am stealing liberally from the work of Gabe Galanda – with his permission, of course. See Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing The Tribal Disenrollment Epidemic: In Search Of A Remedy*, 57 ARIZ. L. REV. 383 (2015). Of the many articles written on this subject theirs is the most thorough and thoughtful.



Therefore, it is to my benefit if some of my brothers and sisters are deemed to be improperly enrolled because the smaller my tribe is at the time of disbursement, the larger my share becomes.

Disenrollment of Tribal Members

It is estimated that more than sixty tribes have in the last twenty years disenrolled thousands of members. A 2014 news article states that the Chukchansi tribe alone went from 1,800 members to 900 over a period of five years and several different disenrollments.³ The disenrollment of 306 Nooksacks in Washington State was described in another news article as the largest disenrollment in the history of Washington.⁴ With only 2,000 members on the rolls this accounts for a disenrollment of 15% of the tribe. The same article quotes David Wilkins, a professor of American Indian Studies at the University of Minnesota and a Lumbee Indian as believing that upwards of 8,000 tribal members have been disenrolled across the nation.⁵ Gabe Galanda puts the numbers at 9,000 members from seventy-nine tribes across twenty states.⁶

As seen in the articles cited herein, virtually everyone who has written on the subject has laid the fault for disenrollment at the feet of money. For example, if my tribe is to receive a certain amount of money in a settlement with the federal government obviously the government will determine who are in fact the members of my tribe by reviewing the tribal rolls. Therefore, it is to my benefit if some of my brothers and sisters are deemed to be improperly enrolled because the smaller my tribe is at the time of disbursement, the larger my share becomes. I profit if the federal government decides to disenroll someone after a review of the tribe's members. If the federal government's financial obligation is a specific amount of money per capita, it is to the government's financial benefit to shrink the tribe.

In the modern era, specifically since the advent of gaming in Indian country, many commentators blame the influence of large profit casinos for the dramatic increase in the tribal practice of disenrollment. While it is often said that power corrupts and absolute power corrupts absolutely⁷ it is equally said that money is the root of all evil.⁸ So it is equally true that people in power often have or want money. In tribes with highly successful gaming operations, millions of dollars are at stake. Casino profits exceed thirty billion dollars a year according to the National Indian Gaming Commission.⁹ The industry generates over ninety-seven billion dollars in sales. Many tribes use the

3. See John Ellis & Mark Benjamin, *Chukchansi Casino Brings Cash and Turmoil To Once Impoverished Tribe*, MODEST BEE (Oct. 18, 2014), <http://www.modbee.com/news/local/central-valley/article3183062.html>.

4. Paige Cornwell, "Nooksack 306' Fight to Remain in the Tribe", SEATTLE TIMES (Aug. 26, 2013). <https://www.seattletimes.com/seattle-news/lsqnooksack-306rsquo-fight-to-remain-in-tribe/>.

5. *Id.*

6. See Lee Allen, *Who Belongs? The Epidemic of Tribal Disenrollment*, INDIAN CTY. TODAY (Mar. 28, 2017), <https://indian-countrymedianetwork.com/news/native-news/belongs-epidemic-tribal-disenrollment/>.

7. Attributed to John Emerich Edward Dalberg Acton, 1st Baron Acton (10 January 1834 – 19 June 1902).

8. To be sure, that language is a misquote. "For the love of money is a root of all kinds of evil." 1 Timothy 6:10.

9. See *Disenrollment Leaves Natives "Culturally Homeless"*, CBS NEWS (Jan. 20, 2014, 3:58 PM), <https://www.cbsnews.com/news/disenrollment-leaves-natives-culturally-homeless/>.

funds for educational and housing programs, for tribal healthcare and fire and safety. Of the 240 tribes in twenty-eight states that have gaming businesses about half distribute some of the profits on a per capita basis to individual members.

To understand what is at stake in disenrollment we must first understand tribal membership. There are within America peoples whose ancestors were in America before the arrival of Columbus in 1492. These peoples are called Indian Tribes and Indians in the federal Constitution. In the modern era they are also referred to as Native Americans.¹⁰ Due to federal policies far beyond the scope of this paper, many people who are Indians by race and culture may or may not be “members” of their tribe. Some of the tribes still in existence are under federal law “recognized” by the federal government. This recognition is sometimes called having a government-to-government relationship between the tribal nations and the federal government. It often involves a tribe that has a treaty relationship with the federal government. As the federal government relocated tribes from their ancestral homelands to reservation lands they created the previously unknown concept of tribal rolls. If the United States is entering into a treaty with a tribe it wants a list of who are members of the tribe. Tribal enrollment is a concept created by the federal government.

Who is an Indian?

American Indians are the last people in America for whom there is a legal definition. Being Indian is a mix of racial makeup, cultural heritage and citizenship in a tribe. In the seminal treatise on federal Indian law, published in 1942, Felix S. Cohen wrote:

The term “Indian” may be used in an ethnological or in a legal sense. Ethnologically, the Indian race may be distinguished from the Caucasian, Negro, Mongolian, and other races. If a person is three-fourths Caucasian and one-fourth Indian, it is absurd, from the ethnological standpoint, to assign him to the Indian race. Yet legally such a person may be an Indian. From a legal standpoint, then, the biological question of race is generally pertinent, but not conclusive. Legal status depends not only upon biological, but also upon social factors, such as the relation of the individual concerned to a white or Indian community.

Recognizing the possible diversity of definitions of “Indianhood,” we may nevertheless and some practical value in a definition of “Indian” as a person meeting two qualifications: (a) That some of his ancestors lived in America before its discovery by the white race, and (b) that the individual is considered an “Indian” by the community in which he lives. The function of a definition of “Indian” is to establish a test whereby it may be determined whether a given individual is to be excluded from the scope of legislation dealing with Indians.¹¹

10. Throughout this Article, I use the terms Indian, American Indian, Native American, and Native interchangeably. It will be obvious that I am using these terms in reference to the indigenous peoples to the part of the North American continent that is now the United States. I find them all useful but inadequate. We are not actually “Native Americans” because it was not America that we are native to—someone else called it by that name—we just called it home. We generally do not think of ourselves as Indians, instead we refer to ourselves by our tribal names. We are *Pawnee* and *Potawatomi*, *Choctaw* and *Chickasaw*, *Navajo*, *Hopi*, and *Sioux*. Many times even these names are English translations of someone else’s name for us. Our names in our own language often translate to “The People,” “The First People,” “The True People,” “The Only People,” or “The People of (some place).” The name *Dine* means “The People”; *Tohono O’odam* means “The People of the Desert”; *Gayogohono* means “People of the Great Swamps”; *Wabanaki* means “People of the Dawn”; *Kitchi-Gumee Anishinabeg* means “The People of Great Lakes”; and *Havasupai* means “The People of the Blue-Green Water.” See Lawrence R. Baca, *Meyers v. Board of Education: The Brown v. Board of Indian Country*, 2004 U. Ill. L. Rev. 1155, 1167. Although the name “Indian” is a misnomer, it is used in the U.S. Constitution three times. See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art I, § 2, cl.3; and U.S. CONST. amend XIV, § 2. Also, Title 25 of the U.S. Code is entitled “Indians.” See 25 U.S.C. Indians. Because of this, the terms “Indian” and “Indian tribes” serve the purpose of representing the “legal name” of “The People.”

11. Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, 1942.

In the 1970's, I was asked to write a chapter for the *Smithsonian Handbook of North American Indians* on the Legal Status of American Indians. One of the first things I addressed was the question of "who is an Indian?" Some statutes or regulations provide that they grant benefits to persons who have a specific quantum of Indian blood, others require membership in a federally recognized tribe.¹² In general I concluded the answer is probably that it depends on the purpose for which the question is being asked. In the *Handbook*, I essentially proposed continued use of the Cohen two prong definition but altered slightly. I modified Cohen's prong (b) and made it "considered an Indian by the community in which he lives or where he was raised." I wanted to recognize that in the modern mobile society some of us may be recognized as Indians in our home communities but not necessarily in our present community. I also added a third prong (c) that "the person holds himself out to be an Indian."¹³ This addresses two concepts. One, that perhaps somebody shouldn't be assigned to a race they don't hold themselves to be.¹⁴ And, two, that someone who has always held themselves out to be one race shouldn't be allowed to call themselves a different race to achieve a benefit.¹⁵

The subject of this paper is not who is an Indian but rather who is a member of a tribe. More importantly the focus is on who can be told they are no longer a member of an Indian tribe and what can they do when that happens. Over the last decade the federal government through the Bureau of Indian Affairs (BIA) has stepped back from its involvement in tribal membership issues and has taken the position that it is important to allow tribes to deal with internal governmental issues without federal intervention. The BIA has refused to become involved in enrollment disputes except where violence has erupted. One working theory as to why the federal government refuses to step in is that it is to the financial benefit of the federal government if tribes disenroll members. Indians who are enrolled members of federally recognized tribes have rights to federal programs. Disenrolled Indians do not. Fewer tribal members mean fewer federal dollars spent on Indian programs. It's all about the bucks.¹⁶

Benefits to someone who is an Indian do not come to them because they are racially or culturally an Indian. They come to that individual because of the government to government relationship between Indian tribes and the federal government. They come to the individual because they are a member/citizen of a federally recognized tribe. The Supreme Court recognized this in a case challenging an employment preference at the Bureau of Indian Affairs that favored tribal members over non-Indians.

Contrary to the characterization made by appellees, this preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference. The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature.¹⁷

12. Today, tribal membership is controlled almost exclusively by tribal law and custom. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

13. SMITHSONIAN INST. HANDBOOK OF NORTH AM. INDIANS, VOLUME 4, HISTORY OF INDIAN-WHITE RELATIONS, Wilcomb Washburn, ed. (1978).

14. In the infamous case *Plessy v. Ferguson*, 163 U.S. 537 (1896), few remember that Plessy argued that he had a legal right-a property right-to his race. *Id.* at 549. He had always held himself out to be white and he argued that he had a right to be white even though the railroad wanted to assign him to the car for "the colored race." *Id.* In fact, the statute allowing separation of the races in the passenger cars had a section exempting the conductors and the railroad from liability for assigning someone to the "wrong car" for their race. *Id.* at 541. Plessy also challenged that part of the statute as being unconstitutional but the issue was deemed by the Supreme Court not to be properly before the Court. *Id.* 549.

15. As I have previously written, the National Native American Bar Association has a great concern about individuals who lie about their race because they believe affirmative action will get them into law school. We call them box checkers. We occasionally ask the rhetorical question of such students, "What race were you before you filled out the law school application?" Lawrence R. Baca, Apples, Bananas, Coconuts and Oreos – the Fruit Salad and Dessert of Race: American Indians in the Diversity Discourse, IILP REVIEW 2012: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION, 2012, at p. 113.

16. Bad racially coded pun intended.

17. *Morton v. Mancari*, 417 U.S. 535 (1974).

Among the many benefits that may flow to a person because of their status as an enrolled member of a federally recognized tribe are various rights guaranteed by the federal government in fulfillment of treaty and other federal legal obligations, such as rights to hunt, fish, gather, and worship on aboriginal lands; to own and occupy real property under federal stewardship and protection; and to receive healthcare, education, and housing.¹⁸

What is Citizenship About?

While the term “member of an Indian tribe” is frequently used, those who are tribal members more often speak of citizenship. Tribal members are citizens of their tribes. Being disenrolled is to have your citizenship revoked. Indian tribes are sovereigns with governmental power over their lands and their citizens.¹⁹ All sovereigns, if they possess such power, should exercise it with the greatest care. Perhaps the greatest challenge to the power of any sovereign government to remove an individual’s citizenship is found in the words of Chief Justice Warren:

What is this Government, whose power is here being asserted? And what is the source of that power? The answers are the foundation of our Republic. To secure the inalienable rights of the individual, “Governments are instituted among Men, deriving their just powers from the consent of the governed.” I do not believe the passage of time has lessened the truth of this proposition. It is basic to our form of government. *This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence.* I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right.

Citizenship is man’s basic right, for it is nothing less than the right to have rights...

The people who created this government endowed it with broad powers. They created a sovereign state with power to function as a sovereignty. But the citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government. Whatever may be the scope of its powers to regulate the conduct and affairs of all persons within its jurisdiction, a government of the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.”²⁰

One tribal court justice has put it thusly:

Tribal membership for Indian people is more than mere citizenship in an Indian tribe. It is the essence of one’s identity, belonging to community, connection to one’s heritage and an affirmation of their human being place in this life and world. In short, it is not an overstatement to say that it is everything. In fact, it would be an understatement to say anything less. Tribal membership completes the circle for the member’s physical, mental, emotional and spiritual aspects of human life.²¹

The importance of tribal membership and tribal citizenship to Indian people cannot be easily captured in words. The loss of citizenship is equally difficult to quantify. Solutions that will allow challenges to the tribe’s power to remove your citizenship, to disenroll you, are even more difficult to come to conceive. Being a member of an Indian tribe brings with it many benefits. Some are social and cultural, some are physical and fiscal, and some are spiritual and psychological. Having those taken from you can be devastating on many levels. Having no

18. See generally Galanda & Dreveskracht, *supra* note 2.

19. *Worcester v. Georgia*, 31 U.S. 515 (1832).

20. See *Perez v. Brownell*, 356 U.S. 44, 64-65 (1958), (emphasis added) (Warren, E. dissenting.).

21. Galanda & Dreveskracht at 390, *supra* note 2.

ability to fight the loss of those benefits only adds to their sense of isolation and estrangement from justice. Because Indian tribes are sovereigns they also possess sovereign immunity from suit.²² A disenrolled member can appeal to the government that has disenrolled him/her but there is no court jurisdiction, neither tribal, state, nor federal, that can take jurisdiction of the case.²³

Solutions to the Problem Tribal Sovereign Immunity

While the federal courts have thus far avoided becoming involved in intra-tribal membership disputes, that will not last forever. When courts become frustrated enough with the inability to address cases involving tribal disenrollment, they will take action. They will make new law. I have always told my students²⁴ that if you want to move the law – either forward or backward – all you have to do is give the trial court judge a set of facts that shock the conscious of the court and a viable legal theory for the court to hang its robes on and the judge will give you the opinion that you need to remedy the problem. A case from the 1880's that is still cited by the Court today is a perfect example of the Supreme Court finding law where none exists.

In 1885, the Supreme Court was confronted with the question of what Constitutional power provided Congress with the authority to enact federal criminal laws that applied to Indians for actions among themselves and wholly within their own reservation lands. In *United States v. Kagama*, the Court wrote that there was in fact nothing in the federal Constitution that granted such a power to Congress. But, the Court went on to hold that the power exists because it must exist and that it must exist in the federal government because only that government could enact laws that applied equally to all tribes. The Court found must do so to protect the Indians – and in this case, presumably from themselves.²⁵

While I agree with my many colleagues who believe that Indian people and Indian tribes must resolve the problem of disenrollment, I raise a fear beyond those raised by others. The Supreme Court has granted unto itself the power to declare what tribal governmental powers are “inconsistent with their status” as domestic dependent nations.²⁶ Tribes stand one too many disenrollments and five votes away from losing their immunity from suit in federal court because the Court decides that it is “inconsistent with their status” as sovereign governments to deny basic human rights to their members and remain beyond the rule of federal law.²⁷

When a tribe disenrolls a member the person loses their rights to many federal benefits. It cannot be long before a court says that an Indian cannot have a federal right taken from them without an attendant federal remedy. When will a court say that while it may be true that a tribal member cannot file suit under the Indian Civil Rights Act (ICRA) because of tribal immunity but that immunity cannot be held up against the United States, the superior sovereign?²⁸ While I think that the legal proposition is wrong – the mere fact that the superior sovereign has the power to take away the tribe's immunity doesn't mean that it has exercised that power – that legal principle sits there like a loaded weapon.²⁹ There are attorneys within the United States Department of Justice who would like to renew their legal assaults on tribes by enforcing the ICRA in federal district court.³⁰

22. *Turner v. United States*, 248 U.S. 354 (1919), *See also* *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998).

23. Galanda & Dreveskracht at 420-22, *supra* note 2.

24. The author has served as an adjunct professor of Federal Indian law at both American University Washington College of Law (2006, 2007) and Howard University School of Law (2008).

25. *United States v. Kagama*, 118 U.S. 375 (1885).

26. *See infra* notes 56-63 and accompanying text.

27. *See* *Oliphant v. Suquamish Tribe of Indians*, 435 U.S. 191 (1978).

28. *See* *Florida Paralegic Assn. v. Miccosukee Tribe of Indians*, 166 F.3d 1126 (1999).

29. *Korematsu v. United States*, 323 U.S. 214 (1944).

30. *See* THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter, Matthew L.M. Fletcher, and Angela R. Riley, eds 2012). Chapter 1 contains a lengthy discussion of DOJ efforts to file suits against tribes under the ICRA.

As lawyers our first solution is often the courthouse. However, you cannot simply file a lawsuit to protect your rights to membership. Indian Tribes are immune from suit.³¹ In addressing membership issues the courts have been clear – state courts have no jurisdiction over Indian reservations in most states. While a 1953 statute gave some previously held exclusive federal jurisdiction on Indian reservations to several states,³² even in those states the courts have routinely ruled that a suit cannot be brought against an Indian tribe because of its sovereign immunity.³³

Some attorneys representing disenrollees have argued that relief should be available under the Indian Civil Rights Act of 1968. Titles I, II & III of the Civil Rights Act of 1968 are the Indian Civil Rights Act.³⁴ The Act provides constraints on the power of tribal self government that are much like the first ten amendments to the federal constitution. Of specific importance to the disenrollment issue is Section 1302 (8) which provides that,

no Indian tribe in exercising powers of self-government shall—

deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;³⁵

For a decade suits were filed in federal court to vindicate the rights created by this statute. In 1978, however, in a case involving tribal enrollment the Supreme Court took up the issue of whether the federal courts had jurisdiction to hear cases under the statute. The Court held:

Indian tribes are “distinct, independent political communities, retaining their original natural rights” in matters of local self-government. Although no longer “possessed of the full attributes of sovereignty,” they remain a “separate people, with the power of regulating their internal and social relations.” They have power to make their own substantive law in internal matters, and to enforce that law in their own forums.³⁶

Tribes are separate sovereigns that pre-exist. Furthermore, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But “without congressional authorization,” the “Indian Nations are exempt from suit.”

It is settled that a waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.”

Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief.³⁷

In some instances the tribes themselves have cited to *Martinez* for the proposition that they are immune from suit in their own courts as well. This would seem to ignore the Court’s belief that:

31. *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998). See also MATHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* (2016).

32. See Pub. L. No 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–26) (the intricacies this statute are far too complex for discussion here).

33. *Lamere v. Superior Court*, 131 Cal. App. 4th 1059, 1064 (2005); see also *Healy Lake Vill. v. Mt. McKinley Bank*, 322 P.3d 866 (Alaska 2014); *Ackerman v. Edwards*, 121 Cal. App. 4th 946 (2004).

34. See 25 U.S.C. § 1301 et. seq

35. *Id.*

36. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)

37. *Id.*



Tribal membership is the foundation of tribal political rights.

Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply.³⁸

The Court further stated that Congress had affirmatively not provided for any relief in the federal courts other than habeas corpus because while Congress was concerned about the rights of Indians it believed that abuses of the tribal process were most severe in criminal cases. Without specific intent of Congress to do so the Court would not imply a waiver of immunity from suit.³⁹

Our reluctance is strongly reinforced by the specific legislative history underlying 25 U.S.C. § 1303. This history, extending over more than three years, indicates that Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people."⁴⁰

So what does an aggrieved disenrolled party do? There have been a number of authors who have proposed solutions. The general thrust of most is that it should be a tribal solution. In some cases the response is that it *must* be a tribal solution.⁴¹ Obviously fair and open elections of responsible tribal officials would be a solution. However, when a person has been disenrolled he/she can no longer vote.

Galanda and Dreveskracht offer many possible solutions.⁴² They identify the myriad evils that flow from disenrollment and are forceful in their indictment of the practice of disenrollment by tribal governments.

Throughout U.S. history, disenrollment has proven to cause the following harms: (1) the perpetuation of federal policies that mandate an arbitrary, aberrant, and forced biological division between Indians and non-Indians, to the detriment of the former; (2) assimilation and the loss of the tribal land base and related Indian cultural identity; (3) wholesale termination of the federal-tribal relationship; (4) a lack of redress to Indians aggrieved by their tribal leaders; (5) intratribal factionalization; (6) Indian-on-Indian violence; and (7) disregard of the federal fiduciary duty.

Tribal membership is the foundation of tribal political rights. When modern tribal governments set membership criteria, they are certainly exercising their sovereign authority to, for example, preserve tribal resources—similar to what most countries do when setting nationalization and citizenship criteria. It bears repeating that when tribal governments disenroll their people, however, they are exercising a nonindig-

38. *Id.* at 58 (citations omitted).

39. *Id.* at 55.

40. *Id.*

41. An article by the American Bar Association Section on Civil Rights and Social Justice was quite forceful in arguing that this is a tribal problem so it must be a tribal solution. However, as I read the article I could hear the punt team running out onto the field. William R. Norman Jr., Kirke Kickingbird & Adam P. Bailey, *Tribal Disenrollment Demands a Tribal Answer*, 43 HUMAN RIGHTS MAG. 12 (2017).

42. Galanda & Dreveskracht at 443, *supra* note 2.

enous concept that has been developed by the federal government, and delegated to tribes in an effort to “wipe out Indian culture, traditions, and ways of life.” Indeed, disenrollment is an invented aspect of “sovereignty” that the U.S. government itself does not even possess.⁴³

Importantly, they go beyond criticism. In proposing several possible routes to resolving the problem they begin by presenting evidence that the Bureau of Indian Affairs has the authority to intervene and that its present refusal to step in is a newly created policy.

Without any tribal consultation or administrative rulemaking, the BIA has for the last half-decade only proclaimed that its hands are tied because of “tribal authority to set limits on membership” and thus the agency cannot make decisions pursuant to tribal law. But this assertion misses the point. The BIA *does* have the authority to involve itself in disenrollment determinations, through its power—indeed, mandate—to establish a trust relationship with those individuals recognized as tribal members. Policy is not law; enrollment is not disenrollment.⁴⁴

Additionally, Galenda and Dreveskracht present several examples of the BIA having exercised that authority and including quote directly from the BIA Indian Affairs Manual.⁴⁵

When enrollees lose their membership they also lose their right to share in the distribution of tribal assets. Since the Secretary is responsible for distribution of trust assets to tribal members, disenrollment actions are subject to approval by the Secretary or his authorized representatives Any person whose disenrollment has been approved by the Area Director acting under delegated authority may appeal the adverse decision as provided in 25 C.F.R. § 2.⁴⁶

In their search for a possible solution Galenda and Dreveskracht also assert first that tribes and tribal courts that act responsibly to provide due process and equal protection to their members are best equipped to develop a resolution.⁴⁷ They give due credit those tribes that have acted responsibly in protecting their members either through court decisions or legislation that outright bans disenrollment.⁴⁸ But they also point out that at some point it is the tribal council that must enforce the tribal court’s judgment and where the tribal council itself has been the defendant there are often difficulties.⁴⁹ They propose a set of changes to tribal law and policy along four avenues.

Stability. Regulations and rules should not be allowed to change frequently, and if by chance they do need to be changed, they must be changed only by prescribed procedures and in limited scope.

Protection from political interference. Any disenrollment determination should be made by an independent tribal office or entity; one not beholden to the tribal council. Establishing a separate corporation to manage economic development matters and having a board of directors that is accountable to the tribal council or another arm of the tribe, such as an economic development board, will also help to ensure that gaming revenue and disenrollment remain completely separate.

Reliability. Whatever institution is set up to manage disenrollment issues should be governed by rules that are extant, effective, respected, and reduce uncertainty about the future of the tribe.

43. *Id.*

44. *Id.*

45. 83 BUREAU OF INDIAN AFFAIRS MANUAL: SUPPLEMENT 2, § 3.8(C)(2)–(3), available at <http://www.indianaffairs.gov/cs/groups/xraca/documents/text/idc012024.pdf>.

46. Galenda & Dreveskracht at 457, *supra* note 2.

47. *Id.*, p. 450.

48. *Id.*, p. 451.

49. *Id.*

A dispute resolution mechanism. As succinctly described by Attorney Brendan Ludwick, “[P]erhaps most important [as] an effective safeguard against tribal disenrollment is an independent tribal authority that has the power to review . . . enrollment actions.” Although this power may be conferred to an appointed or elected committee, comprehensive oversight will likely find greater security in a tribal court, as long as the tribal constitution vests co-equal powers to the judiciary. To be effectual, these tribal courts must be authorized to decide enrollment disputes and to autonomously appraise elected officials’ actions.⁵⁰

While Galenda and Dreveskracht also suggest that individuals look to international forums to enforce rights established under the United Nations Declaration of the Rights of Indigenous Peoples they understand the near impossibility of enforcing judgments in their favor.⁵¹ There is no effective enforcement mechanism of a judgment from an international court in a tribal community. This then circles us back to the federal court system and the issue of sovereign immunity.

Enrollment Disputes Endanger Sovereign Immunity

It is my fear that the war over disenrollment will be the black hole that swallows tribal sovereign immunity from suit. Several federal courts have expressed deep frustration in being unable to become involved in what they see as very serious wrongs perpetrated against disenrollees.⁵² There can arise from a federal court solution to disenrollment a catastrophic blow to the legal principle of tribal sovereign immunity. The Court has thus far steadfastly upheld tribal sovereign immunity. However, in the most often cited modern case for the proposition that tribal sovereign immunity exists, the Court makes these observations in various paragraphs of the opinion:

Though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident. The doctrine is said by some of our own opinions to rest on the Court’s opinion in *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919). Though *Turner* is indeed cited as authority for the immunity, *examination shows it simply does not stand for that proposition.*

The [Turner] Court stated: “The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace.” . . . The quoted language is the heart of *Turner*. *It is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine.* [...] *Turner*, then, is but a slender reed for supporting the principle of tribal sovereign immunity. . . . *Turner*’s passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit. We so held in *USF & G*, saying: “These Indian Nations are exempt from suit without Congressional authorization.” . . . As sovereigns or quasi sovereigns, the Indian Nations enjoyed immunity “from judicial attack” absent consent to be sued. Later cases, albeit with little analysis, reiterated the doctrine. . . . *There are reasons to doubt the wisdom of perpetuating the doctrine.*⁵³

Mathew L. M. Fletcher, one of the nation’s leading experts on federal Indian law, has also noted this concern. In his treatise *Federal Indian Law*, he too brings focus on the Court’s statement that: “In considering Congress’ role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries. As with tribal immunity, foreign sovereign immunity began as a judicial doctrine.”⁵⁴ Fletcher says, correctly, “[f]or the Court, if tribal immunity is judge-made law, then perhaps the Court can eliminate tribal immunity.”⁵⁵

50. *Id.* p. 452.

51. *Id.* p. 462.

52. *Id.* at 453-56; see also *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010).

53. *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998).

54. FLETCHER, *supra* note 31.

55. *Id.*



If you want to scare the Supreme Court of the United States tell them that two thousand nine hundred twenty-eight white people are subject to being governed by fifty Indians because they live within the external boundaries of an Indian reservation.

The legal principle developed by the Court in *Oliphant v. Suquamish Tribe of Indians*⁵⁶ is the fulcrum by which the Court will eliminate tribal sovereign immunity. The Court's analysis in that case is predictive of what the Court may do in a case before it concerning disenrollment. In 1978, the Supreme Court was confronted with the question of whether or not Indian tribes have criminal jurisdiction over non-Indians for criminal activities that take place within a tribe's reservation.⁵⁷ The Court describes the Port Madison Reservation as a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County.⁵⁸ In footnote one you find this language:

"[The] Madison Indian Reservation consists of approximately 7276 acres of which approximately 63% thereof is owned in fee simple absolute by non-Indians and the remainder 37% is Indian-owned lands subject to the trust status of the United States, consisting mostly of unimproved acreage upon which no persons reside. Residing on the reservation is an estimated population of approximately 2928 non-Indians living in 976 dwelling units. There lives on the reservation approximately 50 members of the Suquamish Indian Tribe."⁵⁹

While sixty-three percent of the land base is held in fee simple title by non-Indians, the reservation boundaries have not been diminished so those non-Indians still live within the external boundaries of an Indian reservation. If you want to scare the Supreme Court of the United States tell them that two thousand nine hundred twenty-eight white people are subject to being governed by fifty Indians because they live within the external boundaries of an Indian reservation.

The *Oliphant* Court then engages in a lengthy discussion of circumstances that it believes may demonstrate that the Congress always believed that Indian tribes did not retain criminal jurisdiction over non-Indians.⁶⁰ In one passage the Court notes that:

Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by normal judicial processes; emphasis was on restitution rather than on punishment.

56. *Oliphant v. Suquamish Tribe of Indians*, 435 U.S. 191 (1978).

57. *Id.*

58. The term *checker board* comes about from a federal practice of dividing up Indian lands into 160 acre squares and allotting some of those lands to tribal members while selling others to non-Indians.

59. *Oliphant*, 435 U.S. at 192, n.1 (1978).

60. *Id.* at 204.

In 1834 the Commissioner of Indian Affairs described the then status of Indian criminal systems: "With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, ..."61

The Court makes four separate references in the opinion to "the absence of formal tribal judicial systems" and "the want of fixed laws and competent tribunals of justice."

Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government. See *Cherokee Nation v. Georgia*, 5 Pet. 1, 15, 8 L.Ed. 25 (1831). But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status."

By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice."⁶²

The Court was fixated on "the want of fixed laws and competent tribunals of justice" while meaning Anglo like justice systems.⁶³ The Court has never been able to intellectually come to grips with the concept of tribal oral tradition where everyone in the community knows what the law-ways are by oral tradition. So there was the deadly combination: a Court that has doubts about the necessity for the existence of tribal sovereign immunity to begin with, which does not have a positive reflection on tribal judicial systems generally, and has established as one of its own powers the ability to decide which measures of tribal sovereignty are inconsistent with their status.

In a hypothetical case, let us consider then the disenrollment scenarios set forth at the beginning of this article and the failures of many tribes to adequately protect the rights of their own citizens through their systems of justice. Remember that among the rights lost through disenrollment are federal benefits that inure to the members of federally recognized tribes. The case is brought before a federal judge whose conscious is shocked that a tribe would disenroll half of its membership as the Chukchansi have⁶⁴ and the judge strongly believes that a remedy must exist. The court could hold that while the Supreme Court in *Martinez*⁶⁵ said the federal courts were not given jurisdiction to hear cases addressing violations of Indian Civil Rights Act (ICRA)⁶⁶ because tribal forums were available it didn't mean that the tribes were protected from federal review of tribal actions post tribal judicial action. The court could further rule that where there isn't a viable judicial system (one not subject to the absolute authority of the tribal council) the *Martinez* Court did not intend to leave tribal members without a forum for relief of the federal rights created by the ICRA.⁶⁷ The court could then find that because the ICRA creates a federal right to equal protection and due process and that when federal benefits are being lost through tribal action, it is inconsistent with their status as domestic dependant nations to allow tribes to take away federal benefits and remain beyond the reach of federal court review. And finally, the court could hold that tribal sovereign immunity in these instances is an unconscionable blockage to the protection of rights created by federal law and

61. I think a casual observer of these comments would agree that the Bureau of Indian Affairs in 1834 and the Supreme Court in 1978, had little regard for alternative forms of justice and perhaps none for tribal concepts of restorative justice as opposed to punitive justice.

62. *Oliphant*, 435 U.S. at 210.

63. *Id.* at 202.

64. See *supra* note 3 and accompanying text.

65. See *supra* note 36 and accompanying text.

66. 25 U.S.C. §1301 *et. Seq.*

67. *Id.*

is, therefore, also inconsistent with their status. In our hypothetical case the Circuit Court agrees and the Supreme Court affirms.⁶⁸ Tribal sovereign immunity could just that easily be stripped from tribes. It is my judgment that tribes that disenroll without provision of due process do so at their peril and put all tribes in peril.

Does Any of This Affect Diversity in Law Schools?

Because we at the Institute for Inclusion in the Legal Profession focus many of our concerns on diversity in the classroom and in the profession, I thought I would add this otherwise non-sequitur final thought. A great concern among many Native attorneys is the lack of recruitment retention and graduation of Native American law students. As a part of this I have argued that many of the people in law school today who are claiming to be Indian are in fact not Indians. They are merely checking the box for Native American because they believe you get positive points towards admission for being an Indian. The National Native American Bar Association has lobbied the American Bar Association to establish criteria for who can claim to be an Indian on their application to law school.⁶⁹ NNABA has suggested that law schools should require more than just an X in the Native American/American Indian box on the application form. Schools should require an applicant to give some evidence of their Native heritage. The Supreme Court has declared that there is a “compelling state interest” to have diversity in the law school classroom.⁷⁰ I have argued that the compelling interest to have diversity should include an equal and concomitant compelling state interest in assuring that the law school is getting the diversity that it thinks it is getting. Before a law school accepts that an applicant is an Indian we think requiring you to identify the tribe your family is from is an important start. I think being recognized by the community of Indians as an Indian is further evidence of Native American heritage. I think that being an enrolled member of a federally recognized tribe is the “gold standard” for saying, “Yes, this applicant is an Indian.”

So, does that gold turn to lead in a reverse *chrysopoeia* if your tribe disenrolls you while you are in your third year of college? Do you say in your law school application essay, “Well, for twenty-one years I was a member of the Wanabee Band of Shudabin Indians, but the tribe made a political decision to disenroll my family. My tribe says that my grandfather wasn’t really a Shudabin Indian so my father was not Shudabin and so I am not Shudabin. My dad says the tribe is doing this because by disenrolling my grandfather you also disenroll his six children and their thirty-six children who trace their ancestry to him. That cut ten percent of the tribe’s membership and everybody’s casino profit payout went up. So, even though I grew up on an Indian reservation and in a totally Indian community where I have voted in my tribe’s elections I am not today a member of my tribe. I speak the tribe’s language, I follow the spiritual ways of the religious elders of the tribe as I was taught by my father and grandfather, and am considered an Indian by the community of Indians where I grew up. So, I guess that I am still an Indian with the life experience of an Indian but I am just no longer an enrolled member of my tribe.” For diversity purposes, that applicant brings a lifetime of Indian life experience to the classroom. Sadly, being disenrolled from your tribe is all too commonly now becoming an “Indian life experience.”

68. Obviously, such an opinion would be far more comprehensive and sophisticated than put forward here. However, those who are familiar with federal Indian law get the picture.

69. See NATIONAL NATIVE AMERICAN BAR ASSOCIATION RESOLUTION ON LAW SCHOOL DIVERSITY (2013), <http://www.nativeamericanbar.org/wp-content/uploads/2012/04/2013-07-01-final-NNABA-Accreditation-Resolution.pdf>

70. *Grutter v. Bollinger*, 539 US 306, 328 (2003).

Asian Pacific Americans and Affirmative Action: Challenges in the Struggle to Achieve Equal Opportunity for All

Rockwell ("Rocky") Chin

Director, Office of Equal Opportunity & Diversity, New York State Division of Human Rights

Chris M. Kwok

Case Manager, JAMS

Deanna Kwong

IP Litigation Counsel, Hewlett Packard Enterprise

Derek K. Ishikawa

Associate, Hirschfeld Kraemer LLP

Hannah Kelly

Harvard Graduate School of Education, Degree Candidate 2019

For the Asian American community, affirmative action, originally meant to address historic discrimination and under-representation of racial minorities, has evolved into a contentious and litigious issue. As at least one Asian American affirmative action suit wends its way to the Supreme Court, this article will clarify the growing and bitter divide within the Asian American legal community over affirmative action and its impact.

Preface

Asian Pacific Americans¹ have a stake in opposing racism, White Supremacist ideology, and White Supremacists and promoting diversity in society. Long before becoming caught up in debates as to the merits or demerits of affirmative action, early Chinese immigrants in America found themselves discovering the contradictions of an American society that at its birth deleted the passage condemning slavery in the original language of the Constitution. With the stroke of a pen, the Declaration of Independence's "Life, Liberty and the pursuit of Happiness" was removed and withheld from African Americans, indentured servants, and women. Before long, Chinese would discover their fate was also in this same boat.

Our history in America cannot be told without recounting the trauma, pain, and personal hardships suffered by the early immigrants from Asia as a result of discriminatory anti-Asian laws and White Supremacist views justifying such treatment. There are Chinese Americans today who have childhood memories of traveling through the Deep South, encountering the restroom signs at the gas stations, "Whites Only" or "Coloreds Only." Former University of California Chancellor Dr. Chang-Lin Tien expressed shock at the segregated city buses when he attended the University of Louisville in Kentucky:

1. In this article, we refer to a diverse group of Asian Americans and Pacific Islanders—nationalities from East Asia, South Asia, Southeast Asia, the Philippines and Pacific Island nationalities as "Asian Pacific Americans," "Asian Americans," or "AAPI." Significant language, race, and religious diversity exists among all these nationality groups.

Today, I can still recall my shock when I first boarded a city bus and found that whites rode in the front and “coloreds” rode in the rear. Just where exactly did an Asian fit in? I too have a skin color but I am not black. And if I chose the front section, what kind of statement was I making about the black men, women and children relegated to the rear? . . . Our country has come a long way since the days of segregated buses. But if we fail to provide access to higher education for all minorities, major sectors of our population will not succeed in a society that increasingly mandates advanced academic skills. I fear that the net result will be a two-tiered society, divided like those old buses along racial and ethnic lines.²

Our American democracy is threatened by increasing political polarization and public bullying leaving us to wonder whether or to what degree the gains of the Civil Rights Movement and its legacy are endangered. Chancellor Tien’s fear of America turning into a two-tiered society is not so far-fetched a prospect, as we witness a resurgence of hate and violence and are asked to explain, justify, and defend principles of equality and social and civil justice that many had assumed were well-settled values.

As the country appears to become even more divided, in an article summarizing recent survey findings on Asian American attitudes about affirmative action, Professors Janelle Wong and Karthick Ramakrishnan report that “support among Chinese Americans has declined dramatically over four years, while it has remained stable for other Asian Pacific Americans.”³ The declining support among Chinese Americans for affirmative action reflects views by some in the Chinese community that affirmative action at Harvard and other elite universities favors Black and Hispanic applicants at the expense of Chinese or Asian Pacific applicants. This zero-sum argument pits minority groups against each other. The metaphor is one of fighting for a piece of the pie, rather than looking at sharing the whole pie. Asian American opponents of affirmative action such as the Asian American Legal Foundation, the organization challenging the Harvard University’s affirmative action admission program, are seeking to disrupt the unity of the civil rights coalition, with legal and political support of the United States Justice Department and President Trump. A conversation about affirmative action forces us to confront the state of race and race relations in America and challenges all of us to assess how truly committed we are to equal opportunity for all.⁴

Introduction

Racism and its legacy harms all Americans—Black, Asian Pacific, Native American, Hispanic, and White. It has led to segregation, stereotyping, hate crimes, racial terror and the political marginalization of minority communities and voices. White supremacist ideology has not faded away into the corners of American society. On the contrary, its followers have found new soil in which to grow, showing up boldly in public with and without their KKK robes.

Asian Pacific Americans have a stake in ridding America of the harmful legacy of slavery. America’s open door to immigrants from White European nations slammed shut for Chinese laborers with the passage of the Chinese Exclusion Act in 1882. Japanese and other Asian Pacific Americans were victims of further exclusion laws such as the Immigration Act of 1917 (“The Asiatic Barred Zone Act”). Immigrants from Asia were scapegoated as the “Yellow Peril” and subjected to anti-Asian laws and domestic terror attacks. During World War II, Japanese Americans found that their citizenship did not protect them from being ripped from their homes and incarcerated behind barbed wire. Discussing this history—shameful as it is—is an opportunity for Asian Pacific Americans to contribute to a deeper and all-around appreciation of our past as Americans.

2. Chang-Lin Tien, *Affirming Affirmative Action*, PERSPECTIVES ON AFFIRMATIVE ACTION...AND ITS IMPACT ON ASIAN PACIFIC AMERICANS (Gena A. Lew, ed., 1996) 19, 19-20.

3. Karthick Ramakrishnan & Janelle Wong, Survey Roundup: Asian American Attitudes on Affirmative Action, AAPI Data Bits Blog (June 18, 2018), <http://aapidata.com/blog/asianam-affirmative-action-surveys/>.

4. Those readers who may be interested in articles written by Asian Pacific Americans supporting affirmative action policies see generally PERSPECTIVES ON AFFIRMATIVE ACTION...AND ITS IMPACT ON ASIAN PACIFIC AMERICANS (Gena A. Lew, ed., 1996); DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* (1993).

Today, this legacy—slavery, segregation, exclusion, incarceration, and genocide (Native American Indians and Indigenous peoples)—is reflected in the under-representation of Blacks, Hispanics, Asian Pacific Americans, Native Americans and women among the Fortune 500 Corporate Boards, big firm partnerships, university executive administrators, and many other professions and industries. It is also reflected in the gender and racial make-up of Congress which remains largely White and male.⁵

Who are Asian Americans?

Americans who trace their ancestry to Asian nations and the Pacific Islands are a diverse group. These ancestral roots are in East Asia (Japan, China, Korea), South Asia (India, Bangladesh, Pakistan, Sri Lanka), Southeast Asia (Vietnam, Thailand, Laos, Cambodia, Myanmar, Singapore), and the Pacific Islands (Philippines, Indonesia, Malaysia, East Timor, Brunei, Christmas Island, Guam, Samoa, Hawaii). Chinese immigrants today come primarily from China, Hong Kong, and Taiwan and constitute the largest Asian immigrant population, followed by Indians and Filipinos. California has the largest Asian Pacific American population with some 6.5 million as of 2015, and Hawaii's Asian Pacific American population is about 56%.⁶

While the term “Asian American” or “Asian Pacific American” or “Asian American and Pacific Islander (AAPI)” are all used today in different contexts, it is important for purposes of addressing affirmative action programs and for the U.S. Census to disaggregate this data. There is no single “Asian Pacific American” race, and unlike Hispanics, there is also no single language spoken by the ancestral country. The U.S. Census Bureau definition includes people whose ancestry comes from the “Far East,” Southeast Asia and the Indian subcontinent. In the 1990 census, the term “Asian or Pacific Islander” was accepted as the explicit category,⁷ and in 2000, the US Census used two separate categories: “Asian American” and “Native Hawaiian and other Pacific Islander.”⁸ California has the most Asian Pacific Americans at 6.5 million followed by 1.8 million in New York.⁹ The four largest Asian Pacific American nationality groups in the United States are Chinese, South Asian Indian, Filipino, Vietnamese, Korean, and Japanese (3%).¹⁰

In the California, Asian Pacific Americans make up 16.4% of the population and 10.5% of the State legislature.¹¹ In Massachusetts, a progressive state with a growing population of Southeast Asian immigrants, Asian Pacific Americans hold less than 4% of the representative seats in the State legislature.¹² In New York City, while Chinese remain the largest nationality group, there is widespread diversity such as reflected, for example, in Indo-Caribbean communities whose ancestors came from Southern China and South Asia and settled in the Caribbean in the mid-1800s.

5. Minority legislators make up less than 20% of Congress, despite the fact they are now around 40% of the population. See Kristen Bialik & Jens Manuel Krogstad, *115th Congress Sets New High for Racial, Ethnic Diversity*, PEW RESEARCH CENTER (Jan. 24, 2017), <http://www.pewresearch.org/fact-tank/2017/01/24/115th-congress-sets-new-high-for-racial-ethnic-diversity/>.

6. *Asian-American and Pacific Islander Heritage Month*, U.S. CENSUS BUREAU (May 2017), <https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2017/cb17-ff07.pdf>.

7. *1990 Census of Population*, U.S. CENSUS BUREAU (1990), <https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-1.pdf>.

8. *2000 Census of Population*, U.S. Census Bureau, (2000), <ftp://ftp2.census.gov/library/publications/2001/dec/2kh00.pdf>.

9. *Asian-American and Pacific Islander Heritage Month*, U.S. CENSUS BUREAU (May 2017), <https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2017/cb17-ff07.pdf>U.S..

10. *Id.*

11. *Demographics in the California Legislature* [Presentation], CALIFORNIA RESEARCH BUREAU (2016), <https://www.library.ca.gov/Content/pdf/crb/reports/LegDemographicsNov16.pdf>.

12. Tyler Reny, & Sayu Bhojwani, *Minority Representation Gaps, by the Numbers*, WASHINGTON POST (Oct. 22, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/10/22/minority-representation-gaps-by-the-numbers/?noredirect=on&utm_term=.ccb5ff7055.

In addition to coming from diverse countries with different dialects and languages, there are also profound class differences among Asian Pacific American immigrants. This is due to changes in immigration policy where wealthier immigrants who demonstrate they are creating jobs for Americans may be eligible for citizenship. Previously poor countries like China now have produced a wealth class, and many of these wealthier Chinese immigrants want their children to attend elite colleges and universities. Many parents believe that having their child accepted at an elite school is tantamount to achieving success, and the number of Chinese students at elite schools has continued to climb.

In many states which resettled refugees from Vietnam, Cambodia, and Laos, the poverty rates and percentages of low wage jobs more closely mirror the rates for Black and Latino communities. The Asian American Federation recently released a report in New York City entitled: *Hidden in Plain Sight: Poverty Rates in New York City*.¹³ In the report, the number of Asians living in poverty grew by 44% (from 170,000 in 2000 to more than 245,000 in 2016).¹⁴

By grouping Americans and immigrants from all countries in Asia into one demographic, it becomes difficult to acknowledge and address the diverse problems that each community faces. Failure to recognize and account for this diversity within the general “Asian Pacific American” term and failure to disaggregate the data will lead to further inequity across socioeconomic class and nationality. When looking at tweaking specific affirmative action programs in higher educational institutions, it is useful and even necessary to analyze this disaggregated data in the continued search to address diversity within an entering class.

Affirmative Action Controversy Mirrors Long-Standing Debates About How to Remedy the Legacy of America’s Racial Past

Mention “affirmative action” in a conversation and it is likely to promote strong opinions. When it emerged in the late sixties as a bold initiative to address present vestiges of discrimination carried over by the legacies of segregation, America was seething with urban racial unrest. In the wake of these widespread riots and disturbances, President Lyndon B. Johnson established by Executive Order 11365 the National Advisory Commission on Civil Disorders, aka the “Kerner Commission,” named after its Chairman, Illinois Governor Otto Kerner.¹⁵ The Commission was charged with investigating the causes of urban riots in Los Angeles (Watts Riots, 1965), Detroit (1967), Chicago (Division Street Riots, 1966) and Newark (1967). The Commission not only concluded that “Our nation is moving toward two societies, one black, one white—separate and unequal,” but also warned that unless the conditions that sparked the riots and unrest were adequately addressed, America would be facing its own system of apartheid.¹⁶

Between 1954-1968, the Asian Pacific American population in America was tiny—the consequence of closed door and anti-Asian immigration policies. After the Immigration & Nationality Act of 1965 (aka Hart-Celler Act) eliminated racial quotas in immigration, the number of Asian Pacific Americans began to climb dramatically. Today, Asian Pacific Americans are the fastest growing minority group,¹⁷ with a growth rate that outpaced the Hispanic population in 2013.¹⁸ As of July 1, 2015, the AAPI population was some 21 million, with the largest number of AAPIs living in Califor-

13. *Hidden in Plain Sight: Asian Poverty in New York City*, ASIAN AMERICAN FEDERATION (June 21, 2018), <http://aafederation.org/press/pressrelease.asp?prid=370&y=2018>.

14. *Id.*

15. OTTO KERNER, ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

16. *Id.* at 1.

17. Gustavo López, Neil G. Ruiz & Eileen Patten, *Key Facts about Asian Americans, a Diverse and Growing Population*, PEW RESEARCH CENTER (September 8, 2017), <http://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/>.

18. Anna Brown, *U.S. Hispanic and Asian Populations Growing, but for Different Reasons*, PEW RESEARCH CENTER (June 26, 2014), <http://www.pewresearch.org/fact-tank/2014/06/26/u-s-hispanic-and-asian-populations-growing-but-for-different-reasons/>.

nia (6.5 million as of July 2015).¹⁹ According to a Pew Research Report, by 2055, AAPIs will be the largest immigrant group, even surpassing Hispanics.²⁰

At the same time the mainstream media was covering urban unrest, Asian Pacific Americans were portrayed by white social psychologists as a “model minority,” and specifically compared to Blacks and Hispanics. The stereotype perpetuated inaccurate information about Asian Pacific Americans and was divisive. One of the early references to Asian Pacific Americans as the “model minority” was in an article titled, “Success Story: Japanese American Style” by sociologist William Peterson.²¹ Peterson wrote:

By any criterion of good citizenship that we choose, the Japanese Americans are better than any other group in our society, including native-born white. They have established this remarkable record, moreover, by their own almost totally unaided effort. Every attempt to hamper their progress resulted only in enhancing their determination to succeed. Even in a country whose patron saint is the Horatio Alger hero, there is no parallel to this success story.²²

In December 1966, U.S. News & World Report published a similar article about the Chinese.²³ Soon, the “model minority” stereotype of Asian Pacific Americans began to proliferate in the mainstream press. The model minority myth sought to counterpose the so-called “good” minority (Asian Pacific Americans) with the “bad” minority (Black Americans and later, Hispanics). This not only served to discourage unity between the groups around a common civil rights and anti-discrimination agenda, but it served to discourage civic engagement and legitimate protest by Asian Pacific Americans. A new generation of Asian Pacific American activists and leaders, however, would challenge and discredit the “model minority” as a myth. They were inspired by the civil rights movement as well as Black and Hispanic activists calling for ethnic studies, community empowerment, and a greater voice in the decisions affecting Americans. Many coalitions of color formed during the sixties, seventies and eighties creating lasting bonds between leaders and organizations dedicated to civil rights for all.

The model minority myth further perpetrated a stereotype that as a group, Asian Pacific Americans do not suffer any present effects of past discrimination. This ignores the fact that Asian Pacific Americans were prevented from pursuing job and career options because of discriminatory laws. Moreover, racial disparities in housing and health services counter this portrait of “success.” For Japanese Americans, economic success cannot fairly be measured without calculating the immense property and personal losses they never recovered, let alone the pernicious damage to the mental health and well-being of those who were incarcerated behind barbed wire.

Moreover, the model minority myth spread false information about the economic status of Asian Americans. It portrayed them as highly mobile, with high incomes. Yet an analysis of economic status and livelihood reveals that a substantial number of Asian Americans are employed in low-wage jobs. Even those who became professionals have complained about hitting a “bamboo ceiling.”

Some of the stereotypes that make up the model minority appear to be embraced by the Chinese plaintiffs in the Harvard litigation. They believe that the university’s affirmative action program has placed limits upon their ability to be admitted. They also minimize and disregard the data that reflects under-representation of all minorities—including Asian Pacific Americans—in top management, law partnerships, executive university administrative positions, and Fortune 500 corporate boards. Dale Minami, founder of the Coalition of Asian Pacific Americans, observed:

The debate raging over affirmative action has become a victim of exaggerated rhetoric and politi-

19. Asian-American and Pacific Islander Heritage Month: May 2017, U.S. Census Bureau. (March 14, 2017), <https://www.census.gov/newsroom/facts-for-features/2017/cb17-ff07.html>.

20. Gustavo López, Neil G. Ruiz & Eileen Patten, *Key Facts about Asian Americans, a Diverse and Growing Population*, PEW RESEARCH CENTER (September 8, 2017), <http://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/>.

21. William Peterson, *Success Story, Japanese-American Style*, N. Y. TIMES, Jan. 9, 1966.

22. *Id.*

23. *Success Story of One Minority Group in U.S.*, U.S. NEWS AND WORLD REPORT, Dec. 26, 1966.



The debate over affirmative action at its essence is not only a debate over race but over how much we, as a nation, understand and can overcome the deep and lasting wounds of our past legacy of segregation.

cal posturing. While its opponents have cast affirmative action only as “preferences” or “quotas,” it is, in reality, a diverse mixture of remedies ranging from aggressive efforts to increase the candidate pool of qualified minorities and women to the more controversial “set-asides” requiring minority participation in public contracts. All such remedies were designed to help counter the effects of past discrimination and virtually none exclude non-minorities. The bipartisan U.S. Glass Ceiling Commission found that after 30 years of equal opportunity programs, 95% of senior management positions remain occupied by white males who constitute only 43% of the total work force. Asian Pacific Americans are a blip on the screen at 0.3% of top management ranks.²⁴

Today, after more than 50 years of equal opportunity programs, 72% of senior management positions are occupied by white males,²⁵ who now constitute 54% of the total work force.²⁶ Asian Pacific Americans are 21% of top management ranks.²⁷ While specific affirmative action measures may need to be tailored, the sustained commitment to bold affirmative action makes sense given the central role race and White Supremacy has occupied in American history. Race, ethnicity, color, and gender continue to determine how we are seen or understood most immediately by others. And contrary to speculation during the Obama presidency that America was experiencing a “post-racial” era, according to a recent NBC poll, a majority of Americans believe race relations are actually getting worse.²⁸

The debate over affirmative action at its essence is not only a debate over race but over how much we, as a nation, understand and can overcome the deep and lasting wounds of our past legacy of segregation.

24. Dale Minami, Essay, PERSPECTIVES ON AFFIRMATIVE ACTION...AND ITS IMPACT ON ASIAN PACIFIC AMERICANS (Gena A. Lew, ed., 1996) 11, 11.

25. Stacey Jones, *White Men Account for 72% of Corporate Leadership at 16 of the Fortune 500 Companies*, FORTUNE, (June 9, 2017), <http://fortune.com/2017/06/09/white-men-senior-executives-fortune-500-companies-diversity-data/>.

26. Richard Fry & Renee Stepler, *Women May Never Make Up Half of the U.S. Workforce*, PEW RESEARCH CENTER, (January 31, 2017), <http://www.pewresearch.org/fact-tank/2017/01/31/women-may-never-make-up-half-of-the-u-s-workforce/>.

27. *Labor Force Characteristics by Race and Ethnicity, 2016*, BUREAU OF LABOR STATISTICS (October 2017), <https://www.bls.gov/opub/reports/race-and-ethnicity/2016/home.htm>.

28. Andrew Arengue, Stephanie Perry, & Dartunorro Clark, *Poll: 64 Percent of Americans say Racism Remains a Major Problem*, NBC NEWS (May 29, 2018), <https://www.nbcnews.com/politics/politics-news/poll-64-percent-americans-say-racism-remains-major-problem-n877536>.

History, Experience and Demographic Destiny

While some recent reports from the US Census predict that the country may become “majority minority” in 2045—sooner than anticipated—America today remains a majority White European nation (76.6%).²⁹ Our early laws served to enslave Africans and close the immigration doors to Asian immigrants. “We the People” as found in the Declaration of Independence, did not include Black slaves or Chinese immigrants. Anti-Chinese laws such as the Page Act of 1875 (which effectively served to exclude female Chinese immigrants), the Chinese Exclusion Act of 1882, and the Geary Act, sealed the fate of the first Chinese immigrants who arrived in the 1800s. These hostile and racist laws were designed to restrict, disenfranchise and marginalize the Chinese population in America. Chinese were portrayed in the 19th Century as the “yellow peril,” threatening the livelihood of White laborers. The early Chinese immigrants were fated to live out their lives as single men, without the comfort of wives, children and families, isolated and with limited economic opportunity. Nonetheless, as a community they sought to fight for their rights in America. Significant civil rights cases were initiated by the early Chinese immigrants, establishing important legal principles.³⁰

Like the Chinese before them, Japanese in America faced a hostile America that prohibited land ownership and denied citizenship to the *Issei* (first generation). In the wake of Pearl Harbor, Japanese Americans were rounded up and forced into concentration camps behind barbed wire pursuant to President Franklin D. Roosevelt’s Executive Order 9066. Over 110,000 lost their homes, businesses or farms, personal property, and freedom.³¹

In the 1980s, young Asian Pacific American attorneys, members of various local Asian Pacific American Bar Associations and progressive legal groups joined efforts to fight for redress and reparations for Japanese. The *Coram Nobis* litigation was a highlight of these efforts and its success inspired a generation of AAPI activists and organizers.³²

The most dramatic legislation to impact the future of the Asian Pacific American community in the United States since the disastrous impact of the Chinese Exclusion Act of 1882 was the 1965 Hart-Celler Immigration Act. This act removed previous racial quotas and enabled family reunification. Upon signing the Hart-Celler Act of 1965, President Johnson understated the eventual impact of this revolutionary legislation, perhaps concerned the specter of thousands of immigrants from Asia (and other non-White countries) would raise alarms and foster a new nativism. President Johnson stated:

This bill that we will sign today is not a revolutionary bill. It does not affect the lives of millions. It will not reshape the structure of our daily lives, or really add importantly to either our wealth or our power. Yet it is still one of the most important acts of this Congress and of this administration. For it does repair a very deep and painful flaw in the fabric of American justice. It corrects a cruel and enduring wrong in the conduct of the American Nation.³³

According to Columbia University Immigration History Scholar Mae Ngai:

Both [Presidents] Kennedy and Johnson were very conscious of ... the tarnishing of America’s reputation as the leader of the free world. You had Jim Crow and you had national origins quotas. So, a lot of the willingness of the administration to enact civil rights reform is [from wanting] to look better around the world.³⁴

29. *The US Will Become Minority White in 2045*, *Census Projects*, BROOKINGS (March 14, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/>.

30. See e.g., *US v. Wong Kim Ark*, 169 U.S. 649 (1898); *Yick Wo vs. Hopkins*, 118 U.S. 356 (1886).

31. Heather Steven, *Japanese American Internment During World War II*, [https://www.umbc.edu/che/tahlessons/pdf/Japanese_American_Internment_During_World_War_II\(PrinterFriendly\).pdf](https://www.umbc.edu/che/tahlessons/pdf/Japanese_American_Internment_During_World_War_II(PrinterFriendly).pdf).

32. See *Hirabayashi v. US*, 28 F.2d 591 (9 Cir. 1987); *Yasui v. US*, 772 F.2d 1496 (9 Cir. 1985); *Korematsu v. US*, 584 F. Supp. 1406 (N.D. Cal. 1984).

33. Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill on Oct. 3, 1965, LBJ PRESIDENTIAL LIBRARY, <http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration>.

34. Jia-Rui Cook, *The 1965 Immigration Act that Became a Law of Unintended Consequences*, ZOCALO PUBLIC



Several civil rights laws passed during the sixties address equal opportunity in higher education.

The new immigration law became possible during the sixties in large part because of the effect of the civil rights movement upon the nation. It had a profound and fundamental impact upon Asian Pacific Americans. For the first time, Chinatowns were able to grow and spread in other locations. These changes are reflected in the Census data, with Asian Pacific American percentages (as a proportion of the total US population) rising from 0.4% in 1960, to 1% in 1970, 1.6% in 1980, 2.9% in 1990, 3.8% in 2000, and 5.8% today.³⁵

Affirmative Action in Higher Education Admissions

“Despite efforts by some to use the Asian American, Native Hawaiian and Pacific Islander communities as a wedge against other communities of color in the affirmative action debate, the National Council of Asian Pacific Americans is proud to stand behind affirmative action in higher education...Time and time again for nearly two decades, our communities have supported affirmative action in higher education, including a survey last year that shows 69% approve. We support these policies because they benefit AANHPI students, especially those who face educational disparities that are often hidden by data that is too broad. Simply put, affirmative action strengthens equal opportunities and access to higher education for all students.”³⁶

The National Council of Asian Pacific Americans (“NCAPA”) is comprised of 34 national Asian Pacific American organizations with a mission to strive towards: “equity and justice by organizing our diverse strengths to influence policy and shape public narratives.”³⁷

Several civil rights laws passed during the sixties address equal opportunity in higher education. Title VI of the Civil Rights Act was designed to increase racial diversity across a variety of sectors, including higher education institutions. Title VI provides, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”³⁸

SQUARE (Oct. 2, 2015), <http://www.zocalopublicsquare.org/2015/10/02/the-1965-immigration-act-that-became-a-law-of-unintended-consequences/events/the-takeaway/>.

35. See 1960 Census of Population, U.S. Census Bureau (1960), <https://www2.census.gov/library/publications/decennial/1960/population-volume-2/41927938v2p1a-1ech07.pdf>;

1970 Census of Population, U.S. Census Bureau (1970), <https://www2.census.gov/library/publications/decennial/1970/pc-s1-supplementary-reports/pc-s1-11.pdf>; 1980 Census of Population, U.S. Census Bureau, (1980), https://www2.census.gov/library/publications/decennial/1980/volume-1/united-states-summary/1980a_usc-01.pdf; 1990 Census of Population, U.S. Census Bureau (1990), <https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-1.pdf>; 2000 Census of Population, U.S. Census Bureau (2000), <ftp://ftp2.census.gov/library/publications/2001/dec/2kh00.pdf>; *Asian-American and Pacific Islander Heritage Month*, U.S. CENSUS BUREAU (May 2017). <https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2017/cb17-ff07.pdf>. Note that the U.S. Census Bureau only recorded the population of Chinese, Japanese and Filipino Americans in 1960 and 1970. All other Asian Pacific American groups were grouped in the ‘other’ ethnic identity option on the census until 1980.

36. Press Release, National Council of Asian Pacific Americans, (November 3, 2010) http://www.ncapaonline.org/national_council_of_asian_pacific_americans_supports_affirmative_action.

37. *About*, NATIONAL COALITION OF ASIAN PACIFIC AMERICANS, <http://www.ncapaonline.org/about> (last visited Nov. 17, 2018).

38. 42 U.S.C §§ 2000d.



An early instance of where an anti-affirmative action Asian American organization challenged the constitutionality of racial classifications to desegregate San Francisco's public schools occurred in the mid-1990s.

Through Executive Orders 11246 and 11375, higher education institutions have generally pursued two types of affirmative action plans to increase access among women and racial minorities: mandatory and voluntary. Mandatory programs are typically those that have been required by a government agency or a court to address past discrimination that the institution engaged in, whereas voluntary programs are those that represent conscious decisions by institutions typically focused on creating and maintaining diversity among the student body in order to support collective education benefits for the entire institution. Voluntary programs are generally broken into two categories: (i) race-neutral and (ii) race conscious. The former category of programs has been generally less controversial than the second set of programs, which has been heavily litigated over the past forty years, including in the seminal case of *Regents of the University of California v. Bakke*.³⁹

In *Bakke*, the U.S. Supreme Court addressed the legality of the UC Davis Medical School's admissions program, which had set aside 16 places out of an incoming class of 100 for minority applicants, who were considered separately from the other non-minority applicant pool.⁴⁰ In finding the UC Davis program unconstitutional under the equal protection clause of the Fourteenth Amendment given UC Davis' use of quotas, the court also found that partial consideration of race in higher education admissions as a "plus" was permissible.⁴¹

Although the Supreme Court has upheld the use of race as a limited factor in admissions as recently as the latest *University of Texas v. Fisher* case,⁴² it must be noted that Justice Kennedy who penned the opinion has since retired from the High Court, his successor is Brett Kavanaugh, a jurist not expected to support affirmative action. President Trump recently announced that he would reverse the Obama Administration policies that encouraged the consideration of race as a factor in diversifying student body on campus.

Asian American Legal Foundation and *Brian Ho v. SF Unified School District*

An early instance of where an anti-affirmative action Asian American organization—the Asian American Legal Foundation (AALF)—challenged the constitutionality of racial classifications to desegregate San Francisco's public schools occurred in the mid-1990s.

Lowell High School was one of the pre-eminent high schools in San Francisco and a highly desirable school to which parents of all races wished to send their children.

39. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

40. *Id.* at 274-75.

41. *Id.* at 317-318. Subsequent federal cases, including *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Fisher v. Univ. of Texas et al.*, 136 S. Ct. 2198 (2016) have confirmed that race conscious affirmative action plans were constitutionally permissible only when an institution can demonstrate that its use of race is both narrowly tailored and furthering a "compelling governmental interest."

42. *University of Texas v. Fisher*, 136 S.Ct. 2198 (2016)

A seminal class action case concerning affirmative action and Asian Americans, the Lowell High School case was brought by the AALF in the Northern District of California in 1994, by three school-aged named plaintiffs then in the San Francisco Unified School District.⁴³ In that case, the named plaintiffs were three Chinese-American students who, at the time of the lawsuit, were five years old, fourteen years old, and eight years old.⁴⁴ All had been rejected from San Francisco public schools on the basis of their Chinese descent.⁴⁵ They argued that the San Francisco Unified School District and related district and state defendants had invalidly classified and assigned them and other students based on race, thus violating their constitutional rights to equal protection under the Fourteenth Amendment.⁴⁶ The fourteen-year-old plaintiff, Patrick Wong, was rejected from the prestigious public magnet school Lowell High School “because his entry index score of 58 was lower than the minimum score of 62 required for Chinese applicants, although it was equal to the minimum score of 58 required for applicants of other racial/ethnic groups.”⁴⁷

Ironically, Lowell’s use of a more stringent entry index requirement for Chinese-American applicants versus other racial/ethnic groups was the unintended consequence of a 1983 consent decree that mandated numerous measures intended to end de facto segregation in San Francisco public schools.⁴⁸ Among other measures, the consent decree required that designated “alternative” schools (such as Lowell) enroll no more than 40% of their students from any one of nine listed racial and ethnic groups into which all school-age children were classified: Spanish-surnamed, Other White, Black, Chinese, Japanese, Korean, Filipino, American Indian, and Other Nonwhite.⁴⁹

By 1993, Chinese-American students made up nearly a third of the school-age population in San Francisco and approached the 40% ceiling on any single racial or ethnic group at Lowell.⁵⁰ Lowell attempted to curb its number of Chinese-American students by making it more difficult for them to meet the entry requirements compared to every other group.⁵¹ But Lowell was not the end of Patrick’s difficulties in gaining admission to a school. He was not only denied admission at Lowell, but also was rejected from four other public high schools that had maxed out its allowed number of Chinese-American students.⁵² Eventually he was admitted to Lincoln High School, another top-rated school in the Bay Area.

In 1996, the district court certified the plaintiff class that Ho (and the other two named plaintiffs) represented, namely “‘all children of Chinese descent of school age’ in the San Francisco Unified School District.”⁵³ The parties litigated the case for five years, “including an interlocutory appeal to the Ninth Circuit Court of Appeals which established that the school district’s racial assignment plan would have to be examined under strict scrutiny—a test both the district court and the Ninth Circuit indicated it would almost certainly fail.”⁵⁴ In February 1999, on the first day of trial in the case, the San Francisco Unified School District and its co-defendants settled the case by modifying its admission practices to eliminate race as a factor in determining student admission.⁵⁵ In 2005, the Ninth Circuit rejected a proposed extension of the consent decree that was the basis for the *Ho* litigation.⁵⁶

43. *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 861 (9th Cir. 1998); *Ho v. San Francisco Unified School Dist.*, 965 F. Supp. 1316 (N.D. Cal. 1997).

44. *Ho v. San Francisco Unified School Dist.*, 965 F. Supp. 1316, 1318 (N.D. Cal. 1997).

45. *Id.* at 1318-19.

46. *Id.* at 1319-20.

47. *Id.* at 1319.

48. See Cailin M. Liu, *Beyond Black and White: Chinese Americans Challenge San Francisco’s Desegregation Plan*, 5 *ASIAN LAW JOURNAL* 341, 342 (1998).

49. *Id.*

50. *Id.* at 343.

51. *Id.*

52. *Id.* at 344.

53. *Id.*

54. See *The Ho v. SFUSD Case – The Battle to End Racial Discrimination in San Francisco Schools*, *ASIAN AMERICAN LEGAL FOUNDATION*, http://www.asianamericanlegal.com/about_trashed/the-ho-v-sfusd-case-the-battle-to-end-racial-discrimination-in-san-francisco-schools/ (last visited July 30, 2018).

55. See *id.*

56. See *id.*

Since then, members of San Francisco-based Asian American Legal Foundation (“AALF”) have monitored the San Francisco Unified School District’s assignment plans to ensure compliance with the 1999 settlement.⁵⁷

In an article in the LEAP publication, Henry Der points out that “Not all race-conscious strategies are affirmative action...and that affirmative action as a public policy does not and cannot exist at the K-12 educational level because all school-aged children are required by law to attend school...public schools have a legal obligation to provide equal educational opportunities for all students.”⁵⁸

The Brian Ho case was packaged as an “affirmative action” case, but it essentially stemmed from that desegregation order which sought to address school segregation. “The federal court specifically designed the racially-based Consent Decree enrollment guidelines to prevent the re-segregation of San Francisco public schools.”⁵⁹ Der went further to criticize the plaintiffs and their supporters:

Possibly worse than this hypocrisy and selfishness is growing intolerance among some Asian Americans toward other racial minorities, in particular Blacks. As affirmative action opponents invoke their mantra of “individual rights,” “hard-work,” and “merit,” these Asian Americans have come to believe that they are better than other racial minority groups and specifically view Blacks as unqualified, undeserving individuals who could not get ahead, were it not for affirmative action. Others believe that Blacks have neither worked nor achieved enough to deserve an admission opportunity to a campus like UC Berkeley and should enroll in “lesser colleges.” There is, at times, little empathy that Black Americans may have suffered discrimination, differing in kind and by degrees when compared to the Asian American experience.⁶⁰

Der’s criticism above is sharp but worth reflecting upon as we look to understanding the parties involved in the Harvard lawsuit. This is the same legal team as in the *Brian Ho* case.

Race and Educational Opportunity: Proposition 209, NYC High School, and Harvard University

The academic successes of some segments of the Asian American community (e.g. 3rd, 4th, 5th generation Chinese, Japanese, Korean Americans, Indians and Pakistanis) has led some Asian Pacific Americans to believe that affirmative action harms rather than helps them. In several recent and highly publicized cases, groups of Asian Pacific Americans campaigned against or publicly opposed actions that would increase the strength of affirmative action initiatives in education. This may be due to the fact that educational institutions, and universities in particular, seem to have different standards of admission for Asian Pacific American students. Advocacy groups argue that the overall higher test scores, GPAs, and academic performances of Asian Pacific American groups in aggregate have led to higher standards for these groups in order to maintain admission rates that reflect the demographic percentages of the United States’ racial and ethnic makeup. This has allegedly led to deflated admission of Asian Pacific American students at universities and other schools, which created controversy in several states over issues of fair admissions practices.

While the *Ho* case is long settled, broader questions of the propriety of affirmative action and race-based admission criteria remain divisive among Asian Americans. National surveys indicate that most Asian Americans support affirmative action, but media outlets also report that some of the most vocal and visible opponents to affirmative action historically have been of Asian American descent.⁶¹

57. *See id.*

58. Henry Der, *The Asian American Factor: Victim or Shortsighted Beneficiary of Race-Conscious Remedies?*, PERSPECTIVES ON AFFIRMATIVE ACTION...AND ITS IMPACT ON ASIAN PACIFIC AMERICANS (Gena A. Lew, ed., 1996) 13, 13-14.

59. *Id.* at 15.

60. *Id.* at 18.

61. *See e.g.*, John Eligon, *Asian-Americans Face Multiple Fronts in Battle Over Affirmative Action*, N.Y. TIMES, June 16, 2018, <https://www.nytimes.com/2018/06/16/us/affirmative-action-asian-americans.html>; *see also* Katherine Fang, *I’m an Activist for Asian Americans. I Support Affirmative Action*, OPINION, WASHINGTON POST, July 12, 2018, https://www.washingtonpost.com/opinions/im-an-activist-for-asian-americans-i-support-affirmative-action/2018/07/12/f637fb54-7e0a-11e8-b660-4d0f9f0351f1_story.html?noredirect=on&utm_term=.27d9f3e953e2.

Proposition 209 and Senate Constitutional Amendment No.5

In 1996, California abolished affirmative action with the passage of a highly controversial ballot proposition, Proposition 209. This proposition, which eventually amended the California constitution, prohibited the consideration of race and ethnicity as a factor in admission to public universities, as well as in contracting and other public employment. Leaders of the University of California system and other public educational institutions raised concerns that this measure would seriously impact the ability of the State's higher education system to recruit a more diverse student class. Their predictions have been accurate. In a study of this impact, researchers found that:

In spite of high investments of both human and financial resources in many areas, the UC has never recovered the same level of diversity that it had before the loss of affirmative action nearly 20 years ago—a level that at the time was widely considered to be inadequate to meet the needs of the state and its young people. It has never come close to a student body representing the state's population.⁶²

The termination of race-conscious admissions policies has had dire consequences for certain minority groups in the most competitive UC schools. For example, the percentage of Black freshman at UC Berkeley went from over 7% in 1997 to around 3% in the next year when Proposition 209 went into effect.⁶³ Similarly the percentage of Latino students went from about 14% to 7% during this same time.⁶⁴

In 2014, rallies by Chinese Americans opposing efforts to reinstate affirmative action in the California public university system yet again placed Asian Pacific Americans in the center of an affirmative action controversy. These organized protests from the Chinese community against the amendment to overturn Prop 209 ultimately pressured Asian Pacific American elected officials in California to withdraw their support of the SCA-5 (shorthand for the Constitutional Amendment to overturn Prop 209). The constitutional amendment introduced in 2012 would effectively reinstate affirmative action and allow public institutions to once again consider race and ethnicity in their awards of contracts or admission. While Asian American civic leaders and civil rights groups had joined longstanding coalitions supporting diversity and affirmative action in California, several other Asian Pacific American lobbying groups vociferously opposed this new amendment and partnered with California's Republican Party in their efforts to prevent it from reaching the election ballot. Their belief was that Asian Pacific American representation at state universities and in other public institutions would drop if Proposition 209 were to be repealed. It is not clear whether this would be the case. For example, nearly 42% of first-year students enrolled at UC Berkeley were Asian Pacific American in 1997, one year before Proposition 209 came into effect.⁶⁵ After its passage, and after race-conscious admission policies were prohibited, the percentage was around 43%.⁶⁶

NYC High Schools

Another arena that has fueled controversy within the Asian Pacific American community is the Mayor of New York's plan to eliminate the Specialized High School Admissions Test.⁶⁷ Sensing that school desegregation efforts would affect the entrance exam for the three Specialized High Schools, two New York State senators passed the Hecht Calandra Act in 1971, which mandated that admissions to Stuyvesant High School, Bronx High School of Science, and Brooklyn Technical High Schools would be solely on the basis of an exam. This exam was called the specialized high school

62. William C. Kidder & Patricia Gandara, *Two Decades After the Affirmative Action Ban: Evaluating the University of California's Race-Neutral Efforts*, ETS (Oct. 2015), https://www.ets.org/Media/Research/pdf/kidder_paper.pdf

63. *UC Berkeley Archival Enrollment Data by Ethnicity, 1996-1997*, UC BERKELEY, https://www.berkeley.edu/news/media/releases/2007/12/enroll_archival.shtml.

64. *Id.*

65. *Id.*

66. *Id.*

67. Elizabeth A. Harris, *De Blasio Proposes Changes to New York's Elite High Schools*, N.Y. TIMES (June 2, 2018), <https://www.nytimes.com/2018/06/02/nyregion/de-blasio-new-york-schools.html>.

admissions test (“SHSAT”). The statute also created a program which allowed underprivileged students who nearly passed the SHSAT to attend summer classes and then gain admission to one of the schools.

In 2012, the NAACP Legal Defense Fund filed a complaint with the U.S. Department of Education—Office of Civil Rights.⁶⁸ This complaint alleged that the SHSAT created a disparate impact on Black and African-American applicants and that as a result the test was discriminatory.⁶⁹ The complaint also argued that while NYC junior high schools are predominantly Black and Hispanic, the New York City Specialized High Schools are predominantly White and Asian.⁷⁰ They were supported in this complaint by Asian Pacific American politicians John Liu and Ron Kim, as well as by other Asian Pacific American organizations like the Asian American Legal Defense and Educational Fund (AALDEF) and the Coalition for Asian American Children and Families.⁷¹ To date, there has been no finding issued by the OCR. This complaint marked the beginning of the latest round of debate on the SHSAT.

New York City Mayor Bill De Blasio introduced a bill into the New York State Senate in June 2018 that would incrementally lessen the consideration of the SHSAT.⁷² In 2019, twenty percent of seats in New York’s specialized high schools will be reserved for low income middle school students who just miss the test cut off, an increase from the five percent of seats that are reserved for these students.⁷³ Eventually, Mayor De Blasio would like to eliminate the SHSAT entirely and rely on class rank and state standardized test scores to determine student admission.

Mayor De Blasio held a press conference to discuss these planned changes after he was met with anger and protest.⁷⁴ His rhetoric at the conference seemed to pit Asian Pacific American communities against Black and Latino communities in their competition for admission to top performing high schools. The political messaging of the roll out cost the Mayor public support that he might have gotten from Asian Pacific American elected officials and Asian American organizations that were sympathetic to his point of view. As a result, much of the news coverage in the first two weeks after his roll out was composed of Asian Americans and protesters that oppose his proposed changes.⁷⁵

For many Asian American parents—perhaps especially those coming from Asian countries—there is a very long history of the use of tests in Asian nations as the sole means of selecting college students, officials, and educators. While higher education policy experts agree that test scores should not become the only factor evaluated by college admissions offices, the debate surrounding how to diversify the Specialized High Schools of New York continues as people seek to avoid zero-sum arguments that pit Asian American students against Black and Hispanic students while at the same time, avoid scapegoating Asian American students or blaming Asian Americans for their large representation in these schools.

68. New York City Specialized High School Complaint, LDF (Sep. 27, 2012), <https://www.naacpldf.org/case-issue/new-york-city-specialized-high-school-complaint/>.

69. *Id.*

70. *Id.*

71. *Id.*

72. Mayor DeBlasio and Chancellor Carranza Announce Plan to Improve Diversity at Specialized High Schools, NYC (June 3, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/281-18/mayor-de-blasio-chancellor-carranza-plan-improve-diversity-specialized-high#/0>.

73. *Id.*

74. *Mayor De Blasio’s Plan for Elite New York City High Schools Met with Anger by Many*, CBS NEW YORK (June 4, 2018), <https://newyork.cbslocal.com/2018/06/04/mayor-de-blasios-plan-for-elite-new-york-city-high-schools-met-with-anger-by-many/>.

75. *See id.* *See also* Chris Campanile, Selim Algar & Bruce Golding, *De Blasio’s Plan to Get Rid of Admissions Tests Faces Strong Opposition*, N.Y. Post, June 5, 2018, <https://nypost.com/2018/06/05/de-blasios-plan-to-get-rid-of-admissions-tests-faces-strong-opposition/>.

Harvard Admissions

“Historically, such programs [as affirmative action] were critical in making higher education available to Asian Americans in the 1960s and 1970s, before which Asian Americans had suffered exclusion and de jure segregation in public education like other people of color.”⁷⁶

-Nancy Leong, Professor of Constitutional Law at the University of Denver

In a high-profile litigation, the Asian American Legal Foundation along with the support of Edward Blum sued Harvard University in a case that when to trial in the Fall of 2018. . Both the USDOJ and President Trump have publicly announced their support for the plaintiffs in this litigation by the anti-affirmative action legal group. It is a case whose outcome may well change the course of affirmative action admissions programs in private institutions of higher education. The Harvard Asian American Alumni Alliance (“HAAAA”) wrote in a statement supporting the university’s affirmative action program:

[W]e strongly believe that any bias or potential bias against any group must be addressed by more and deeper understanding of racial, ethnic and cultural issues, not less. We also believe that race and ethnicity are critical components of the diversity of the student body that enriched our Harvard educations. And thus we cannot support the ultimate goals of the SFFA lawsuit, which seeks as its sole remedy that Harvard “conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission.”

We believe that Harvard has a responsibility to be inclusive of students and communities whose educational opportunities have been limited by race and ethnicity-related circumstances, and that Harvard must strive to understand those circumstances as it admits each class through a whole-person admissions process. This is not to say that Harvard and like universities bear the primary burden of addressing historical inequities, but they certainly must play a role. Many Asian Americans also confront systemic barriers to education, and we want Harvard Admissions to take those into account too. We believe that all of us are better off when we sit across the dining hall table and the seminar table with both those who can relate at a gut level to our own lives and those whose journeys might be a struggle to comprehend. Race and ethnicity undeniably play a role in defining the spectrum of intellectual and social support and challenge that Harvard seeks to provide. Additionally, we believe that Harvard should build citizens and leaders for all communities—ones who have learned to build bridges to others.⁷⁷

Some Chinese American immigrant groups have joined the anti-affirmative action organization Students for Fair Admissions (“SFFA”) arguing that affirmative action artificially deflates the Asian American population at Harvard and other elite universities.

Whether or not this is because Asian American applicants are held to higher standards than other groups in order to gain admission to elite educational institutions, at least this is the perception many applicants and their families have. If it is shown that Asian Pacific American applicants are treated differently than Whites, this negative action would be illegal. Yet the controversy and how it is framed by the litigation leaders is that Blacks and Hispanics are taking away seats from qualified Asian Pacific American applicants. Edward Blum, the political strategist and leading force behind the *Fisher I* and *II* cases, is one of two anti-affirmative action organizers behind the Harvard lawsuit.

After the losses of the *Fisher* cases, Students for Fair Admissions seeks to use discrimination against the Asian Pacific American community as a way to undermine affirmative action programs at top universities. In the organization’s motion for summary judgment, SFFA alleges that not only did

76. Nancy Leong & Erwin Chemerinsky, *Don’t use Asian Americans to Justify Anti-Affirmative Action Politics*, WASHINGTON POST (Aug. 3, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/08/03/dont-use-asian-americans-to-justify-anti-affirmative-action-politics/?noredirect=on&utm_term=.26664d04dc56.

77. Amu Chu, et al., Letter to Members, Harvard Asian American Alumni Alliance (Aug. 29, 2018), <http://haaaa.sigs.harvard.edu/article.html?aid=147>.

Harvard discriminate against Asian Pacific American applicants on the basis of subjective scores, but also that Harvard knowingly did so. Harvard University conducted an internal review of its admissions practices, and, according to SFFA, found that the ways in which the admissions team assessed subjective personality traits of Asian Pacific American applicants differed from its assessment of white students. Overall, Asian Pacific American applicants were found to have “less attractive” personality scores.⁷⁸ This evaluation of Asian Pacific American applicants appears to revive an aspect of the model minority myth by failing to recognize unique traits and individuality among Asian Americans.

Harvard denies that this internal investigation led to the discovery of discrimination against Asian Pacific American applicants, but the University concedes that if applicants were admitted on academic merit alone, Asian Pacific Americans would make up around 45% of the student body. The current percentage of Asian Pacific American students in Harvard’s student body hovers around 23%.⁷⁹

Harvard University has a vested interest in maintaining a diverse student body, not only because it has a duty to society as an institution of higher education, but because diversity at universities leads to deeper learning experiences for all students. Further, if SFFA is concerned with the admission practices that artificially lower Asian Pacific American representation at Harvard, it seems that the best place from which to draw admission seats is the White or legacy population at Harvard. Admissions standards for White and legacy applicants are allegedly lower than the standards for Asian Pacific American applicants. Instead of eliminating affirmative action, perhaps the university could accept more qualified diverse students and fewer legacy students.

Epilogue

Americans of diverse backgrounds have a stake in advancing justice and equality in America. Affirmative action remains an important tool in the civil rights arsenal. Failure in this century to achieve greater progress in eliminating racial disparities can threaten to derail our common endeavor to maximize the human capacity and creativity of all of our peoples. Let us find a way, even given our differences, to move forward. Something Chancellor Chang-Lin Tien wrote at the end his essay on affirming affirmative action is an appropriate way to find our way forward together:

The Asian community has always been united by a strong sense of justice. I am confident that we will come to the fore as the current debate on affirmative action unfolds. As we face the challenges of the 21st century, we can draw inspiration from a poem carved on the wall of the Angel Island detention center. As the anonymous Chinese poet waited for clearance to enter America, he wrote:

“Already a cool autumn has passed.

Counting on my fingers, several months have elapsed.

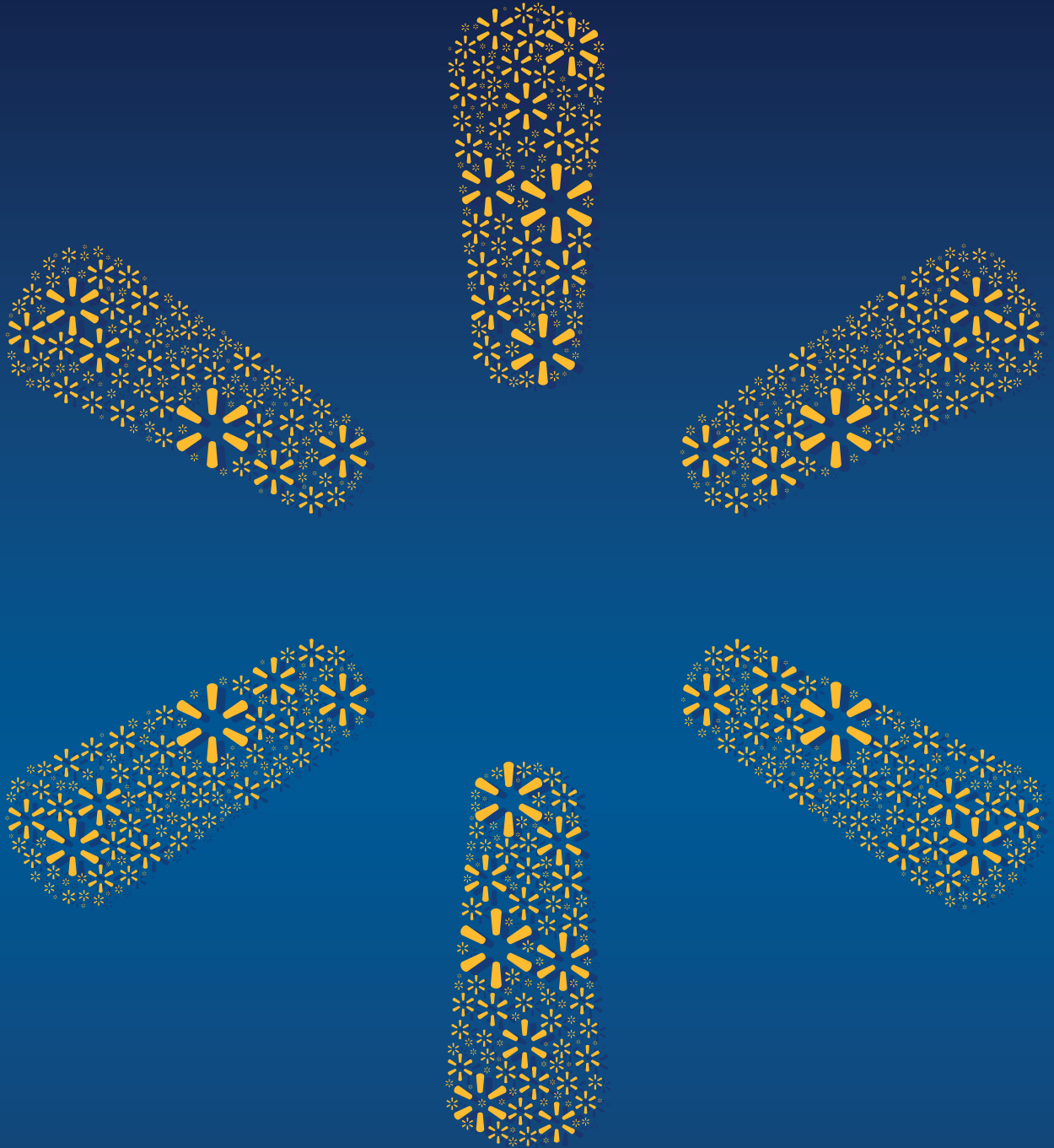
Still I am at the beginning of the road.”

We, too, are at the beginning of the road—the road towards a society in which equal opportunity truly exists and in which universities prepare all of nation’s students to live and work harmoniously in the global village of the 21st century. I look forward to traveling down the road together with you.⁸⁰

78. Students for Fair Admissions, Plaintiff’s Memorandum of Reasons in Support of Its Motion for Summary Judgment (June 15, 2018), <https://int.nyt.com/data/documenthelper/43-sffa-memo-for-summary-judgement/1a7a4880cb6a662b3b51/optimized/full.pdf#page=1>.

79. *Admissions Statistics*, HARVARD COLLEGE, <https://college.harvard.edu/admissions/admissions-statistics> (last visited Nov. 17, 2018).

80. Chang-Lin Tien, *Affirming Affirmative Action*, PERSPECTIVES ON AFFIRMATIVE ACTION...AND ITS IMPACT ON ASIAN PACIFIC AMERICANS (Gena A. Lew, ed., 1996) 19, 20.



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Countering Cultural Isolation: Increasing the Numbers of Native Law Students and Lawyers

By **Randall R. Murphy**

Deputy Attorney General, California Department of Justice

Native American numbers in the legal profession are small. How can law schools more effectively recruit, retain, and successfully launch Native American law students into the legal profession?

Since the demographics of the legal profession have been reported, Native American demographics – as law students, attorneys in large law firms and corporate law departments, and the profession in general – in all the categories upon which the profession focuses most of its diversity and inclusion attention, are noted almost as an afterthought. In large part, this is because our numbers within the profession are small and the agencies and organizations collecting and compiling this data may, understandably, feel that our numbers are so small as to not truly count. Moreover, those small numbers, as best as we can tell given the absence of more robust and fulsome data, have remained stagnant for many years. The point that many in the legal profession’s diversity and inclusion community seem to miss, however, is that it is precisely because Native numbers are small and have remained relatively stagnant for so long, that the profession has allowed itself to become complacent about, and perhaps even indifferent to, the ramifications of diversity and inclusion efforts that omit Native Americans. That is a mistake.

Allow me to explain: It has been almost 30 years since I was in law school and from my own experiences, I understand why more of my fellow Native Americans did not and do not pursue entry into the legal profession. What I find alarming, however, is that not only have the numbers of Native Americans in our profession not changed in any meaningful way, neither has the law school experience for Native students. Until meaningful change is incorporated into legal education and beyond, Native American numbers in the profession will remain small, even miniscule, and similarly, the numbers related to other types of racial/ethnic diversity will also continue to suffer, all to the continued detriment of the legal profession and the clients we serve. Without significant numbers of Native Americans in the ranks of American lawyers, the people who are the only group specifically identified by name in the United States Code, will continue to have minimal opportunities to have their individual, community and our tribal interests represented by another member of their tribe or community. Without significant numbers of Native Americans in the legal profession, people will continue to be forced to rely upon a legal system that is foreign in the sense that it lacks representation by anyone who might share a similar cultural background and the understanding that brings. Despite the best intentions of the non-Native lawyers and the legal system, this absence of representation undermines the degree of confidence Native Americans, indeed all Americans, can have in that system. That is not justice.

In It to Win It

Ours is a profession of hierarchies. Some courts are higher than others. In law firms, partners rank higher than associates. And some law schools are deemed more prestigious, more elite than others. Today, thanks to the internet, it’s easy to not only find out which law schools are ranked higher than others, it’s also easy to find out why the rankings are questionable, or even wrong – if you know to even ask the question.



Too many Indian students don't have the chance to be in it, much less win it.

When you grow up on a reservation, where few adults attend college, much less law school, the very notion of attending law school is so foreign that Native students may not even know to ask if one law school is better than another and what differences in rank actually mean in the real world? How many Native students will know to think about their lives beyond law school and the employment opportunities that may or may not be available to them, simply based upon the name and reputation of the educational institution bestowing their law degree?

My own experience bears that out. I earned my undergraduate degree from the University of Nebraska. When I was applying to law school, I had little understanding of admissions criteria for law schools. I had accepted an offer from a respectable but by no means "name" law school, when a family emergency required me to defer for a year. During that time, I ran into one of my former professors on the street. He had been a mentor and was familiar with my GPA, LSAT score, University activities, and community activism. He was surprised to see me as he thought I was gone to law school. I explained the situation to him and told him where I would be attending law school the following year. He asked why I hadn't applied to any of the "top" law schools. I clearly remember my answer: "I'm not a white fraternity boy – I really don't think I'm going to get into those schools." My professor told me in no uncertain terms that I was mistaken. He asked me to apply as a personal favor to him. So, for his sake, I did. I typed out the essays and applications, using a great deal of white-out, and, thanks to fee application waivers, sent the 15 or so applications off to the top schools on the U.S. News and World Report list. When the letters of acceptance started arriving, I was surprised. I chose to go to Yale and, unknowingly, opened the door to the myriad career opportunities I would not have had if that professor hadn't advised me to apply to elite schools. If I had earned my law degree at the school I originally planned to attend, I have no doubt I would have had a satisfying career, but my opportunities would have been severely curtailed. But at the time, I didn't know that. There was no one I knew to ask that question. And even if I had, I didn't know how to ask it. As an aspiring lawyer who was also Native American, I had no clue how to be in it to win it.

Today, decades later, too many Indian students don't have the chance to be in it, much less win it. They don't know to ask whether or/and why one law school is deemed "better" than another, whether a degree from one will carry more weight for initial employment opportunities than another, and, most importantly, whether they have a realistic chance to be admitted to, survive, and thrive at a "top" law school. For our legal profession to truly become more diverse and inclusive, we need to ensure that law school alone is not the end goal of Native students both on and off reservations and other students from socio-economically disadvantaged backgrounds. We need to ensure that law schools educate and advise these students on how to effectively use their degree because it will open doors for them to achieve success through a wider variety of career opportunities about which many of these students are unaware.

This is no criticism or disparagement of those law schools not deemed "elite." I know as well as anyone the problems with the way law schools are ranked. But the reality is that many graduates of law schools not considered "elite" will have fewer career opportunities than those of their peers at the "top" schools. They are much less likely to be given serious employment consideration by large law firms, the academy, and prestigious judicial clerkships.



I sometimes wonder if I may have done a disservice to the more Reservation-connected, traditional (in the Native sense) students who applied, were admitted and matriculated to Yale or other elite law schools.

Critical Mass

If you've ever been in a group for any significant amount of time and discovered that there was no one like you, you know it's no picnic. The other people may be perfectly nice and friendly, but one can't help but feel isolated, alienated, alone. And when those feelings last more than the length of a single meeting or a conference or a social event, but goes on day in and day out, each and every day, for years, it is wearing, worrying, and wearying. If we want to see more Native members of this profession, we need to think strategically about how to provide enough critical mass of Native American students in our law schools so that their entry into the profession isn't so isolated that they shut down emotionally or exit before graduation.

In 1986, when I was a 1L, I was the only Reservation-connected (Rosebud and Pine Ridge) Native, not only in my class but in the entire law school. According to the admissions office, there were only two other Natives enrolled and one of them did not want to be identified. In three years I never did determine the identity of the mystery Indian. The other identified Native told me he had visited the Navajo Reservation one summer and seemed very uncomfortable talking about his Indian background. I never did find out his tribal affiliation. He chose not to be involved in anything Indian at the school.

After experiencing the lack of Indians for a few months I went to the admissions office to inquire about the dearth of Indian law students. I was told that the prior cycle contained only 5 applicants and at least one of them had put down Native in error (thinking it meant born in the United States). Perhaps I was naïve. I believed that all that was needed was for someone to contact prospective Indian law students and urge them to apply, and, once accepted, attend law school. So, I made it a personal mission to try to recruit other Indians to join me in New Haven. They say misery loves company.

In those days before concerns about data privacy became an issue, the Admissions Office gave me a list, with contact information, of the pool of candidates with either the grades or LSAT scores to be competitive for admission into the law school. During the Fall of 1986, 87 and 88 I called every person who identified as Native with either the grades or scores to be competitive at the top schools. This was not a particularly difficult task because the total number in any given year was never greater than thirty. Also, some of the conversations were short when I discovered the person was not really Indian but put down "Native" for various misguided reasons. Yet I persisted, encouraging these students to consider Yale or another name law school. The success of this effort was reflected by the fact that nine Natives were enrolled in Yale Law School the year after I graduated.

I sometimes wonder if I may have done a disservice to the more Reservation-connected, traditional (in the Native sense) students who applied, were admitted and matriculated to Yale or other elite law schools. I was 30 when I began law school. I was used to being an outsider and feeling culturally isolated to some degree, although at Nebraska I always had the Native group for shelter. But

for a 21 or 22-year-old quasi-traditional Native to be put into the cultural isolation that is an elite law school can be disheartening. It is a simple fact that Native people are culturally isolated at top law schools and frequently viewed as museum pieces or historical curiosities.

Countering Isolation

Achieving critical mass is a challenge but I believe it can be done. Yet once achieved, it raises another difficult question: how do law schools (and in the end game) firms, lessen the cultural isolation of Native students and attorneys, and is that even possible. I believe the same general approaches can work if instituted at all levels, with the possible exception of a Native space-that might simply be too difficult at a law school or firm with only one or two Natives in separate offices.

It is possible to lessen, if not eliminate, the isolation of Native law students and lawyers.

It starts with understanding that we are not all the same. Our tribal cultures vary widely. Being traditionalist and Reservation-connected means different things to different Indians. Thus, a cookie cutter approach is inappropriate. Having said that, the first step is simple: just treat us as people without stereotyping us and/or expecting us to act a certain way. Many of us may be relatively unsophisticated when we get to a top law school or firm, but if we get there it usually means we are bright enough to figure things out. But to get there requires steps be taken at the undergraduate level to increase the numbers of Natives applying and matriculating to law schools.

Next, when possible, it entails greater partnerships between undergraduate institutions and law schools.

Undergraduate Inclusion and Support

Undergraduate information dissemination and guidance is where the progression to law school must begin. No major educational institution with more than two or three Native students should be without a Native center, comprising at minimum a separate room, with a door, where Native students can gather. I was shocked when a group of Native students (approximately 12-15) from the University of Southern California came to our Indian Commission meeting and asked for our support in helping them convince USC to at least give them a room to meet in. I was amazed that they did not have a Native Student Center of any nature whatsoever. This is an issue that is easily remedied if the institution chooses to do so. Without a central gathering place, it is difficult for Natives to feel they have a place where they can just “be Indian.” Not having a “safe” place when so many other groups have a space also makes us feel like second class citizens.

Second, a Dean of Native Students at the undergraduate level, who may wear other hats as well, is a necessity. Not only is such a liaison with the administration and faculty necessary to help Native students (many of whom are first generation) navigate the intricacies of colleges and universities, but a Dean is also necessary to help maintain peace in the on-campus Native community. Unfortunately, some Natives will engage in tribalism to the detriment of other Natives. My observation has been that this is more common at the undergraduate level. Some will try and make life difficult for members of other tribes. For example, an undergraduate at an elite East Coast University, often rated in the top ten nationally, wanted to include one of his tribe’s dances at a cultural event. The three people running the event – all from a southwestern tribe – told him that his dancing was not good enough. They excluded him from the Native group isolating him even further. He soon dropped out. Those three Natives running the student organization went on to isolate other Native students, as well. The truly sad part of this very real progression of events was that the school did not recognize what was going on because a non-native administrator did not believe the Native students who complained; he simply didn’t believe Indians would do that to each other. Non-Indian administrators need to listen to Native students with an open mind. They need to be aware that other agendas may be in play that give the lie to the stereotypical belief that all Indians are a united front of happy campers at a school.

On the undergraduate level, the solution is to avoid the patronizing approach (where the white administrator's thinking was jaundiced by his stereotyping of the students as a homogeneous group). He needed to listen to the students and then follow up to see if their concerns were accurate. Once the above steps are taken, many other pieces of the puzzle will fall into place. Native students with a place to gather and talk and an administrator who can work with them will lead to greater success stories and help keep the students in school. From there the students interested in law schools will have someone they can talk to about how achieve that goal: what classes to take, the need for a professor to write letters of recommendation for them, how to prepare for the LSAT, and a myriad of other questions that arise for the person who has no family members or others who have walked that road. Just as I did not know which law schools to which to apply, the current first-generation Native student will not know what is possible without someone whispering in their ear.

Law School Inclusion and Support

As with an undergraduate institution, a law school with more than three Native Students should have a separate Native Center or at least a room where the students can be at peace. At the professional school level, however, it is also vital to have professors designated to reach out to these students as mentors: the first-generation Native student may not know how to go about creating that relationship on his or her own. The importance of having a faculty member or administrator to help guide their course of study becomes more important the higher the level of the law school.

The law school administrators might also want to reach out to any undergraduate organizations that exist and make sure the incoming Native students are aware of that resource. At a minimum the incoming Native 1Ls should be aware of any Native student center. A law student's inclusion in the undergraduate Native community would help both sides of the coin. The undergraduates could use the law student as a resource, even if they are not considering law school, and the law student has an automatic community where he or she will usually be respected. This also would help the pipeline concept increasing the possible number of LSAT-takers and undergraduate Natives who can be shown that law school can be a real possibility if the proper steps are taken.

Recruiting and Retaining Native American Associates

It is worth noting that the Native law school graduate brings a cultural uniqueness and way of thinking to the practice of law. This is not a discussion of why diversity is important – surely that issue has long since been decided. The question here is how law firms can make themselves attractive to a Native graduate. There are big picture human interaction issues and other work environment issues. The big picture issue is a very simple one: for law firms the inclusion and retention of junior Native lawyers must focus on the obvious: we are neither museum pieces or curiosities and do not care to be treated as such. Understand that we are not what Hollywood depicts, but, as far as being lawyers goes, we are much like everyone else at our level.

In the recruiting process the presentation of a firm's opportunities is important, but don't assume that every Indian wants to work on Indian issues. It is more important to stress that the firm will provide mentoring, training, quality assignments, and inclusion in social activities with other lawyers and clients.

One would think that the concept of treating us like other associates would never enter into the conversation at this level, but my own and other Native experiences going back thirty years, clearly shows it remains a problem. A Hindu Asian Indian does not seem to suffer the same inquisitive curiosity about the pantheon of Hindu deities as does the Native (who has no similar pantheon but is still asked questions about our spiritual beliefs). Thus, a first step is to be aware that stopping by a Native's office and asking about "worshipping the sun" is really not appropriate (true example from top international firm's New York office). The excuse of just "being curious" does not really justify the questions. Does that mean that when a Native associate is brought on board a firm-wide meeting must be held with a list of does and don'ts? No, it does not.



Unfortunately, most senior lawyers have no idea how to respond to the changing landscape.

What it means is that a series of training sessions should be held as part of the firm's normal training where issues relevant to all minority lawyers are discussed and an awareness is instilled in the firm's culture that individuals of different cultures are not at the firm to satisfy the curiosity of the majority white male population. The inclusion of current minority associates who could speak without fear would be very helpful in that regard. The issue of speaking without fear is, of course, of monumental importance. A minority associate who wants to share an inappropriate experience should not have to worry about affecting his or her career with the telling. Just as an Episcopalian associate might have difficulty, and be offended, by a series of questions concerning the founding of the church by Henry VIII in the midst of a political/marital disagreement with the Pope, a Native should not have to answer questions about ceremonies, and the meaning or the origins of their spiritual beliefs. Frankly, the Immaculate Conception and its similarity to Greek myths seem very curious to me, but I don't ask Catholics about the oddity of that similarity.

With some of the largest law firms in the world it never ceases to amaze me how very well-educated white people continue to ask such abysmally foolish (and offensive) questions. Do you worship the sun (I'm not an ancient Egyptian)? Do you believe that everyone has a spirit animal (sure, mine's a phoenix)? Why can't Indians just give up the reservations? Don't they just hold you back (sure, like owning property holds you back)? I was asked these questions and, sadly, I am told by young Natives in firms that they are still being asked similar questions today. Not much has changed in 30 years. But, things are changing at a rapid pace now, and along with other social changes, the awareness that certain questions and assumptions about minority lawyers are inapposite. Unfortunately, most senior lawyers have no idea how to respond to the changing landscape.

Conclusion

We are witnessing a change in the way law schools and firms approach cultural diversity and inclusion. For too many years the occasional minority person was brought in to elite law schools and major law firms because it was deemed necessary for appearances. Now, there is an awareness that minority law students and lawyers bring something unique to the table. It has been a long journey. We may no longer be at the base of the mountain staring up, but we are by no means at the summit looking down. Continued sustainable change requires acknowledgement of our needs, recognition of our particular challenges, and appreciation for the benefits our diversity brings to our colleagues, clients, and profession. It starts at the undergraduate level, perhaps even earlier, and while requiring concerted, coordinated efforts, does not demand difficult effort. Hopefully, undergraduate institutions and law schools can lead the way so that 30 years hence, another Native is not still bemoaning the lack of progress spanning 60+ years.

Recalibrating Diversity Initiatives

By: Enrique Ortiz Ortega

Vice-President, Regulatory Reform Strategy Group, Legal and Compliance Division,
Morgan Stanley

How does the legal profession reach out to Hispanic law students and ensure they are supported and included? Here are different approaches on how to support diversity initiatives for Hispanics and other minority groups.

Difficulties in growing the pipeline¹ of diverse candidates by race and gender are well documented² across various groups in the United States, but I submit that by expanding the definition of diversity to include a wider net of traditionally underrepresented groups we can yield a more diverse reflection of society in the legal profession.

This piece is intended to continue, or in some cases commence, the conversation on this topic, and does not attempt to address derivative issues or impose a single-solution. This paper's *raison d'être* is to argue that in addition to — but not *in lieu* of — investing pipeline³ efforts on assisting traditionally underrepresented, widely defined, racial, ethnic and gender groups; we should also consider defining the concept of diversity more broadly (in dimensions and characteristics) when designing and targeting pipeline initiatives aimed at increasing diversity in the legal profession.

While these are covered in further depth below, this piece will address how to make the legal profession more diverse by focusing pipeline organizations' resources at public and other non-elite educational institutions in order to expand the universe of where employers can recruit from. Additionally, the note will highlight methods by which to increase racial, ethnic, and gender diversity in the profession by targeting historically disadvantaged groups within an umbrella racial or ethnic group⁴ — e.g. on account of nationality, colourism, minority status within a wider racial or ethnic group, etc. Lastly, the paper will conclude by advocating for the use of median income data across the poorest zip codes in the country to ensure that pipeline efforts and initiatives consider economic diversity— with the added benefit of including people of colour and White Americans under this dimension of diversity.

Efforts to ensure diversity across its various dimensions (e.g. economic diversity,⁵ diversity within umbrella racial ethnic categories) are particularly appropriate at this time of income inequality,⁶ and peculiarly important to the legal profession due to the influence and impact that lawyers have on advocating for and shaping public policy in our democracy. Expanding the definition of diversity to consider additional criteria has the added benefit of providing much needed focus on the people that are in most need across society.

1. Diversity pipeline initiatives—or organizations established to pursue increasing pipeline initiatives—should be understood, for purposes of this paper, to mean organizations engaging in the mentoring of students, at the middle or high school, or college levels, introducing young people to higher education opportunities, community outreach to underrepresented groups in the legal as well as potentially other selective professions, and other efforts aimed at making the legal profession more diverse and representative of our society.

2. An estimated seventy-two percent of matriculants at the nation's most competitive universities hail from the wealthiest quartile of families in the U.S. JENNIFER GIANCOLA & RICHARD KAHLENBERG, TRUE MERIT, ENSURING OUR BRIGHTEST STUDENTS HAVE ACCESS TO OUR BEST COLLEGES AND UNIVERSITIES (2016), available at http://www.jkcf.org/assets/1/7/JKCF_True_Merit_Report.pdf.

3. *Supra* note 1.

4. I define 'umbrella race or ethnic categories' as those categories encapsulating diverse groups at the 'Hispanic' or 'African American' level without identifying additional nuances to identity such as country of origin (e.g. Mexican-American, Nicaraguan American), specific ethno, cultural, or linguistic heritage within a national group (e.g. Mapuche native Chileans, Andalusian-Mexicans, Quechua speaking groups in Ecuador) etc.

5. *Supra* note 2.

6. STANFORD CTR. ON POVERTY & INEQUALITY, 20 FACTS ABOUT U.S. INEQUALITY THAT EVERYONE SHOULD KNOW (2011), available at <https://inequality.stanford.edu/publications/20-facts-about-us-inequality-everyone-should-know>.

Background

It is widely acknowledged that individuals of Hispanic Origin (“Hispanics” or “Latinos”)⁷ and African Americans⁸ are underrepresented in the legal profession and other corporate environments.⁹ According to the latest available U.S. Census Bureau population estimates for 2016,¹⁰ Hispanics and African Americans represent 17.8% and 13.3% of the national population, respectively. By contrast, the percentage of Hispanic or African American students at U.S. law schools is 8.7% and 8%. The share of Hispanic and African American lawyers across law firms nationwide—covering from second-year law school students through equity partner levels—is 3.69% and 3.14% respectively.¹¹ The figures above underscore that even if all currently enrolled Hispanic and African American law school candidates attained and retained employment as lawyers, the drastic disparity would remain.

Finite Pool of Talent with Current Recruitment Approach

The organizational barriers to diversity faced by top law firms and other elite professional services organizations is the *already limited diversity at the nation’s law schools* and it is compounded by the finite list of selective universities at which a substantial portion of their recruitment is conducted.¹² A 2014 diversity study that looked at the enrollment of African American students at the country’s top fifteen law schools found a range of 3.6% to 8.7% in enrollment by African American students.¹³ Therefore, if an elite law firm or professional services organization only recruits at the top fifteen law schools with limited diversity in total enrollment — as some tend to do¹⁴— and then further limits invitations for candidate interviews to only the top ten percent of students at those institutions, then the pool of diverse candidates can become extremely restricted.¹⁵

In order to expand the pool of diverse candidates from where legal employers can recruit, initiatives such as *The Boston Lawyers Group’s Diversity Job Fair for Students of Color* should be increased and expanded nationally.¹⁶ This initiative focuses on bringing diverse rising second-year law school students from across the country together with major law firm summer associate recruiters.¹⁷

Expanding the pool of diverse candidates can be accomplished by growing the universe of regional and local law schools at which law firms, in house legal teams, and other employers perform on campus interviews. This effort can and should be performed in partnership between pipeline organizations and career services offices, law firms, and legal departments across the nation.

7. The U.S. Census Bureau defines the term *Hispanic Origin* as, “[p]eople who identify with the terms *Hispanic* or *Latino* are those who classify themselves in one of the specific Hispanic or Latino categories listed on the decennial census questionnaire and various Census Bureau survey questionnaires—Mexican, Mexican American, Chicano or Puerto Rican or Cuban—as well as those who indicate that they are ‘another Hispanic, Latino, or Spanish origin.’” U.S. Census Bureau, *Hispanic Origin* (Mar. 7, 2018), <https://www.census.gov/topics/population/hispanic-origin/about.html>.

8. The U.S. Census Bureau defines the term *Black or African American* as, “[a] person having origins in any of the Black racial groups of Africa.” U.S. Census Bureau, *Race* (Jan. 23, 2018), <https://www.census.gov/topics/population/race/about.html>.

9. Tracy Jan, *The Legal Profession is Diversifying. But Not at the Top*, WASH. POST (Nov. 27, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/11/27/the-legal-profession-is-diversifying-but-not-at-the-top/?noredirect=on&utm_term=.137a96a855f9

10. U.S. Census Bureau, *Population Estimates, July 1 2016*, <https://www.census.gov/quickfacts/fact/table/US/PST045216#qf-headnote-a> (last visited Feb. 4, 2018).

11. MINORITY CORP. COUNSEL ASS’N, 2017 VAULT/MCCA LAW FIRM DIVERSITY SURVEY REPORT (2017), available at <https://www.mcca.com/wp-content/uploads/2017/12/2017-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf>.

12. Lauren Rivera, *Firms are Wasting Millions Recruiting on Only a Few Campuses*, at p. 2 HARVARD BUS. REVIEW (Oct. 23 2015), <https://hbr.org/2015/10/firms-are-wasting-millions-recruiting-on-only-a-few-campuses>.

13. *Ranking the Top Law Schools by Their Percentage of Black Students*, J. OF BLACKS IN HIGHER EDUC. (Dec. 30, 2014), <http://www.jbhe.com/2014/12/ranking-the-top-law-schools-by-their-percentage-of-black-students>.

14. See generally Transforming Women’s Leadership Legal Executive Inst., *Q&A with Minority Corporate Counsel Association President Jean Lee: Working to Improve the Pipeline of Diverse Candidates* (Sept. 21, 2016), <http://legalexecutiveinstitute.com/jean-lee-improving-pipeline-diverse-candidates>.

15. *Id.*

16. *Annual Diversity Job Fair*, BOSTON LAWYERS GRP., <http://thebostonlawyersgroup.com/program/annual-job-fair> (last visited Feb. 26, 2018).

17. *Id.*

In addition to expanding the network of law school recruiting, growing the pipeline of diverse candidates can be achieved by focusing on reaching diverse communities within umbrella racial or ethnic groups.

Diversity Within Racial and Ethnic Groups

Capturing complex nuances of identity when analyzing demographic data can be difficult to do, even for the U.S. Government. Attempts at collecting population information by the U.S. Census Bureau in a way which more closely captures self-identification by many groups, but particularly Hispanics,¹⁸ and multi-racial Americans¹⁹ are evolving. This difficulty is also faced by the diversity and inclusion community given that data on diversity within the legal profession is available at the umbrella racial or ethnic level. It can, therefore, be difficult to understand the effectiveness of diversity initiatives aimed at bringing underprivileged sectors within those communities into the legal profession.²⁰

Questions concerning whether diversity pipeline initiatives are effective at reaching traditionally underrepresented groups in the legal profession, particularly in the case of Hispanics—on which I focus below—need to peel beyond heterogenous terms to focus on sectors of those communities in most need of assistance.

The case of Hispanics—given the wide spectrum covered by this category—presents a particularly difficult umbrella racial or ethnic term for purposes of gauging the effectiveness of diversity efforts in the legal profession. Data on Hispanic underrepresentation in law school matriculation and participation in the legal profession is widely known, but metrics on participation by Hispanic national groups or number of generations in the U.S. are not readily available. The data compiled by the American Bar Association (“ABA”) on practicing attorneys, and the Law School Admissions Council (“LSAC”) on Hispanics applying and matriculating in law schools is now mostly collected at the *Hispanic* level.²¹ This void in data collection matters insofar as it does not allow advocates to perform a deep dive into the data and study the efficacy of bringing greater numbers of individual communities within the Hispanic population (e.g. Dominican-Americans, Mexican-Americans, or Colombian-Americans [to name but a few]) into the legal profession.

Community	% of US Population
Mexican-American	63.0
Puerto Rican	9.5
Salvadorian-American	3.8
Cuban-American	3.7
Dominican-American	3.3
Guatemalan-American	2.5
Colombian-American	1.9

Source: Pew Hispanic Center²²

18. D’Vera Cohn, *Seeking Better Data on Hispanics, Census Bureau May Change How it Asks About Race*, PEW RESEARCH CTR. (April 20, 2017), <http://www.pewresearch.org/fact-tank/2017/04/20/seeking-better-data-on-hispanics-census-bureau-may-change-how-it-asks-about-race>.

19. *Id.*

20. Pew Research Ctr., *Chapter 1: Race and Multiracial Americans in the U.S. Census*, in MULTIRACIAL IN AMERICA PROUD, DIVERSE AND GROWING IN NUMBERS (2015), available at <http://www.pewsocialtrends.org/2015/06/11/chapter-1-race-and-multiracial-americans-in-the-u-s-census>.

21. Law School Admissions Council, *Archive: 2000-2009 Applicants by Ethnicity* (Oct. 24, 2013), <https://lsac.org/lsacre-sources/data/ethnicity-sex-applicants/archive-2> (historically, the Law School Admissions Council (“LSAC”) collected data on Hispanics, Mexican-Americans, and Puerto Ricans separately. Since 2010, however, the LSAC only compiles data on Hispanics and Puerto Ricans).

22. Antonio Flores, Gustavo Lopez & Jynnah Radford, *Facts on U.S. Latinos, 2015*, PEW RESEARCH CTR. (Sept. 18, 2017), <http://www.pewhispanic.org/2017/09/18/facts-on-u-s-latinos-trend-data>.

Without delving too deeply into the complicated history of racial relations and categorization in Latin America and Iberia, a person from Latin America may have racial ancestry from a single or a combination of any of the main native ethnic groups of Europe, the Americas, or Africa. The result of this mixture is that within a single national ethnic group (e.g. Mexican, Cuban, Dominican, et al) individuals can have—in varying degrees—a European, Native American, or African phenotype. In Latin America, akin to observable patterns in the U.S. and Canada related to the historical effects of colonization and based on anecdotal experiences, individuals of a European phenotype tend to have higher incomes, wealth, and cross-generational educational attainment.

This brief history on Latin America is important to understand the context under which various Hispanic immigrant groups have arrived in the U.S. With some exceptions, law school pipeline initiatives in the U.S. aimed at the Hispanic community have focused on the Hispanic community as a whole and have not been tailored to Afro-Latinos from the Dominican Republic or Puerto Rico nor to Native American Latinos from Mexico or Peru. I raise this point partially on account of my own experience. I am a third-generation Mexican-born attorney (my grandfather and uncles were and are state and federal prosecutors and judges in Mexico) from a relatively prosperous family that came to the U.S. from Canada—not directly from Mexico. Yet, when I applied to law school or have sought employment in the U.S., I have been able to avail myself of the increasing number of opportunities being afforded to Hispanics nationwide due to diversity and inclusion pipeline initiatives (particularly on how to apply to jobs in law school which I was not familiar with) aimed at reducing the effects of racial discrimination targeted at Hispanics. I am not alone. Many Hispanics, though not all, in the legal profession—as well as other elite professional services (banking, consulting, et cetera)—share similar middle to upper-middle class backgrounds in our ancestral countries of origin.

I note aspects of my personal history above to note, both, the gains which have inured to my benefit from diversity initiatives targeting the wider Hispanic community, and to contrast my experience from that of many Hispanic immigrants I interact with each day. The Hispanic community is diverse by definition; therefore pipeline initiatives ought to be carefully tailored to address the individualities of communities at their local or regional level according to intended audiences. A pipeline initiative targeting second-generation middle-class Cuban-Americans in Coral Gables, Florida or upper-middle class Mexican-Americans in La Jolla, California is unlikely to address the challenges faced by working class Afro-Cubans in Hialeah, Florida or first-generation undocumented Mexican immigrants in Queens, New York. We must look beyond ethnic origin alone and consider a target community's number of generations in the U.S., relative economic well-being at the municipal or regional level, educational attainment of parents in an individual's country of origin, and discrimination within a particular umbrella race or national community—to name but a few—when seeking to expand diversity initiatives.

For example, by virtue of my involvement in pro bono immigration law related work in New York City, I have had the opportunity to meet several adolescent undocumented immigrants—primarily between the ages of seventeen to nineteen and originally from Mexico and Central America—whom have shared a desire to want to be a lawyer, a doctor, or even a banker. In a significant number of those cases, my clients have shared structural impediments preventing their pursuit of law school or other higher educational opportunities. In the experience of some of my clients, the primary impediments to pursuing a career in law include never having met a lawyer previously, their inability to pay for a four-year college degree, a cultural/class expectation to stay close to home and care for their siblings (particularly for women), a misconception that legal studies are only available for the *gueros*,²³ or simply that no one in their family had ever finished *la secundaria*.²⁴

Countering structural impediments facing Hispanics in general can be started by ensuring that Latino attorneys visit underprivileged, predominantly-Hispanic middle and high schools to show that it is possible to be Hispanic *and be a lawyer* at the same time. However, additional measures have to be performed by diversity pipeline initiatives to target particularly disadvantaged sectors of the het-

23. Mexican Spanish expression for lighter-skinned folks of Hispanic or non-Hispanic background.

24. Spanish term for secondary school, the middle school equivalent in the Mexican federal education system.

erogeneous Hispanic community. Potential suggestions for addressing how to bring more Hispanics into the legal profession such that it looks and feels closer to the Latino society in the U.S. today may be to enhance pipeline initiatives for first-generation immigrants in urban and non-urban settings. It should focus on promoting the opportunities of law school or other higher educational opportunities to young Hispanic women in middle and high school, purposefully including Afro-Latino and Indigenous Latin American lawyers such that the initiatives are more representative of its intended audience. Initiatives should also expand their marketing to include the importance of higher-education in Latino communities for parents and grandparents.

By focusing on diversity initiatives that look beyond umbrella racial or ethnic categories, the goal would be to diversify the profession itself in a wide-array of dimensions.

Other Means to Target Diverse Communities – Use of Zip Code Income Data

Additional mechanisms to specifically target diverse, historically underrepresented communities in law school or the legal profession generally—in addition to considering race or ethnic categories—may include looking at economically disadvantaged zip codes²⁵ when deciding where to focus pipeline initiatives. If diversity pipeline initiatives consider the use of zip codes with the lowest average household incomes per state or nationally as a consideration on where to concentrate efforts, we may be able to specifically target poor Hispanics, African Americans, and White Americans. According to 2012 Internal Revenue Service tax filings by zip code, the poorest counties in the U.S. have a disproportionate representation of, though not exclusively, predominantly African American and Hispanic counties.²⁶ Furthermore, the same analysis of 2012 tax filings covering the ninety-four zip codes with the lowest median income in the U.S. has numerous rural counties listed (many in the industrial Midwest populated mostly by White Americans), bi-coastal urban area representation, and includes diversely populated military as well as university/colleges areas.²⁷ In turn, focusing on lower-income zip codes or areas with pronounced income inequality may allow diversity pipeline organizations to purposefully target African American and Hispanic students with objectively reduced resources relative to their peers. Additionally, by focusing pipeline resources on the poorest zip codes, we may yield the added benefit of bringing lower-income White Americans (urban as well as rural) and Asian Americans into the proverbial diversity and inclusion tent.

Concluding Policy Proposals

In order to make the legal profession more representative of our society, we need to focus pipeline initiatives on providing underprivileged middle and high school students—of any and all backgrounds—access to and knowledge of opportunities in the legal profession and other elite professional services careers to begin with. A potential strategy, though by no means the only plausible means by which to expand pipeline initiatives may include the following four approaches.

Firstly, amplify mentorship programs aimed at diverse, lower income communities that are tailored to middle or high school students. The purpose would be to expose those students to law school opportunities and teach them how to get there. For example, *Just The Beginning – A Pipeline Organization* Summer Legal Institute program targets diverse high school students in various cities across the country to increase awareness on critical hard and soft skills for law school admission and ultimate success. For example, the program focuses on hard skills such as navigating the law school admissions process and soft skills inclusive of critical thinking, professional etiquette, public speaking.²⁸

25. Richard V. Reeves, *America's Zip Code Inequality*, BROOKINGS INST. (Dec. 21, 2015), <https://www.brookings.edu/opinions/americas-zip-code-inequality>.

26. Richard Morrill, *Rich, Poor, and Unequal Zip Codes*, NEW GEOGRAPHY (Jan. 30, 2014), <http://www.newgeography.com/content/004154-rich-poor-and-unequal-zip-codes>.

27. *Id.*

28. *Summer Legal Institute for High School Students*, JUST THE BEGINNING – A PIPELINE ORG., <http://jtb.org/summer-legal-institute> (last visited on Mar. 13, 2018).



With respect to Hispanic communities in particular, increase interactions between lawyers or judges and target students with similar backgrounds beyond merely membership in an umbrella race or ethnic group.

Secondly, increase exposure programs designed to place diverse, lower income middle school, high school, and university students in contact with lawyers or judges with the aim of underscoring the importance of a legal career. Additionally, develop guidance on the importance of grade point averages in middle and high school, tips on navigating the university or college admissions process, education on scholarship opportunities, and the importance of mentors should be part of the curriculum (through my pro bono clients I learned that students often think scholarships are completely unattainable for them). The *Just The Beginning – A Pipeline Organization* Middle School Law Camp already engages in a program similar to my suggestion in partnership with Loyola University School of Law, but it is limited to the Chicago area.²⁹

Thirdly, expand community outreach targeting African-American and Latino families (particularly parents and grandparents) in lower income areas on the importance of a university or college education, even if that setting is beyond the family's immediate metropolitan area.

Fourthly, with respect to Hispanic communities in particular, increase interactions between lawyers or judges and target students with similar backgrounds beyond merely membership in an umbrella race or ethnic group. For example, if the diversity pipeline organization's aim is to target undocumented middle-school students in Queens, NY, then participation by lawyers with shared immigrant experiences (inclusive of language barriers that had to be overcome, potentially past interactions with the labyrinthine immigration system, or parents from similar rural/lower income areas in country of origin) may be helpful in order to make the goal of being a lawyer or other selective professional appear to be further attainable.

²⁹. *Middle School Law Camp*, JUST THE BEGINNING – A PIPELINE ORG., <http://jtb.org/middle-school-law-camp> (last visited Mar. 13, 2018).

A Call For Greater Collaboration Among Attorneys of Color Within Law Firms

Michael A. Wilder

Shareholder, Littler Mendelson, PC

Brandon R. Mita

Associate, Littler Mendelson, PC

Are law firms structured to achieve diversity and inclusion success? What needs to change? Perhaps the “islands” or “silos” affinity groups can create need to be put aside in favor of creating personal connections between all people of color and across all levels of a firm.

There is now a general consensus among law firms that diversity and inclusion matters.¹ Law firms, big and small, comprehend that having diversity in their lawyer ranks is no longer simply an issue of cosmetics, but more importantly, that it makes business sense and further enables law firms to have a more competitive edge in the market.²

With that aside, the discussion on increasing diversity within law firms centers mainly on two areas: (1) recruiting attorneys from diverse backgrounds; and (2) placing the burden on law firm management to provide adequate resources to diverse attorneys so there is better opportunity to move up the firm’s ladder. While these are both important and necessary, there is also a flip side that remains to be explored in order to combat the rising attrition of diverse attorneys from firms—namely, the need for attorneys of color within firms to work together collaboratively and collectively to achieve common ends.

However, while we talk about cross-racial collaboration, this article is not advancing the position that this work should only occur at a firm’s management level, but rather, this concept should be integrated throughout the firm and occur at all levels. This article will discuss the reasons for greater collaborative efforts among diverse attorneys and the potential benefits that can be achieved through these interactions through the lens of this article’s authors.

Collaboration Is Important

Data Suggests Gloomy Outlook for Attorneys of Color

You may be asking, “Why should attorneys of color within law firms care about greater cross-racial collaboration?” It is true that numerous law firms engage in various collaborative efforts between and among their attorneys of color in order to address many of the issues that exist within these environments. These law firms may have diversity and inclusion committees, councils, and initiatives that grapple with their firms’ recruitment strategies, retention efforts, and diversity and inclusion

1. Sharla C. Toller, *The Call to Action Ten Years Later: A Look at the Effects on Retention of Women and Racial Minorities at Law Firms*, INST. FOR INCLUSION IN THE LEGAL PROFESSION REV. 67 (2014).

2. *Id.* at 66.

policies. However, despite the seemingly widespread employment of such groups, there remains a disconnect between the aims of these entities and the inconsistent results that pervade the law firm industry. Moreover, the data also shows that there is a growing disparity between different racial groups within law firms.

According to NALP’s 2016 Report on Diversity, the gains in the number of attorneys of color in law firms have been marginal at best.³ In its Report, NALP tracked percentages of Asian, Black/ African American, and Hispanic partners and associates within law firms from 2009 through 2016.⁴ The data, for the most part, reflects small increases in the percentages of these groups in the partner ranks year over year.⁵ Similarly, as shown in the table below, the percentages of Asian and Hispanic associates show slight increases from 2009 through 2016.⁶ However, the percentage of Black/ African American associates has either remained stagnant or even decreased in certain years. For example, the 2016 percentage for Black/ African American associates was 4.11%.⁷ This figure represents an increase from 2015 (3.95%), but an overall backwards step from the 2009 percentage (4.66%).⁸ Moreover, there has been a decline in the overall percentages of Black/ African American partners, associates, and counsel within law firms when compared to their Asian and Hispanic counterparts.⁹

Table 2. Partner and Associate Demographics at Law Firms — 2009-2016

	Partners						Associates					
	Asian		Black/African-American		Hispanic		Asian		Black/African-American		Hispanic	
	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women
2009	2.20%	0.76%	1.71%	0.57%	1.65%	0.41%	9.28%	5.12%	4.66%	2.93%	3.89%	2.00%
2010	2.30	0.81	1.70	0.56	1.70	0.44	9.39	5.15	4.36	2.75	3.81	1.94
2011	2.36	0.82	1.71	0.58	1.92	0.48	9.65	5.31	4.29	2.61	3.83	1.92
2012	2.48	0.89	1.73	0.60	1.91	0.48	10.01	5.40	4.19	2.55	3.90	1.95
2013	2.67	0.91	1.78	0.60	1.99	0.54	10.48	5.64	4.10	2.43	3.82	1.89
2014	2.74	0.99	1.72	0.63	2.16	0.60	10.80	5.81	4.01	2.31	3.95	1.89
2015	2.89	1.07	1.77	0.64	2.19	0.63	10.93	6.00	3.95	2.25	4.28	2.03
2016	3.13	1.17	1.81	0.64	2.31	0.68	11.25	6.35	4.11	2.32	4.42	2.15

Source: The NALP Directory of Legal Employers.

Not surprisingly, attrition data further shows that attorneys of color are affected at a much higher percentage. According to a 2017 Report on Law Firm Diversity by Vault and the Minority Corporate Counsel Association, 21.80% of all lawyers who left the law firms surveyed in 2016 were members of a racial or ethnic minority group.¹⁰ Therefore, because the data continues to reflect a certain level of stagnating growth in the numbers of diverse attorneys within law firms, attorneys of color already working in these firms need to start finding alternative ways to combat attrition and build safe spaces for each other and their peers.

3. NALP, 2016 REPORT ON DIVERSITY IN U.S. LAW FIRMS 5-6 (2017), available at <https://www.nalp.org/uploads/2017NALPReportonDiversityinUSLawFirms.pdf>.

4. See *id.* at 8, tbl.2.

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.* These general trends among the different racial groups and pertaining to the partner/ associate ranks have also been confirmed via a separate 2017 Law Firm Diversity Survey Report issued by Vault and the Minority Corporate Counsel Association. See VAULT & MINORITY CORPORATE COUNSEL ASSOCIATION, 2017 VAULT/MCCA LAW FIRM DIVERSITY SURVEY 11-18 (2018), available at <https://www.mcca.com/wp-content/uploads/2017/12/2017-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf> (hereinafter VAULT & MCCA).

9. NALP, *supra* note 3, at 8, tbl. 2.

10. VAULT & MCCA, *supra* note 8, at 8.

The Siloing of Diverse Attorneys Within Law Firms

In addition to the diversity and inclusion committees, councils, and initiatives mentioned previously, many law firms have affinity groups.¹¹ If used properly, affinity groups have the ability to positively impact various sub-groups of employees who share commonalities based on ethnicity, culture, gender, sexual orientation, or other aspects of their collective individualities.¹² Moreover, affinity groups provide necessary outlets for attorneys to provide their members with, among other things, opportunities for professional and leadership development, kinship and social bonding, a forum to further develop strategies and policies to address issues affecting the group at issue.¹³

On the flip side, affinity groups may have the potential to cause individuals to silo their identities. For example, a mixed-race female attorney, who happens to be Black and Asian, may have to join three separate affinity groups in order to check all of the boxes that comprise her identity (*i.e.*, a Black/African American affinity group, the Asian/Asian American affinity group, and the women's affinity group). Even if she does join all three affinity groups, it may be the case that her issues as a mixed-race female will not be fully addressed by any one particular group. Separately, even though most, if not all, affinity groups express an open and inclusive membership policy, it may be perceived as difficult for a particular attorney to join an affinity group where the individual believes that s/he is lacking in the one-shared commonality that forms the basis for the affinity group. By way of example, an attorney who identifies as Black/African American may hold some reservations about joining the Hispanic affinity group. Recruitment into those affinity groups may also be targeted to only those individuals who are believed to have the particular traits that would fit within the specific groups.

Finally, while these affinity groups may be jointly tied together through a diversity and inclusion committee or council, it is more often likely that the ability to share personal experiences, issues, and solutions will only be limited to those who sit on those joint committees or councils. This separation may ultimately deprive the majority of members of these affinity groups from the opportunity to learn and benefit from one another and to ultimately create a more diverse and informed minority population.¹⁴

Where Do We Go From Here?

With the issues having been identified, it must also be recognized that efforts can be made across racial lines so that attorneys of color further integrate and collaborate in order to achieve common ends within their law firms.

The Historical Perspective

History teaches us that there are countless instances where all racial minorities have collectively benefitted when different ethnic and racial groups have worked together. During the Civil Rights Movement, several Asian Americans joined hands with African American leaders to build a more inclusive nation.¹⁵ Most know about the triumphs of Malcolm X and Martin Luther King, Jr., but working alongside them were individuals like Yuri Kochiyama and Grace Lee Boggs—both of them were

11. Toller, *supra* note 1, at 73.

12. Sandra S. Yamate, *Affinity Groups in Large Law Firms: What to Consider*, AM. BAR ASS'N (Winter 2009), https://apps.americanbar.org/litigationnews/practice_areas/minority-affinity-groups-in-large-law-firms.html.

13. *See id.*; Toller, *supra* note 1, at 73.

14. Please note that the purpose of this section is not to advocate against the use of affinity groups, but only to point out the limitations of such groups.

15. *See, e.g.*, Quintard Taylor, "Justice Is Slow but Sure": *The Civil Rights Movement in the West: 1950-1970*, 5 NEV. L.J. 84, 91 (2004); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 23-8 (1998).



Historical context aside, attorneys of minority races or ethnicities can benefit from exposure to other attorneys and groups within their law firms with which they may not personally identify.

Asian Americans who believed in obtaining social justice for all.¹⁶ Separately, Hugh MacBeth, a Los Angeles-based Black attorney and a member of California's Race Relations Commission, was an outspoken advocate against the incarceration of persons of Japanese ancestry in the United States during the Second World War.¹⁷ MacBeth's opposition to the forced detention of Japanese Americans occurred at a time when very few questioned the U.S. Government's decision to do so.¹⁸ Lastly, seven years before the landmark U.S. Supreme Court decision in *Brown v. Board of Education*,¹⁹ Hispanic families engaged in similar litigation efforts in *Mendez v. Westminster School District of Orange County*²⁰ in order to preclude Orange County, California from having separate schools for Caucasian and Hispanic students. It could be argued that the *Mendez* decision served as an important test case for the legal team in *Brown*²¹ and the beginning of the end for the "separate but equal" doctrine, previously set forth in *Plessy v. Ferguson*.²² These examples illustrate that communities of color have the capacity to achieve measureable gains through collective advocacy. The ability to look past racial lines provided these groups with opportunities to have a greater impact on the issues they were working on.

Breaking Down Artificial Walls

Diversity is defined as, "the condition of having or being composed of differing elements: variety; especially the inclusion of different types of people."²³ Historical context aside, attorneys of minority races or ethnicities can benefit from exposure to other attorneys and groups within their law firms with which they may not personally identify. Based on our experiences, here are three simple ways in which attorneys of color can increase their collaborative efforts with others:

Join more or different affinity groups and bar associations of color: To begin, we understand that all attorneys, regardless of how they identify, are extremely busy and that their time is valuable and lim-

16. Hansi Lo Wang, *Yuri Kochiyama, Activist And Former World War II Internee, Dies at 93*, NAT'L PUB. RADIO (June 2, 2014, 12:51 AM), <https://www.npr.org/sections/codeswitch/2014/06/02/318072652/japanese-american-activist-and-malcolm-x-ally-dies-at-93>; Thomas J. Sugrue, *Postscript: Grace Lee Boggs*, NEW YORKER (Oct. 8, 2015), <https://www.newyorker.com/news/news-desk/postscript-grace-lee-boggs>.

17. *Intersections of Black and Japanese American History: From Bronzeville to Black Lives Matter*, DENSHO (Feb. 17, 2016), <https://den sho.org/japaneseamericanandblackhistory>.

18. Greg Robinson, *Hugh Macbeth*, DENSHO ENCYCLOPEDIA, <http://encyclopedia.densho.org/Hugh%20Macbeth>.

19. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *superseded by* 349 U.S. 294 (1955).

20. *Mendez v. Westminster Sch. Dist. of Orange Cty.*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd sub nom.* *Westminster Sch. Dist. of Orange Cty. v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

21. See Francisco Macias, *Before Brown v. Board of Education There was Mendez v. Westminster*, LIBRARY OF CONG. (May 16, 2014), <https://blogs.loc.gov/law/2014/05/before-brown-v-board-of-education-there-was-mendez-v-westminster>.

22. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

23. *Definition of Diversity*. MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/diversity> (last visited June 25, 2018).

ited. However, experience has shown us that by personally investing our time and energy into causes that are not our own and by caring about the plight of others, we increase our ability to be compassionate, share both similar and differentiating experiences, and expel notions that affinity groups are simply remote islands in a vast ocean. Accordingly, we believe it is imperative for attorneys of color to become “joiners” in a larger sense. Specifically, we encourage attorneys of color within firms to expand their horizons and seek out ways to engage different racial affinity groups and bar associations.

Engage in more frequent professional and personal interactions with other attorneys of color: Whether it is working on cases, giving presentations, setting up formal or informal mentoring opportunities, or simply extending invitations to lunch or happy hours, associates and partners of color profit from building rapport with each other on professional and personal levels. Even though we are from different racial backgrounds, we, the authors of this article, are living proof that these types of interactions are attainable. We have enriched each other’s lives and our practices and instantly impacted our separate and collective successes within our firm. Indeed, there have been many occasions where we have called each other for advice or used each other as sounding boards. So, do not wait for firm-sponsored diversity events to have these interactions. Start now!

Encourage your law firm to (occasionally) break down the affinity group structure: We start out with the premise that affinity groups play important roles within the law firm structure. However, again, we note that in many instances there may be few opportunities for different affinity groups and diversity councils to meet and work with other groups of color within their firms. With that said, we understand that diversity councils and committees, as well as affinity groups, may be constrained by their assigned budgets. If possible, however, attorneys within these groups should make attempts to encourage their firms to provide additional opportunities for diverse attorneys, including attorneys of color, to meet and to pool resources so that a larger number than just the members of the diversity councils or committees are able to meet, interact, and work together in combined sessions. If this means foregoing one or two diversity council/committee or affinity group meetings in favor of an all-affinity group meeting, then the potential gains of having a shared space may be worthwhile.

Conclusion

In closing, the purpose of this article is to highlight our strong belief that sustainable diversity within law firms can be achieved so long as *everyone* is invested in ensuring that we all reap the benefits of a diverse law firm environment and demonstrate that commitment through proactive means. With that said, we also wish to clarify that we are not attempting to shift the burden of “diversity” within law firms entirely upon the shoulders of the handfuls of diverse attorneys within these spaces and doing this work already. Instead, this article simply posits that diversity within firms is attainable where there is a shared sense of trust, understanding, and shared responsibility for each other. That trust and understanding can only be developed over time and by working together collectively with those that may be different. It is not enough for partners alone to engage in this work. It must occur at all levels. Accordingly, attorneys of color are asked to develop their potential to create new bridges through collaborative means and reinforce currently-existing relationships with other attorneys of color. By doing so, hopefully, we will close the divide and achieve the kind of diversity the legal profession deserves and needs.

How Attorneys with Disabilities Get the Job Done: Service Animals and the Law

Angela C. Winfield

Associate Vice President for Inclusion and Workforce Diversity at Cornell University

Fran Ortiz

Professor of Law at South Texas College of Law Houston

Attorneys with disabilities often execute their day to day duties with the support and help of a service animal. Fortunately, many laws protect the right to have a service animal in the workplace, in public housing, and on various modes of transportation.

A question many attorneys without direct experience working with a colleague with a disability either ask or wonder about is how an attorney with a disability actually does the work. It is often challenging to imagine how you would draft a contract with limited to no use of your hands, conduct document review if you had a print disability such as dyslexia, or travel to your law firm’s office across the country if you were blind. Though it may be difficult to comprehend, it is possible and attorneys with disabilities successfully complete these tasks every day. Being able to navigate and interact with the world independently—online and off—is a result of, among other things, the intersection of the law and assistive technology. Various laws protect the rights of individuals with disabilities and require employers, public accommodations, and services to provide equal access to individuals with disabilities. Meanwhile, a range of tools and technologies exists and/or are being developed that assist individuals with disabilities. Assistive technology is any product, equipment or system that enhances learning, working and daily living for individuals with disabilities. It includes computer software like screen readers and speech recognition software, hardware like specialized switches and keyboards, as well as mobility aids like wheelchairs and guide dogs. This article focuses on the assistive technology of service animals.

Service animals can provide a number of assistive tasks for a person with a disability—from guiding the blind or alerting a deaf person to a sound, pulling a wheelchair, retrieving items, or warning a person with epilepsy of an oncoming seizure. This is not an exhaustive list of the possible tasks a service animal can provide, but rather an example of how varied the work can be and the diverse types of disabilities that can benefit from using a service animal. What follows is an overview of some of the federal laws that govern service animals.

Employment and Other Areas of Public Life

The Americans with Disabilities Act¹ (ADA) requires that state and local government services (Title II) and public accommodations and commercial facilities (Title III) “modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.”² ADA regulations specifically define and provide for use of service animals for purposes of Titles II and III of the Act. The regulations make no mention of service animals in the context of Title I employers, however, meaning there is no automatic right to use of service animals in the workplace. However,

1. 42 U.S.C.A. §§ 12101 – 12213 (2013).

2. 28 C.F.R. § 35.136(a) (2017) (public entities); *id.* § 36.302(c)(1) (public accommodations).

regulated employers³ must still make reasonable accommodations for individuals with disabilities under the statute, and those seeking use of a service animal need simply apply as they would for any other reasonable accommodation.⁴ Accordingly, private law firms and corporations should understand what is required if an attorney requests a service animal as a reasonable accommodation as well as how to accommodate a client who uses a service animal.

At one time ADA regulations broadly defined “service animal” to include any type of animal trained to work with individuals with disabilities.⁵ Today, the term “service animal” includes only dogs that are “individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”⁶ Despite that limitation, regulated entities must still make “reasonable modifications of policies, practices or procedures” to allow miniature horses to perform the tasks of a service animal if they have been trained to do so.⁷ Unlike service dogs, however, regulated entities may consider the miniature horse’s type, size, and weight, and whether the entity can accommodate those features⁸ as well as whether the horse’s presence would compromise “legitimate safety requirements that are necessary for safe operation.”⁹ In addition, for both service dogs and miniature horses, regulated entities need only accommodate them if the handler is in control of the animal by physical or other means and the animal is housebroken.¹⁰

Specifically excepted from the ADA definition of “service animal” are animals that are used for “emotional support, well-being, comfort, or companionship.”¹¹ This exception, however, does not prohibit the use of animals to do tasks related to psychiatric conditions, such as medical alerts for anxiety attacks or deep pressure therapy.¹²

Should a regulated entity be unsure of whether an animal is a service animal, the entity may *not* ask about the extent of the individual’s disability. However, the individual may be asked whether “the animal is required because of a disability and what work or task the animal has been trained to perform,” but only if the training is not readily apparent.¹³ Even if questioned, the individual need not provide documentation showing proof of training. This lack of documentation provides a certain level of ease of access for individuals with disabilities using legitimate service animals. However, it also opens the door to abuse by individuals without disabilities who want to be accompanied by a pet, which may or may not be well-behaved and could pose a danger to service animals or the public. It also presents an added complication in light of the businesses that sell “certifications” because there is no official service animal certifying body and the law not only does not require documentation, it prohibits entities from asking for proof or documentation.¹⁴

Service animals may go anywhere in an ADA-covered facility that the public is allowed to go, but facilities may not charge fees not required of people unaccompanied by pets, except a charge may

3. Federal employers are prohibited from discriminating based on disabilities under the Rehabilitation Act of 1973, 29 U.S.C.A. § 701 et. seq. (2018), rather than the ADA.

4. Job Accommodation Network, *Accommodation and Compliance Series: Service Animals in the Workplace* (June 21, 2017), <https://askjan.org/media/downloads/ServiceAnimalsintheWorkplace.pdf>.

5. *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 56 Fed. Reg. 35544, 35594 (July 26, 1991) (previously codified at 36 C.F.R. § 36.104); *see also* Tiffany Lee, *Criminalizing Fake Service Dogs: Helping or Hurting Legitimate Handlers?*, 23 *ANIMAL L.* 325, 328 (2017) (discussing the history of the definition of “service animal” under the ADA). Note, state laws may expand the definition to include other species of animals.

6. 28 C.F.R. §§ 35.104, 36.104 (2017).

7. *Id.* §§ 35.136(i)(1), 36.302(c)(9)(i).

8. *Id.* §§ 35.136(i)(2)(i), 36.302(c)(9)(ii)(A).

9. *Id.* §§ 35.136(i)(2)(iv), 36.302(c)(9)(ii)(D).

10. *Id.* §§ 35.136(b), (d), (i)(2)(ii)-(iii), 36.302(c)(2), (9)(ii)(B)-(C).

11. *Id.* §§ 35.104, 36.104.

12. *Id.*

13. *Id.* §§ 35.136(f), 36.302(c)(6).

14. *See* Adam Edelman, *Collared: New Laws Crack Down on Fake Service Dogs* (May 5, 2018), <https://www.nbcnews.com/politics/politics-news/collared-new-laws-crack-down-fake-service-dogs-n871541>. In response to this abuse, a number of states have enacted laws that make it a punishable offense to falsely claim an animal as a service or emotional support animal. *See id.*

be assessed for damages caused by a service animal if the facility normally assesses a charge for damages caused by individuals using the facility.¹⁵

Housing

Discrimination under the Fair Housing Act¹⁶ includes a refusal to make “reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford . . . a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.”¹⁷ Under the United States Department of Housing and Urban Development (HUD) regulations, use of an assistance animal in housing is contemplated as a reasonable accommodation even where no-pets policies have been established.¹⁸ Assistance animals under the FHA are also excluded from the rules regulating common household pets in federally administered and subsidized housing programs for the elderly and disabled¹⁹ and other individuals living in public housing.²⁰

The FHA allows for the use of “assistance animals,” a term that is much broader than “service animals” under the ADA. HUD considers an “assistance animal” to be “an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability.”²¹ The term is not limited to just dogs or to breed, size or weight, and the animal does not need to be individually trained or certified to qualify as an assistance animal.²²

Persons seeking accommodations for use of assistance animals apply to do so in the normal manner of requesting accommodations from housing providers. If the housing provider determines that an applicant has a “physical or mental impairment that substantially limits one or more major life activities” and a disability-related need for an animal,²³ then the housing provider must waive a no-pets policy and allow use of the assistance animal. A housing provider may require documentation from a “physician, psychiatrist, social worker, or other mental health professional” to prove a disability or need for an assistance animal where the disability or need is not readily apparent or already known.²⁴ The documentation must show that the animal alleviates one or more symptoms or effects of the disability.²⁵ However, the housing provider need not provide an accommodation if the assistance animal will directly threaten health and safety or cause substantial property damage to others and neither circumstance can be reduced or eliminated by reasonable accommodation.²⁶ Additionally, an accommodation does not have to be made if it would impose on the housing provider an undue financial and administrative burden or fundamentally alter the nature of the services provided.²⁷

Housing providers cannot charge fees for assistance animals, including deposits applicable to pets. Assistance animals are permitted anywhere in the premises where persons are allowed to go.²⁸

15. 28 C.F.R. §§ 35.136(g)-(h), 36.302(c)(7)-(8) (2017).

16. 42 U.S.C.A. §§ 3601 – 3619 (2012).

17. 24 C.F.R. § 100.204(a) (2018).

18. *Id.* § 100.204(b) (describing in Example 1 reasonable accommodation of a seeing-eye dog).

19. *Id.* § 5.303.

20. *Id.* § 960.705.

21. U.S. Dep’t Housing & Urban Dev., Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, FHEO-2013-01 (Apr. 25, 2013), https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

Airline Transportation

Air carriers are prohibited from discriminating against passengers with disabilities under the Air Carrier Access Act²⁹ (ACAA) and must permit qualified passengers to travel with their service animals, which is defined more expansively than under the ADA. The United States Department of Transportation defines “service animal” as “[a]ny animal that is individually trained or able to provide assistance to a qualified person with a disability; or any animal shown by documentation to be necessary for the emotional well-being of a passenger.”³⁰ Although any animal may be considered a service animal, airlines may still exclude animals that are too large or heavy, pose a direct threat to health or safety, significantly disrupt cabin service, or are prohibited from entering a foreign destination.³¹ However, mere offense or annoyance of other passengers or airline personnel is insufficient as a basis for exclusion.³² Airlines are not obligated to accommodate unusual service animals like snakes and other reptiles, ferrets, rodents and spiders.³³

Airline personnel can use a number of ways to determine whether an animal is a true service animal or merely a pet, including credible statements by the disabled individual, visual clues such as special harnesses or tags, and observing the animal’s behavior.³⁴ Passengers seeking to travel with service animals used for emotional support or psychiatric assistance in the cabin may also be required to provide specific documentation dated no more than one year from the scheduled flight on letterhead from a licensed mental health professional treating the passenger.³⁵ They may also be required to provide 48-hours advance notice of intent to bring on an emotional support or psychiatric service animal.³⁶

As with the service animal provisions under the ADA, the service animal provisions under the ACAA are also easily abused by passengers without a disability seeking to travel with their pets without paying the costs of transport. In addition to state legislation seeking to curb the abuse,³⁷ federal legislators have proposed legislation in Congress to require animal behavior training for ACAA service animals,³⁸ and the U.S. Department of Transportation has proposed rules meant to prevent fraud in the use of service animal and to ensure consistent regulation.³⁹

Conclusion

Service animals can provide an invaluable benefit to individuals and attorneys with disabilities, helping individuals navigate and complete daily living and work-related tasks. The range of laws that cover this unique partnership are varied in their definitions and the protections they provide. It is important to recognize and appreciate the fact that many attorneys with disabilities rely on these laws in order to practice law.

29. 49 U.S.C.A. § 41705 (2016).

30. Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. 27614, 27663 (May 13, 2008).

31. 14 C.F.R. § 382.117(f) (2018).

32. *Id.* § 382.117(a)(1).

33. *Id.* § 382.117(f).

34. 73 Fed. Reg. at 27658 – 27659.

35. 14 C.F.R. § 382.117(e) (2018).

36. 73 Fed. Reg. at 27649.

37. *See supra* note 14.

38. *See, e.g.*, S.B. 2738, 115th Cong., 2d Sess. (2018) (amending 49 U.S.C. § 41705).

39. *See* Traveling by Air with Service Animals, 83 Fed. Reg. 23832 – 23842 (May 23, 2018).



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Embracing the “SOGI/E” Spectrum Through Deliberate Action

By Kimberly Forte

SOGI/E Inclusion Consultant and Cultural Humility Trainer

All too often, when the legal profession discusses diversity and inclusion, the setting is Big Law. But large law firms and large corporate clients are not the only employers who are concerned about diversity and inclusion. Here, Forte showcases the work of the Legal Aid Society’s LGBT Law and Policy Initiative and describes the knowledge, work, and continued education it takes to cultivate cultural humility.

In 2011, The Legal Aid Society developed its LGBT Law and Policy Initiative. The goals of the initiative are to increase the Society’s cultural humility to better represent lesbian, gay, bisexual, transgender, gender non-conforming/non-binary, and queer (“LGBTGNCQ+”) clients and to increase its litigation, public policy, and legislative efforts on behalf of low-income LGBTGNCQ New Yorkers. The Initiative works with all three of the Society’s practices – Civil Legal Services, Criminal Defense, and Juvenile Rights. Today, the Initiative’s small staff, consisting of an attorney, a paralegal and at times a social worker have trained over 1,500 Legal Aid employees (and counting) and this author conducts these trainings for outside organizations. The Initiative has also partnered with the practices of law reform units to work on four federal class actions lawsuits that raise civil rights violation of LGBTGNCQ+ communities. These seven years have taught the author a lot about lawyers and the legal profession and this paper is a retrospective on those lessons and a personal hope for our collective future. In full disclosure, I write this piece self-identifying as an attorney of almost nineteen years, a gay cisgender woman, a wife to a non-binary/gender nonconforming woman, and a mother of two—so, to say that my work is deeply personal is an understatement.

The Society’s education of its staff on sexual orientation and gender identity and expression (“SOGI/E”) and how these identities impact a client’s and colleague’s experience on cases or in our offices began as cultural competency trainings. After some self-analysis, the Initiative staff made a shift to frame the training as one of practicing and working within the profession with *cultural humility*. The reason for this change is the acknowledgment that no one can ever be competent in another’s culture and that instead we should have a “lifelong commitment to self-evaluation and critique, to redressing the power imbalances, and to developing mutually beneficial and non-paternalistic partnerships with communities on behalf of individuals and defined populations.”² The training is about acknowledging and respecting the full spectrum of SOGI/E that clients and colleagues may hold. The training focuses on three questions: Why is a training about SOGI/E necessary? What language should one use when discussing SOGI/E? How and when does an attorney discuss SOGI/E identities with clients— and at times, colleagues?

Lawyers Are Just People with ESQ. at the End of Their Names

The true focus of revolutionary change is never merely the oppressive situations that we seek to escape, but that piece of the oppressor which is planted deep within each of us, and which knows only the oppressors’³ tactics, the oppressors’ relationships.

Audre Lorde

2. Melanie Tervalon & Jann Murray-García, *Cultural Humility versus Cultural Competence: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education*, 9 J. HEALTH CARE FOR POOR & UNDESERVED 117 (1998).



Approximately 40 percent of homeless youth in the United States identify as part of the LGBTGNCQ communities.

The legal profession wields great power over the life experiences of fellow humans. We help shape and create the governing of our world by the fights we take on and those we ignore. This choice to fight or ignore is influenced by privilege and lack of self-analysis of our collective biases. The focus of this author's work has been to teach legal and social services professionals that the privilege of being cisgender and heterosexual can often skew a person's understanding of how our world is focused almost exclusively on the cisgender binary and heterosexual identities and how much those deep-rooted expectations of self-expression and orientation drive even the smallest interactions with others. No one can determine another's sexual orientation or gender identity by physical appearance. We have all been taught the stereotypes of how women and men are expected to express themselves and have relied on those stereotypes to assume someone else's identity. Ask yourself: How often do I choose the word "ma'am" or "sir" when talking to a stranger? How often do I choose to use "Mr.," "Ms.," or "Mrs." to greet someone based on the name I read on a piece of paper or the gender I have been provided by a third party?

Because of these stereotypes, this author will often hear from trainees that they have never represented a transgender client, or they represented only two to three gay clients over many years. For those of us working with oppressed communities, this is statistically impossible. The intersection of LGBTGNCQ identity and poverty is significant, especially for the transgender community. Approximately 40 percent of homeless youth in the United States identify as part of the LGBTGNCQ communities.⁴ Same-sex African American couples are more likely to be poor than different-sex African American couples and more likely to live in poverty than white same-sex couples.⁵ Transgender people are four-times more likely to have a household income under \$10,000 and are two-times more likely to be unemployed than their cisgender counterparts.⁶

In addition to societal stereotypes, lawyers fall prey to their own assuredness of how much they "get it." There is no doubt that being an attorney affords all of us an opportunity to understand judicial decisions, legislative processes, and executive actions more than the lay person. But attorneys often take it a step further by often assuming they understand the totality of the experiences of the oppressed peoples. This author is no different and should not be given a pass on her own failings. She has often thought: "having worked in public interest law for almost two decades, how could one not understand the deep prevalence of racism?" The past few years of being afforded an education by my colleagues of color have shook me to the core of just how much more knowledge I need and much more work I need to do to get "woke."

3. Audre Lorde, *Age, Race, Class and Sex: Women Redefining Difference*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 114 (2007).

4. LAURA E. DURSO & GARY J. GATES, *SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS* (2012), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>.

5. M.V. LEE BADGETT, LAURA E. DURSO & ALYSSA SCHNEEBaum, *NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, BISEXUAL COMMUNITY* (2013), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>.

6. Brad Sears & Lee Badgett, *Beyond Stereotypes: Poverty in the LGBT Community*, WILLIAMS INST. (June 4, 2012), <http://tinyurl.com/97wnn8j>.

Much like the lack of understanding of other oppressed identities, the lack of understanding around SOGI/E identity is pervasive in our profession. Throughout my experience of training both internally and externally, I have seen countless misunderstandings, such as: “discussing SOGI/E identity makes others uncomfortable especially clients, so we should not do it;” or “to discuss how someone self identifies their SOGI/E is far too personal to that individual, so it should be off limits;” or “we would insult someone by asking them if they were not heterosexual or cisgender.” Given the wealth of knowledge about SOGI/E available to our profession and the presence of incredible LGBTGNCQ+ talent, these statements are cringe- worthy in 2018.

Most of the audiences at the trainings strive and wish to do the right thing but often struggle with understanding how important being honest about one’s lack of understanding matters to people. Lawyers always want to have the answers—here is a tip: you do not have all the answers, especially when it comes to someone else’s identity or lived experience. Additionally, attorneys think that other people know their good intentions despite the relaxed humor or conversations that occur in workplaces and in front of clients. Ask yourself: “When was the last time you laughed at a gay joke?” “When was the last time you heard some say something racist and you interrupted that bias?”

It is hard work to hold each other accountable. This author often finds herself emotionally exhausted after a day of training, feeling as though I am fighting to prove the existence of myself and my spouse in this world despite being white, able bodied and very privileged. It is hard to reconcile the being in awe of the incredible work of colleagues and the recognition of bias in the same humans. For too long our profession has given people the benefit of the doubt. We must hold each other to our professional responsibilities and look to the great model rule from the American Bar Association as a benchmark.⁷

You’ve Got the Tools, You Just Don’t Know You Have a Job to Do

Let us not act out of fear and misunderstanding, but out of the values of inclusion, diversity, and regard for all that make our country great.

-Loretta Lynch⁸

Our profession is built on the concept of *stare decisis*, and yet one could argue that our national growth as humans comes in the bravery to break precedent and embrace justice. The start of a cultural humility shift is being open to actually “being open” when meeting someone and can be the key to great attorney/client or colleague/colleague relationship. This author too often hears resistance masked in “that is the way we’ve always done it” or “if my client or colleague doesn’t identify that way, they should just tell me.” Putting the onus on the marginalized community to fight for their own recognition shows a lack of understanding about others’ fear of discrimination, and in the case of non-heterosexual and non-cisgender individuals, may lead to a lack of openness that could be detrimental to a working relationship. In the worst- case scenario, it could limit legal remedies one may be able to seek on behalf of a client. Look at it from the perspective of the strengths in our profession and rely on the fact that you own the tools to make this shift: active listening, asking open ended questions, doing research and client/ colleague centered advocacy.

It is professional misconduct for a lawyer to:

- a. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- b. commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- c. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- d. engage in conduct that is prejudicial to the administration of justice;

7. Model Rules of Prof’l Conduct r. 8.4 (Am. Bar Ass’n 1983)

8. Loretta E. Lynch, Attorney General, Dep’t of Justice, Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals (May 9, 2016).

- e. state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- f. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- g. engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Recognizing and being inclusive of open ended SOGI/E identity questions reflects one’s own understanding of not relying on stereotypes for an answer but rather the opportunity to listen to another person tell you about themselves. For example, if you meet a star applicant for an associate position who uses they/them/their pronouns and when you approach the candidate you say “Hello Mr. Smith” and then default to using the he/him/his pronouns when referring to them

– you may have just lost that star to another firm. Think of this minor shift – “Hello, I’m Kim Forte. I have your resume but want to ask, what name do you want me to use in referring to you? And just so I’m clear when discussing your application with others, what pronoun should I use in referring to you? And so you know, I use she/her/hers pronouns.”

If we truly wish to take on gender responsivity and create affirming workplaces, we need to embrace the idea of actual non-discrimination based SOGI/E which means affording the full spectrum of identities to be vocalized in our workplaces through personal expression and striving to let go of our over use of gendered language when speaking to each other. Yes, this author is making the argument that not every person perceived to identify as male should have to wear a suit and tie to work if it does not affirm their gender identity; and yes, this author is making the point that we as a profession should rethink how we construct bathrooms in offices such that they are simply for the use of all and no one has to make a gender statement by entering a particular door. Rely on the concept so well taught by incredible social workers – let’s meet each other where we actually are, not where we expect each other to be.

If you are someone who needs some guidance on getting started with how to make a shift to ensure you are putting your best affirming foot forward and you are not sure you are using SOGI/E language appropriately, here are some tips:

Sexual orientation (SO).

In discussing sexual orientation, it is important to recognize that the terminology “sexual preference” is erroneous. This term suggests that our romantic and physical attraction to others is a choice and therefore can be cured. Terminology relating to sexual orientation is fairly common in today’s lexicon: lesbian, gay, bisexual, and heterosexual. It is important to not assume what label an individual uses for themselves and to not transfer an identity from one person to another even if you assume they have the same orientation. We have attorney colleagues at LGBTGNCQ+ national organizations who put out vocabulary guidance—use their knowledge to guide you in discussions.

It is also common to assume clients’ or colleagues’ sexual orientation based on personal expression. During client interviews or in casual conversation, it is often asked, “Are you married?” That question used to be loaded before *Obergefell* and still may feel that way for many. It is even more detrimental when we ask it and then assume we know the gender of the person’s spouse. For example, someone is talking to a woman and says, “What’s your husband’s name?” It is a far better practice to say, “Tell me about your spouse.”

In the Initiative’s trainings, this author makes the point that as a cisgender married woman, all too often I am asked who is my husband or who is the father of my children. Questions such as these



If we truly wish to take on gender responsiveness and create affirming workplaces, we need to embrace the idea of actual non-discrimination based SOGI/E which means affording the full spectrum of identities to be vocalized in our workplaces.

lead me instantly to evaluate whether or not I should out myself. In a flash of a moment I ask myself these questions: “Am I safe?” “If I come out about my orientation, am I safe?” “Are my children safe?” “Would my outing of my identity change the interaction in this moment and if so, am I able to handle that change regardless of this person’s reaction?” Many occasions of my self-outing and/or expressed frustrations of having not been asked questions about my family in terms of a “spouse” or “other parent,” have been met with the reply, “well, you shouldn’t be insulted.” The truth is that in 2018 and living in a jurisdiction with strict anti-discrimination laws, I am highly insulted that my existence and identity in my own work and life communities is not recognized.

Gender identity and expression (GI/E).

When discussing gender identity and expression, understand that everyone is assigned a sex at birth. It is assigned to us by the doctor who delivers us, and it is determined by our physical anatomy. However, an individual’s gender identity is an internal identity of being male/ female, masculine/feminine, neither or both. Gender identity begins to manifest around two to three years of age. Some of us have a gender identity that matches our sex assigned at birth. Those individuals are *cisgender*. Some individuals have a gender identity that does not match their sex assigned at birth. Some of these individuals identify as *transgender*, *genderqueer*, and/or *non-binary*. One common identity is *gender nonconforming*—an umbrella term for all people who do not dress or express themselves based on traditional expectations of the sex assigned to them at birth. Finally, some people do not identify with binary gender at all. Our colleagues at the National Center for Transgender Equality explain that “some societies – like ours – tend to recognize just two genders, male and female. The idea that there are only two genders is sometimes called a “gender binary,” because binary means “having two parts,” male and female. Therefore, “non-binary” is one term people use to describe genders that do not fall into one of these two categories, male or female.⁹

Embrace SOGI/E neutrality in speech choices. All too often we default to using the pronoun of the person’s legal sex assigned to them at birth. Although awkward for many in the beginning and despite what information you may have been provided by a third party, we should all start interactions with another by asking the individual’s name and pronoun.

When discussing these concepts of identity, it is important not to confuse or conflate the two. Do not assume that because a client has a gender identity that is different from their sex assigned at birth that they have a sexual orientation that is not heterosexual. Do not assume that a client who identifies as gay, lesbian, bisexual, or asexual has a gender identity different than their sex assigned at birth regardless of your perception of their gender expression.

Be prepared.

Simply put, a person's identity always plays a role in how she/he/they are treated throughout all their experiences. When someone who is non-heterosexual and non-cisgender is open with us about their identity, do not assume they are open about their identity with everyone. One just has to watch the news these days to hear the ways in which the LGBTGNQ+ communities are being oppressed. It is an act of kindness and responsibility to each other to say, "I want to make sure I don't out you to others. Are you open about your identity with our/your colleagues?" Confidentiality is something we all commit to everyday. Remember the guidance that our client/colleague/friend to whom the information applies is the only person who has the self-agency to determine who hears the information.

We must give the words of laws and policies life

Words mean more than what is set down on paper. It takes the human voice to infuse them with deeper meaning.

-Maya Angelou¹⁰

The Legal Aid Society is proud to hold this commitment:

As an equal opportunity employer, The Legal Aid Society prohibits discriminatory employment actions against and treatment of its employees and applicants for employment based on actual or perceived race or color, religion or creed, alienage or citizenship status, sex (including pregnancy), national origin, age, *sexual orientation (emphasis added), gender identity (one's internal deeply-held sense of one's gender which may be the same or different from one's sex assigned at birth; one's gender identity may be male, female, neither or both, e.g., non-binary), gender expression (the representation of gender as expressed through, for example, one's name, choice of pronouns, clothing, haircut, behavior, voice, or body characteristics; gender expression may not be distinctively male or female and may not conform to traditional gender-based stereotypes assigned to specific gender identities) (emphasis added), disability, marital status, familial status, domestic partnership status, genetic information or predisposing genetic characteristics, military status, domestic violence victim status, arrest or pre-employment conviction record, or any other characteristic protected by law.*¹¹

The Legal Aid Society is proud to work amongst law firms with whom we partner to fight daily in courts to ensure the civil rights of various oppressed communities. However, as an organization whose commitment since 1876 is to ensure that no New Yorker should be denied access to justice because of poverty, we recognized that we had to do more anti-bias work with our staff and management to unmask racism, classism, homophobia, transphobia, anti-immigrant biases, and so many other cultural biases. We have been on this journey of training and selfeducation and anti-bias work for several years and as we continue it, we realize there is always work to be done.

Our profession is changing the face of the world as it relates to inclusiveness of SOGI/E identities, but the macro of civil rights gains and the micro of human interactions are two distinct realities in our profession. Whereas, we see more and more firms fighting for the rights of non-heterosexual and non-cisgender communities, we have not seen an equal cultural shift in how these communities are treated on personal level in courthouses or by individual court employees, judges and even their own attorneys.

It is easy for lawyers to believe in equality, but it is hard for us to infuse self-reflective humble behaviors that recognize the lack of equality and history of oppression of our colleagues and clients. Why? This author would argue that we have not done enough to mandate the teaching of anti-bias work in our profession. It should be a requirement of all law students and mandated trainings at all

9. Nat'l Center for Transgender Equal, *Understanding Non-Binary People* (July 2016), https://transequality.org/sites/default/files/docs/resources/Understanding-Non-Binary-July-2016_1.pdf.

10. MAYA ANGELOU, *I KNOW WHY THE CAGED BIRD SINGS* 162 (1979).

11. The Legal Aid Society, *Employee Handbook* (2018).

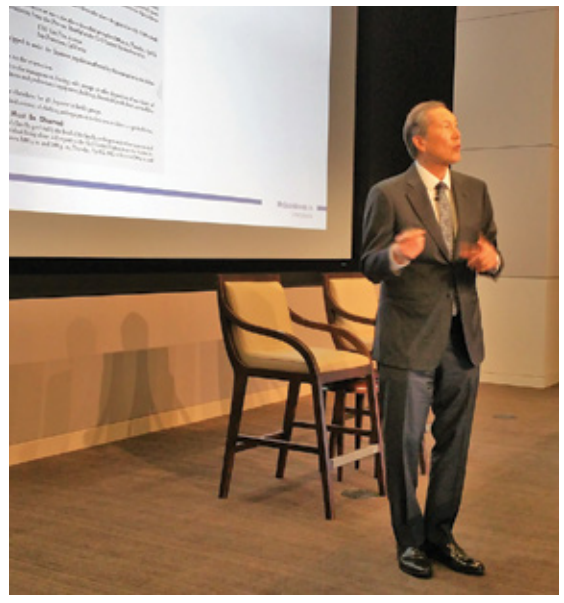


We need not only understand what an equal employment opportunity violation looks like but also what the cost of assumptions and the pain of the lack of recognizing the depth of identities in our profession cause each other.

firms, legal services organizations and government offices. We need not only understand what an equal employment opportunity violation looks like but also what the cost of assumptions and the pain of the lack of recognizing the depth of identities in our profession cause each other. We must breathe life into the words so many lawyers fought to have legislated or written in opinions. And that step is made by each and every one of us, each and every day we go to work. We must all admit that we do not know things, that we cannot understand another's journey. We must capitalize on taking moments to ask others about themselves and their lived experiences and seek to educate ourselves about our own biases. We all say that diversity should be celebrated and it should. Ask yourself: "Have you taken the time to really understand what you are celebrating?" "Have you given true meaning in your words and actions to uphold the law as it relates to inclusion?"



In 2017 we were excited to present a Symposium on the State of Diversity & Inclusion at AT&T in Dalas, TX. Interested in partnering with IILP to present a Symposium in your city? Email info@theiilp.com for more information.



Straight Privilege: Shining Light on Unearned Advantage Based on Sexual Orientation

By Steven T. John

Steven John & Associates, LLC

Privileged manifests in a myriad of ways. Straight privilege is as pervasive as white privilege and both need to be in our collective and individual consciousness. By sharing some of his own life experiences, John unpacks heteronormativity he has experienced as an attorney, citizen, and husband. He calls “straight allies to acknowledge the power you wield in your personal and professional lives,” and to fight for justice by letting go of “heteronormative entitlement.”

When Wellesley academic, Peggy McIntosh, published her provocative personal essay on white privilege nearly three decades ago, it came at a time when the academy was gaining significant traction exposing academic biases across a broad spectrum of intersecting prejudices.¹ Since the publication of *White Privilege: Unpacking the Invisible Knapsack*, our public discourse on racial oppression, its corollary, and racial privilege, have entered the mainstream, regularly expounded and dissected on campuses, in legislative chambers, and in corporate board rooms, with the imprimatur of moral authority and with broad support from those who retain the reins of religious, political, and economic power.

While powerful in the clarity of its purpose, namely to acknowledge and shed light on her own position of privilege as a white academic in a specific time and place, McIntosh’s essay is essentially personal.² It is a reflection on her own awakening to the realities of privilege hierarchies. It is set against the backdrop of her experiences working in an institution where she and her female colleagues of color operated under different rules of social and professional engagement. In the essay, she tells her story and challenges those reading it not to extrapolate. Rather, she recommends honest self-reflection from anyone committed to understanding how racial privilege benefits them and how to recognize it after lifelong conditioning to not see it.³

Unlike McIntosh, my aim is to call attention to a privilege that I, as a gay man, do not enjoy. In attempting to shine a light on the flip-side of anti-LGBT+ bias, namely heterosexual privilege, I acknowledge the risks inherent in generalizing the points of view of a majority whose perspectives I do not share.⁴ To the extent I am able to justify my assertion that I understand the drivers of bias against LGBT+ people, I am inherently

1. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack* (1988), https://nationalseedproject.org/images/documents/Knapsack_plus_Notes-Peggy_McIntosh.pdf.

2. *Id.* McIntosh makes it clear throughout her essay that she is writing about her personal experience of realizing her unearned racial privilege. She writes from the point of view of someone who “realized I had been taught about racism as something which puts others at a disadvantage, but had been taught not to see one of its corollary aspects, white privilege which puts me at an advantage.”

3. See John Blake, *It’s Time to Talk About “Black Privilege,”* CNN (Mar. 31, 2016, 11:28 AM), <https://www.cnn.com/2016/03/30/us/black-privilege/index.html>. The backlash to the label “white privilege” has been predictably pointed, as evidenced by the increasingly bold counter-argument from American white nationalists that people of color are, in fact, the people who enjoy “special privileges,” (e.g., Black History Months).

4. In the interest of readability, I have limited my references to the vast spectrum of sexual orientation and gender identity with the widely used, though admittedly under inclusive, LGBT+. For a longer discussion of the definition and history of initialism of non-heterosexuality, see Jeffrey J. Iovannone, *A Brief History of the LGBTQ Initialism*, <https://medium.com/queer-history-for-the-people/a-brief-history-of-the-lgbtq-initialism-e89db1cf06e3>.



Public sentiment has evolved toward greater social acceptance of LGBT+ people and their relationships. But our concept of “normal” remains decidedly heteronormative.

incapable of describing the intellectual struggle that straight people experience in identifying and acknowledging their own privilege.

Unlike pernicious racial bias, which may or may not be conscious, heterosexism, and the extreme of homophobia, is unvarnished, overt, and socially tolerated, if not wholly endorsed, except in the most progressive communities. Yes, LGBT+ people have made legal strides in the last decade in their fight for equality. Brave public officials throughout the country, as well as the leaders of a number of major corporations, have picked up the banner, boldly pressing local, state, and federal legislatures to turn away from state-sponsored bias.⁵ Public sentiment has evolved toward greater social acceptance of LGBT+ people and their relationships. But our concept of “normal” remains decidedly heteronormative.

I understand the operation of straight bias in my life and the privilege it presumes, as a matrix of religious, social, and academic conditioning. Steeped in religiosity, heteronormative conditioning began early in the home in the form of proscriptions in gender-specific clothing, toys, and mannerisms. Heterosexual men in my family and community modeled “right” behaviors that were in turn reinforced by their female partners. In my public-school experience, the hiding of non-conforming sexual orientations in history education reinforced the rightness of ignoring or suppressing the identification of LGBT+ people and their contributions to religious, political, and civil life. While not explicit, the modeled behaviors were intended to ensure the development of *normal* children in a society that frowns on non-conforming gender behavior, regardless of a child’s ultimate sexual orientation. For me, heteronormative behavior was reinforced over and over again in classrooms and on playgrounds and that has been true throughout the early academic lives of virtually all children.⁶

Like most gay men who knew at an early age that they were *different*, I struggled as a young man to suppress behaviors and mannerisms I imagined betrayed my *otherness*, fearful of disapprobation, familial rejection, or homophobic epithets and threats of violence at school. Children learn to identify and revile *otherness* in their classmates, leading to playground bullying that eventually works its way into the office, the courtroom, and our legislatures. My straight friends who exhibited classically male personalities and interests appeared less anxious even when they were the targets of bullying. My experience of awakening to the gay man I was becoming was different from those of my straight-identifying friends and classmates in profound ways.

5. HRC Staff, *At Clinton Global Initiative Annual Meeting, HRC To Launch Groundbreaking Global Corporate Coalition*, HUMAN RIGHTS CAMPAIGN (Sept. 29, 2015), <https://www.hrc.org/blog/at-clinton-global-initiative-annual-meeting-hrc-to-launch-groundbreaking-gl>.

6. Kaia Tollefson, *Straight Privilege: Unpacking the (Still) Invisible Knapsack* (May 1, 2010), <https://files.eric.ed.gov/full-text/ED509465.pdf>.

Shortly after returning from a two-year Mormon mission⁷ and re-matriculating at Brigham Young University (BYU),⁸ I revealed my sexual orientation during an ecclesiastical interview.⁹ My first honest acknowledgment of my sexual orientation was met with swift condemnation. I was given an impossible ultimatum: I could accept expulsion from the university and a full course-load of failing grades, or I could submit to psychotherapy for the remainder of the term with the expectation that I would quietly depart from the university at the end of the semester. I chose the latter in fear that expulsion would bring deep embarrassment to my family and close circle of friends. As terrifying an experience as it was, I knew that it could have been much worse. Had I *confessed* to my same-sex attraction just a decade earlier, the on-campus psychotherapy prescription may have included experimental electroshock aversion therapy,¹⁰ a practice that, while short-lived, cast a long shadow over the lives of LGBT+ students on BYU's campus. It is a practice that has since been repudiated by the American Psychological Association as ineffective and potentially dangerous.¹¹

The LDS church has not changed its position on LGBT+ relationships in spite of recent public attempts to ameliorate the frustrations of a membership that is increasingly accepting of LGBT+ people and their relationships. The church famously helped to bankroll California's narrowly won *Prop 8*, which denied LGBT+ people the right to marry.¹² This was my church, my people, and they were once again trumpeting their rejection of a core component of my identity.

The psychological injuries LGBT+ youth sustain when treated unfairly because of sexual orientation are acute and qualitatively different from the experiences of straight youth.¹³ LGBT+ people who suffer harassment, bullying, and physical violence are more likely to be seriously traumatized by homophobic attacks than their heterosexual counterparts are by other forms of harassment.¹⁴ The stresses of non-conformity, and the distress of being the target of homophobic attack, lead to an alarmingly disproportionate risk of suicide and suicide ideation among LGBT+ youth than in the general population.¹⁵

Professionally, LGBT+ attorneys remain vulnerable to usually subtle, occasionally overt, homophobia in the workplace. Those of us practicing a learned profession often delude ourselves into believing our straight colleagues have transcended the dogma of ancient bias, intellectually unfettered to the mythologies held to dearly by the less educated. It is a fantasy, of course, laid bare in the odious comments and writings of jurists and practicing lawyers alike.¹⁶ There are, to be sure, innumerable allies among the ranks of lawyers of

7. Many members of The Church of Jesus Christ of Latter-Day Saints spend time away from their families, schools, jobs, and communities to serve as proselytizing Missionaries. They are sent to locations around the world chosen for them by administrators in the church's world headquarters in Salt Lake City, Utah. See *Missionary Preparation*, THE CHURCH OF JESUS CHRIST LATTER-DAY SAINTS, <https://www.lds.org/callings/missionary?lang=eng>.

8. Brigham Young University is a private research university in Provo, Utah. It is owned and operated by The Church of Jesus Christ of Latter-Day Saints.

9. Members of The Church of Jesus Christ of Latter-Day Saints are required to meet with their local congregation leaders once a year to establish their *worthiness* to participate fully in church life. Students attending BYU must meet rigorous standards of personal conduct to remain eligible to study at the university. Adherence to those standards is self-reported during their required annual meetings with on-campus congregation leadership.

10. MAX FORD MCBRIDE, *EFFECT OF VISUAL STIMULI IN ELECTRIC SHOCK THERAPY* (1976).

11. *Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, 157 AM. J. PSYCHIATRY 1719-21 (2000). See also *Resolution on Appropriate Therapeutic Responses to Sexual Orientation*, 53 AM. PSYCHOL. J. 934-935 (1998).

12. Officially titled *Proposition 8 – Eliminates Right of Same-Sex Couples to Marry*. *Prop 8* was a state-wide ballot proposition to amend California's constitution to bar same-sex marriages. It was placed on the November 4, 2008 ballot. The proposition was approved on a Yes vote from 52.24% of participating voters. See, *Ballot Measures Statewide Summary by County*, <http://elections.cdn.sos.ca.gov/sov/2008-general/ssov/10-ballot-measures-statewide-summary-by-county.pdf>.

13. S.T. Russell et al., *Lesbian, Gay, Bisexual, and Transgender Adolescent School Victimization: Implications for Young Adult Health and Adjustment*, 81 J. OF SCH. HEALTH 223-30 (2011).

14. J.A. Muraco & S.T. Russell, *How School Bullying Impacts Lesbian, Gay, Bisexual, and Transgender (LGBT) Young Adults* (2011), 4 Frances McClelland Institute for Children, Youth, and Families https://mcclellandinstitute.arizona.edu/sites/mcclellandinstitute.arizona.edu/files/ResearchLink_Vol.%204%20No.%201_Bullying.pdf.

15. The Trevor Project, *Facts About Suicide*, <https://www.thetrevorproject.org/resources/preventing-suicide/facts-about-suicide>.

16. See Elie Mystal, *Senior Lawyer Unleashes "Old School" Homophobic Rant, Hits "Reply All," ABOVE THE LAW* (Aug. 26,

all stripes, but openly hostile LGBT+ bias, couched in the First Amendment¹⁷ and underpinned by religious dogma,¹⁸ remains an uncomfortable reality in legal practice, as in all professions.

So, what of heteronormativity and straight privilege? My straight-identifying, cisgendered friends, family, and colleagues appear to move through their adult lives without having to consider how others perceive them in the context of their mannerisms and intimate relationships. Most are keenly aware of the persistence of homophobia as a general matter and consider themselves allies, even advocates, of the LGBT+ community. But they are unlikely to understand the pervasiveness of heterosexist bias among their friends and associates, and in themselves.

There are, however, well-known, explicit biases against LGBT+ people that have been codified and institutionalized by religious organizations around the world. Religious bigotry directed at LGBT+ people spreads beyond the pulpit, seeping into every crevice of civil life, coloring legislative and judicial judgment. It rationalizes odious discrimination in housing, employment, and healthcare.¹⁹ In the wake of *Obergefell v. Hodges*,²⁰ several states have, or are attempting to codify a *religious freedom* exemption for any employer or service provider who does not want to employ or do business with LGBT+ people.²¹ While the fight over public accommodation across a range of services is now in the hands of the federal courts, early signals suggest wide-spread sympathy remains for religious intolerance.²² For example, the Trump administration, in a reversal of Obama administration policy, has directed the Department of Health and Human Services to promulgate rules protecting health care providers who object to providing services to women and LGBT+ people where those services would conflict with the service provider's religious beliefs—e.g., contraception, abortion, sterilization, and gender reassignment surgery.²³

It is impossible to create an exhaustive list of the myriad ways in which straight people stand at a distinct, unearned advantage over LGBT+ people, or the struggles and injustices LGBT+ people experience in their personal and work lives. I attempt here to catalogue the issues I believe to be most closely associated with the imbalance in power and advantage between straight people and their LGBT+ colleagues, friends, and family members. Because the legal and social landscape continues to shift daily for LGBT+ people, I consider the following list to be likewise fluid. It is hardly exhaustive. But these are my observations, based in personal experience and in the experiences of the LGBT+ people I've known:

2014), <https://abovethelaw.com/2014/08/senior-lawyer-unleashes-old-school-homophobic-rant-hits-reply-all>.

17. First Amendment Defense Act, S. 2525, 115th Cong. (2018).

18. The explicit purpose of the *First Amendment Defense Act* is "to ensure that the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person speaks, or acts, in accordance with a sincerely held religious belief or moral conviction that marriage is or should be recognized as a union of one man and one woman, or two individuals as recognized under Federal law, or that sexual relations outside marriage are improper." *Id.*

19. It is well documented that there is current a wave of anti-LGBT+ initiatives working their way through local, state, and federal courts and legislatures. One need look no further than to Mississippi's H.B. 1523, signed into law in April of 2016, which permits persons and businesses to rely on their religious convictions to discriminate against LGBT+ people in providing a number of services, including certain health services. H.R. 1523 2016 Reg. Sess. (2016). For a broader discussion of state sponsored anti-LGBT+ legislative initiatives, see Wang, T., S. Geffen, and S. Cahill, *The Current Wave of Anti-LGBT Legislation: Historical Context and Implications for LGBT Health*, <https://fenwayhealth.org/wp-content/uploads/The-Fenway-Institute-Religious-Exemption-Brief-June-2016.pdf>.

20. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

21. American Civil Liberties Union, *End The Use Of Religion To Discriminate*, <https://www.aclu.org/issues/religious-liberty/using-religion-discriminate/end-use-religion-discriminate>.

22. Movement Advancement Project, *Religious Exemptions & Service Discrimination* (2017), <http://www.lgbtmap.org/file/talking-about-religious-exemptions-service-discrimination.pdf>.

23. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (Jan. 26, 2018) (to be codified at 45 CFR 88).



Unlike legal protections in employment and housing for women and racial minorities, LGBT+ people remain vulnerable to employment and housing discrimination in most U.S. states.

1. I cannot assume that the people I encounter at work, in social settings, or in public accommodations will interact with me politely, or at all, if they know that I am gay, even if I look and speak like them.
2. There are no guarantees that I will be able to land a job with, or rent or buy a home from, someone who is hostile to LGBT+ people. Unlike legal protections in employment and housing for women and racial minorities, LGBT+ people remain vulnerable to employment and housing discrimination in most U.S. states.²⁴
3. When my husband and I travel together, we can rest assured that, upon checking-in to our hotel, we will be asked, usually with a look of confusion, if we really want only one room with only one bed.
4. Emboldened strangers on the street regularly ask me and my husband if we are brothers or twins. Their eyes widen and their faces flush when we tell them we are a married couple. The confrontation is often disconcerting and leaves each of us to wonder how badly the questioners' reactions might have been. Anti-gay, homophobic violence remains a real threat to men like us. We do not hold hands in public in most places we travel to, knowing that doing so would draw unwanted attention and the real risk of violence.²⁵
5. My husband and I wear wedding bands and professional contacts routinely ask personal questions about my "wife" and whether I have children. Each query brings a moment of reflection and fear of an uncomfortable reaction. It also presents a choice to either awkwardly change the subject, correct the misunderstanding, or retreat into a closet of dishonest personal representation.
6. In spite of the open public discourse on LGBT+ equality and the breadth of LGBT+ activism across the country, the presumption of gay rarity compels the occasional question of "do you know so-and-so" who also happens to be gay. The response, "I do not," is usually met with a nod and a tacit acknowledgment that the question is absurd on its face.

24. Movement Advancement Project, *Non-discrimination Laws* (2018), <http://www.lgbtmap.org/equality-maps/non-discrimination-laws>.

25. Hate crimes involving violent attacks on LGBT people are on the rise in the U.S. Transgendered people of color are particularly at risk. While hate crimes remain grossly underreported to and by local and federal law enforcement, recent data indicates that LGBT people are the largest hate crime victim group in the U.S., followed by Jews and African Americans. See Haeyoun Park & Iaryna Mykhyalshyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html>.



LGBT+ families living in twenty-nine states enjoy no protections against employer discrimination and therefore have no guarantee of access to those employment benefits.

7. Straight friends and family routinely ask us to psychoanalyze people we do not know, hoping we can shed light on behaviors or life circumstances suggestive of same-sex attraction. I am neither interested in, nor qualified to address, queries concerning human behavior that is not my own.²⁶
8. While generally welcome in our respective family homes, we do not express our affection for one another in front of family and friends, for fear of offending their sensibilities. We will not be caught kissing in the privacy of their homes for fear of uncomfortable glances, or awkward silences. We know that our relationship is tolerated, not celebrated.
9. Unlike our heterosexual counterparts who have access to private employer-provided spousal benefits, LGBT+ families living in twenty-nine states enjoy no protections against employer discrimination and therefore have no guarantee of access to those employment benefits.
10. In spite of *Obergefell*, we are not guaranteed access to government sponsored child fostering programs in forty-two U.S. states that remain silent on the matter.²⁷ Seven U.S. states expressly grant a religious exception to state-sponsored private adoption and foster service providers who object to providing services to LGBT+ families and children.²⁸
11. I have been conditioned to avert my gaze when crossing paths with male strangers. We live with the presumption of same-sex sexualization and many straight men have been taught to assume that gay men sexualize all men. It is an irrational presumption grounded in the historical reality of male sexual aggression as an act of violence. It is the bias that forms the foundation of the so-called *gay panic* defense in criminal cases of violence against gay men and transsexuals.²⁹ It rationalizes violent acts against LGBT+ people suggesting that the perpetrators' fear of being the target of gay

26. This is not to say that I am not open to discussing my emotional life as a gay man. I recently met a concerned parent of a teen who came out as bisexual to his family. The parent, who knows that I am in a same-sex marriage, approached me to ask a number of questions about my personal experience of coming out. I was honored to be asked and I understood that their aim was to shed additional light on their teen's experiences. It was a respectful exchange that focused on the things I could honestly speak to, namely, my own experiences as a young gay man raised in a conservative religious community. The questioning parent was wise enough to understand that their child's experience was fundamentally their own. LGBT+ people can and should share their personal stories with anyone who genuinely wishes to understand their experiences. But as with all human beings, our stories are ours alone.

27. The Movement Advancement Project (MAP) has done an exceptional job of collecting and publishing data on LGBT+ policy initiatives throughout the United States. Their interactive *Equality Maps* provide insight into the current state of legislation related to the treatment and protection of LGBT+ people across a number of policy areas including employment, housing, family planning, and access to health care, among many others.

28. MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

29. Cynthia Lee, *The Gay Panic Defense*, 42 UC DAVIS L. REV. 471 (2008).

affection could reasonably lead to violence as an act of “self-defense” or as the catalyst of a state of temporary insanity.³⁰ Incredulously, this remains a viable defense in criminal prosecutions of serious crimes, including homicide, in all but two U.S. states - California and Illinois.

12. I do not enjoy the same options available to straight men to worship within many religious communities because of my sexual orientation and my relationship status, regardless of the convictions of my faith.
13. I live in a city renowned for its progressive ethos of LGBT+ inclusion and I am unlikely to experience hospital visitation confusion in moments of medical crisis. But once outside the progressive bubble of San Francisco, my husband and I must take extra steps to prove the legitimacy of our relationship and our request for access to one another should either of us be hospitalized.
14. There are few credible, positive gay leading characters in film, but I do not see myself in representations of our cultural heroes. I do not find people like me in the Disney stories of my youth, for example. While we have made strides in general representations in media, where “gay” is implied, as it was in the most recent live action iteration of the *Beauty and the Beast* story, it is attached to malevolence and servility or it is clownish and stereotypically camp.
15. Businesses that strive to create inclusive environments remain vulnerable to open hostility and media-supported attacks when their efforts at inclusion are visible in marketing campaigns. Starbucks, for example, came under attack for *normalizing* same-sex relationships like mine by including illustrated images of presumably same-sex couples holding hands on their holiday coffee cups.³¹
16. I cannot move freely around the world because a number of international destinations are dangerous for LGBT+ people. I would not risk traveling to parts of the Caribbean, Africa, the Middle East, or Russia, for example, because non-conforming sexual orientations are criminalized and come with the threat of prosecution and punishment that includes, in the most extreme jurisdictions, the death penalty.³²
17. For many heterosexual people, including some who consider themselves allies of the LGBT+ community, any consideration of what it means to be LGBT+ focuses on the sex act, rather than the bonds of love that hold LGBT+ couples together, or the families they work hard to create. Being gay means so much more than physical intimacy.
18. I live with the reality that any illness or significant weight loss will trigger concerns from family and straight friends that the cause of the malady or physical change is HIV infection. HIV/AIDS remains a persistent stigma and many still believe it to be a *gay disease* in spite of the scientific and demographic realities of the disease.³³ Never mind that men and women of color are disproportionately affected by AIDS in the United States.³⁴ Nevertheless, I can rest assured as a gay man that any conversation with a healthcare provider about any ailment will begin with a litany of questions about my sexual activity.

30. *Id.*

31. Daniel Reynolds, *Conservatives Attack Starbucks Holiday Cup’s “Gay Agenda,”* ADVOCATE (Nov. 17, 2017), <https://www.advocate.com/business/2017/11/17/conservatives-attack-starbucks-holiday-cups-gay-agenda>.

32. See International Lesbian, Gay, Bisexual, Trans and Intersex Association: A. Carroll & L.R. Mendos, *State-Sponsored Homophobia 2017: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition* (Geneva; ILGA, May 2017).

33. UNAIDS, *Global HIV & AIDS Statistics — 2018 Fact Sheet*, <http://www.unaids.org/en/resources/fact-sheet>.

34. C.T. Laurencin et al., *African-Americans Still Disproportionately Affected by HIV*, J. OF RACIAL AND ETHNIC HEALTH DISPARITIES (2018).

In This Together

I enjoy the community of a diverse group of friends of all genders and sexual orientations—a luxury afforded me by the time and place in which I live. For LGBT+ people living outside the ultra-progressive enclaves of large, American urban areas, the reality of isolation persists. Their lives are less visible to the homogeneous, heterosexual majority, whatever the racial or religious composition of the community. The Internet may offer the hopeful promise of identity acceptance, offering LGBT+ people who feel alone in the world access to images and stories of people just like them.

Straight allies sitting on the sidelines of the LGBT+ struggle for equal rights acknowledge the injustice of prejudice, but what role do these allies play in the quest for full LGBT+ inclusion in religious and civil life? Straight privilege is power, wielded from the courthouse, the legislature, the pulpit, the news room, and the board room. Just as the civil rights movement for racial equality leans on white support, the gay rights movement has, and always will, depend on the moral courage of heterosexual men of all colors. While straight women have been less reluctant to voice support for gay rights, they too remain divided in their acceptance of non-conforming sexual orientation and the place of LGBT+ advocacy in the fight for racial and gender equality.

I recognize that we all operate in a matrix of intersecting advantages and disadvantages based on race, gender, religion, and sexual orientation. My point of view as a gay man observing heterosexual privilege necessarily fails to peel back the seemingly endless layers of power and privilege affecting us all. To exhaust the possibilities of privilege would sit squarely outside the scope of this piece, but I acknowledge the limitations inherent in any exercise that attempts to illuminate our understanding of any singular privilege.

Conclusion

Finally, while I have shared my perspective on straight privilege and the effects of heteronormative bias in my life and in the lives of LGBT+ people I know, I am reminded daily that the world is changing around us. From the *It Gets Better Project* to *The Trevor Project*, LGBT+ youth are receiving hopeful messages of affirmation I could not have imagined as a young gay man growing up in a small town in Idaho nearly a half-century ago.³⁵ My husband and I did not imagine the day would come when we would be legally entitled to exchange marriage vows, yet here we are. It was unfathomable just a short time ago that we would see mainstream religious sects ordain LGBT+ ministers, but they are installed and ministering to increasingly diverse congregations. We could also never have imagined that a community would elect a transgendered woman to a seat in a state legislature. These have been the presumptive positions of power reserved for cisgendered straight men and, more recently, women. This is progress.

We have come a long way towards LGBT+ equality in a very short period of time, and we have a long way to go. Our efforts are vulnerable to homophobic backlash and the bigoted retrenchment of the progress we are making. I encourage all who consider themselves to be our straight allies to acknowledge the power you wield in our personal and professional lives and to hold sacred your responsibility to exercise that power ethically and with humility. It is a power unearned; a mere product of circumstance, whether you see it or not. The uncomfortable truth is that we will make no progress in our fight for justice and equality without your willingness to cede power and let go of the presumption of heteronormative entitlement.

35. See IT GETS BETTER PROJECT, <https://itgetsbetter.org> (last visited Aug. 13, 2018); see also TREVOR PROJECT, <https://www.thetrevorproject.org/#sm.0000q1d8xw134cz9uv71eu93pajz0> (last visited Aug. 13, 2018).

Being a B: Perspectives on Being a Bisexual Lawyer

Bendita Cynthia Malakia

Inclusion Manager-Americas, Hogan Lovells

Malakia breaks down the myths and stereotypes that negatively impact bisexual lawyers and demonstrates the how ignorance and misunderstanding can hurt and target bisexual individuals, even among the LGBTQ+ community.

Introduction

Over the last ten years, the legal diversity industry has become more formalized, gaining more prominence with the advent of organizations, programs and initiatives like the Leadership Council on Legal Diversity (2009),¹ American Bar Association Model Rule 113 (2016)² and the Mansfield Rule (2017).³ Within these initiatives and more broadly, there has been an increasing inclusion of the lesbian, gay, bisexual, transgendered, queer, questioning, intersex, pansexual, and asexual (LGBT+) community, one example being the addition of the LGBTQ+ category in the second iteration of the Mansfield Rule.⁴ There is little attention being paid to the individual identities within the LGBT+ conglomerate, with the default research and attention being given to those with homosexual identities (e.g., gays and lesbians) despite reference to the broader community.⁵ This is no different in the legal community. In fact, as of October 15, 2018, a Google search on bisexual lawyers and their specific work experiences comes up practically nil. There is a void in legal diversity scholarship that the experiences of bisexual lawyers should fill. I have not conducted a formal research study on the experiences of bisexuals or bisexual lawyers specifically. Instead, I endeavor here to share my experiences as a bisexual lawyer and the common experiences of other bisexual lawyers I have come across and articulate my thoughts on the challenges that bisexual lawyers may face due to the implicit and explicit biases that both heterosexual and the lesbian and gay communities may have about bisexuality.

I will start with a discussion of biphobia, the bias and discrimination that bisexual people face, and its causes, corollaries and impact. The first of which is bi-erasure, alluded to above, the phenomenon that bisexuals and bisexuality do not exist and are eradicated from both queer and heterosexual spaces. I will then discuss myths and misperceptions that represent biphobia, discrimination from the LGT+ community, and the impact that biphobia has on bisexual people. This article will finish with a discussion on what this means for the perceptions that non-bisexual people have about bisexuals and the ways that those may not translate as desirable for a lawyer.

Biphobia

Biphobia is discrimination against bisexuals on the basis of their bisexual identity.⁶ In my view, like homophobia, the term is similar to “homophobia” in that it is a misnomer: individuals who are

1. *About LCLD*, LEADERSHIP COUNCIL ON LEGAL DIVERSITY, <https://www.lclldnet.org/about/>.

2. Malvina Longoria & Vanessa Watson, *Driving Diversity and Inclusion from the Inside Out*, ACC DOCKET (March 17, 2017), <https://www.accdoCKET.com/articles/driving-diversity-and-inclusion-from-inside-out.cfm>.

3. *65 Law Firms Pilot Mansfield Rule 2.0 to Boost Diversity in Leadership Ranks*, DIVERSITY LAB, <https://www.diversitylab.com/pilot-projects/mansfield-rule> (last visited Oct 18, 2018).

4. *Id.*

5. Milena Popova, *Inactionable/Unspeakable: Bisexuality in the Workplace*, 18 JOURNAL OF BISEXUALITY 54–66 (2017), <https://www.tandfonline.com/doi/full/10.1080/15299716.2017.1383334>.

6. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STANFORD L. R. 353 (2000).

discriminating, expressing or imputing bias against bisexuals, are generally not afraid of anything related to bisexuals themselves. This may not be completely true, though. Heterosexuals may be afraid of the destruction of the legitimacy or singularity and stolidity of their way of life that recognition of bisexuality may threaten. Other members of the LGT+ community may likewise be afraid that bisexuality represents a blurring of the battle lines so to speak, and a dilution of the legitimacy of the claim of unique identities requiring special spaces, specific support and definitive initiatives. This section will explore the various phenomena—some of which have been studies, others have not—that are byproduct or evidence of biphobia: bi-erasure, the myths and misperceptions of bisexuality,

Bisexual erasure

Bi-erasure reflects the eradication of bisexual people in conversations about the LGBT+ community and that bisexuality itself is not recognized as being a standalone sexual orientation with permanence as heterosexuality and homosexuality.⁷ Simply put, bisexuals live with the stereotype that they do not exist.⁸

Erasure as a result of aggregation into an LGBT+ community

One phenomenon that may contribute to bi-erasure is the LGBT+ community being considered a monolith. As with all demographic identities, thinking about them as a monolith often leads to inaccurate conclusions and problematic conflation that does not allow for proper resourcing and support and facilitates discrimination. In my view, while the small percentages of LGBT+ individuals make conflation necessary to generate political power and support, aggregating these individual identities also serves to develop hierarchies where some members of the sub-group have more power than others, and some – like bisexuals – are ignored almost entirely.

LGBT+ people make up on average 3.8% of the US population.⁹ This figure only represents the LGBT+ part of the population that is comfortable being openly identified. Open identification can be hampered by many overlapping and intersecting personal and societal factors including family acceptance, individual identity, religion, education, legal risk, community social norms, social support, etc.¹⁰ The LGBT+ population is made up of groups of people that have wildly different circumstances¹¹. With some understanding of the underlying experiences, these sub-groups are not likely bedfellows.

7. *Id.* at 357 (comprehensive treatment of bi-erasure).

8. Samantha Joel, *3 Myths About Bisexuality, Debunked by Science*, PSYCHOLOGY TODAY (May 22, 2014), <https://www.psychologytoday.com/blog/dating-decisions/201405/3-myths-about-bisexuality-debunked-science> (an interesting iteration of bi-erasure is the perpetuation of the unicorn myth, which takes the form of bisexuals (women, typically) with romantic and sexual interest in generally heterosexual and cisgender men and women). Lili Silver, *How I Found Out I Was a Sexual “Unicorn”*, MARIE CLAIRE (July 25, 2016), <https://www.marieclaire.com/sex-love/a21670/unicorn-bisexual-woman-join-a-couple> (bisexuals are fetishized, scarce, desirable due to scarcity, and reduced to mythology. Further, there is some thought that bisexuals have lives that are more desirable because of the benefits that they assume prevail, regardless if untrue); Zachary Zane, *Why Passing as Straight When You’re Bisexual Is a Privilege*, HUFFINGTON POST (June 3, 2016), https://www.huffingtonpost.com/zachary-zane/bisexuals-passing-and-straight-privilege_b_9374272.html; Bisexuals experience less discrimination than other LGBT+ people because they are closer to being heterosexual than other members of the LGT+ community. While Starbucks brought the unicorn back to the fore with its specialized Frappuccino of that name in 2017, the term infers a fetishization and uniqueness that belies the lack of political, social and . power and the actual extent of inclusion of bisexuals inside and outside of the LGBT+ community. Mary Bowerman, *People are Freaking Out Over Starbucks Unicorn Frappuccino*, USA TODAY (April 18, 2017), <https://www.usatoday.com/story/money/nation-now/2017/04/18/people-freaking-out-over-starbucks-unicorn-frappuccino/100592430>.

9. *LGBT Data & Demographics*, THE WILLIAMS INSTITUTE (May 2016), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density>.

10. *A Survey of LGBT Americans*, PEW RESEARCH CTR. (June 13, 2013),

<http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/>.

11. INSTITUTE OF MEDICINE, *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING* (2011), available at <https://www.ncbi.nlm.nih.gov/books/NBK64810/>.

By way of oversimplification, I will suggest that there are two meta-groups whose experiences have been conflated into the LGBT+ category. On the one hand, there are individuals experiencing non-heterosexual sexual orientation (e.g., gay, lesbian, bisexual, pansexual, questioning, among others) and on the other, individuals that do not ascribe to, or fit into traditional cisgender men-woman binaries (e.g., transgender, intersex, genderqueer, agender, among others). One of the oversimplifications here is conflating gender with sex, which is done by including intersex in the gender identity category. Gender identity is, broadly, the gender that conforms to the way we feel, and sex is a nod to the traditional biological categories that we are placed into at birth¹². Intersex individuals, individuals born with one or more conditions where their reproductive or sexual anatomy does not fit the typical definitions of female or male, are as common as redheads¹³. However, many are not aware given that there are almost infinite ways to be intersex. These may include body chemistry, hormones, mixed chromosomes, lack of functioning sex glands, or genitals that do not fit within the classic definitions for male or female bodies - that may not be explained or revealed to an intersex individual or their parent(s).¹⁴

Conflating gender identity and sexual orientation together can mean bisexual transwomen, questioning transmen, gay agendered individuals and lesbian genderqueers, among endless potential permutations. This list demonstrates how different the issues of gender identity are from sexual orientation. It is easy to see how individual strands of the LGBT+ community may be erased in favor of the LGBT+ identities that have more power and visibility, by virtue of race, socioeconomic status, and ability to leverage corporate power, etc.

Lack of open identification contributes to bi-erasure.

Regardless of the reason, an uncomfortable fact remains: only roughly 28% of bisexuals openly identify compared to 77% of gay men and 71% of lesbians.¹⁵ Bi-erasure, however, is a real challenge on top of the small percentage of bisexuals that have openly identified. In the conversation about the challenges and triumphs of the LGBT+ community, both members and non-members of the community presume that bisexuals either do not exist, or do not have issues that are worthy of raising or that are distinct from other members of the community¹⁶. At the root, this means that when majority support is being garnered for LGBT+ community, bisexuals are often excluded, and more tragically, the LGBT+ community broadly not only fails to advocate for, but often downplays the position of, bisexuals. Discrimination from both the heterosexual and homosexual communities puts bisexuals in a position that is arguably more fragile than that of heterosexuals and other members of the broader LGBT+ community. Bi-erasure is, in fact, often rooted in and a byproduct of biphobia.¹⁷

Bisexuality as a joke

Most commentary about bisexuals is joke fodder that underlies the fact that people do not take bisexuality or its status as a sexual orientation seriously¹⁸. Challenges abound from these myths. Part of the beauty of belonging to—or identifying with—an underrepresented

12. Milton Diamond, *Sex and Gender are Different: Sexual Identity and Gender Identity are Different*, 7(3) CLINICAL CHILD PSYCHOLOGY & PSYCHIATRY 320 (2002).

13. Hida Viloria, *How Common is Intersex? An Explanation of the Stats*, INTERSEX CAMPAIGN FOR EQUALITY (April 1, 2015), <http://www.intersexequality.com/how-common-is-intersex-in-humans/>.

14. More clinical terms for the many ways individuals may be intersex include, without limitation, androgen insensitivity syndrome, partial androgen insensitivity syndrome, classical congenital adrenal hyperplasia, late onset adrenal hyperplasia, vaginal agenesis, ovotestes, 5 alpha reductase deficiency, mixed gonadal dysgenesis, complete gonadal dysgenesis, and hypospadias. See Melanie Blackless *et al*, *How Sexually Dimorphic are We? Review and synthesis*, 12 AMERICAN J. OF HUM. BIOLOGY 151-66 (2000).

15. Anna Brown, *5 Key Findings About LGBT Americans*, PEW RESEARCH CTR. (June 13, 2017), <http://www.pewresearch.org/fact-tank/2017/06/13/5-key-findings-about-lgbt-americans>.

16. *Bisexuality is a Distinct Sexual Orientation*, SCIENTIFIC AMERICA (Jan. 17, 2008), <https://www.scientificamerican.com/podcast/episode/8902D6F8-F97C-E6FE-74B6D67845F05FEA>.

17. Sami Clements, *What is Bi-Phobia, Bi-Erasure, and Bi Visibility?*, QUEER GRACE, <http://queergrace.com/biphobia/>.

18. SCIENTIFIC AMERICA, *supra* note 16.

community is the ability to connect and joke and poke fun at ourselves. However within the LGBT+ community, transgendered folks and bisexuals are just outright excluded, which makes humor feel like it is at their expense rather than everyone being part of the joke. Where transpeople and bisexuals differ in treatment is that most within the LGBT+ community do not doubt that transgendered people exist.

For bisexuals that do deem to exist, myths and misperceptions prevail

Regardless of the aptness of the name, biphobia is real and has a significant impact on bisexuals, including in their positioning in the LGBT+ community. Some of the ways that bisexuals are discriminated against include the perpetuation of the following misperceptions by both LGBT+ and straight, cisgender communities:

- Heterosexuality and homosexuality are the only two sexual orientations, also known as monosexism¹⁹. In other words, bisexuality is not a sexuality in and of itself at all, just a pit stop for individuals that are scared to declare their full gayness or lesbianism²⁰. The denial of bisexuality is the result of adherence to the same type of binaries our society typically thrives to maintain in the gender identity space. This reduces sexuality to a very limited binary where heterosexuality and homosexuality exist and nothing else is legitimate. There are a couple variations on this myth that are pervasive.
 - A variation of bisexuality as pit stop myth is that men cannot be bisexual²¹. This is a myth that I have heard be perpetuated by lesbians and gays, on the one hand, and heterosexual, cisgender communities on the other hand, and is rooted in a misogyny that is deep and pervasive in our society. The argument being that manhood that is touched by any characteristic that is remotely feminine or not representative of 100% traditional masculinity is not manhood at all. In other words, there is no way for a man to be *part-man*. Bisexual men are not even given a portion of the grace in the sexuality continuum afforded to their bisexual sisters. The counter myth to this, which is equally harmful, is that all women are bisexual.
 - Another variation of the bisexuality as a pit stop myth is that bisexuality is merely a phase for women trying to figure out whether they are straight or lesbians. This variation is problematic in that it undercuts the seriousness of bisexual relationships and identity. It suggests that bisexuality should be the subject of ridicule as a transient state, the penchant of college girls trying something new, or an act that women can try to fulfill the fantasies of heterosexual men. However, those in the broader LGBT+ community that have not decided to openly identify, do not consider heterosexuality or being cisgender as temporary status prior to achieving homosexuality or a gender identity that is different from that identified at birth²².
- Bisexuals must be in a relationship with both a man and a woman at the same time in order to be fulfilled.²³. This view denies the actual lives of bisexual people who experience bisexuality in many different forms, sometimes in different ways throughout the course of their sexual lives. For instance, some bisexuals have equal intellectual, romantic, and sexual desire for more than one gender, but others prefer certain relational aspects with certain genders and not others or in different proportions.

19. Clements, *supra* note 17.

20. Jeanna Bryner, *Study: Bisexuality Not Just an Experimental Phase*, LIVE SCIENCE (Jan. 23, 2008), <https://www.livescience.com/2254-study-bisexuality-experimental-phase.html>.

21. Zachary Zane, *7 Myths About Dating Bisexual Men — Because No, We're Not "Confused"*, BUSTLE (Feb. 29, 2016), <https://www.bustle.com/articles/138247-7-myths-about-dating-bisexual-men-because-no-were-not-confused>.

22. *US Researchers Find Evidence That Homosexuality Linked To Genetics*, GUARDIAN (Dec. 1, 2008), <https://www.theguardian.com/world/2008/dec/01/homosexuality-genetics-usa>; Michael Castleman, *The Continuing Controversy Over Bisexuality Psychology*, TODAY (March 15, 2016), <https://www.psychologytoday.com/intl/blog/all-about-sex/201603/the-continuing-controversy-over-bisexuality>.

23. Zane, *supra* note 21.



Bisexuals are not often considered full members of the LGBT+ family.

- Bisexuals lack the ability to commit and are promiscuous²⁴. Bisexuality must mean that you desire multiple genders at the same time, or that you cannot choose.

These myths and misperceptions are often crudely reflected in comments made to bisexual people as a matter of course.

Discrimination also comes from LGBT+ community

Bisexuals are not often considered full members of the LGBT+ family²⁵. When bisexuals bring their opposite sex partners to LGBT+ spaces, they are often questioned, mocked or ignored²⁶. Queer publications and people have been focused on the disappearance of traditional LGBT+ spaces with the legalization of marriage equality and the increasing acceptance of some members of the LGBT+ community into our broader society, but these spaces were never actually spaces where bisexuals were welcomed or supported. Further, my sense is that the LGBT+ community views bisexuals as being able to access heterosexuality, making bisexuals somehow less authentic in the community than other LGBT+ people and less worthy of advocacy. In effect, bisexuals can *pass* as straight. As a result, the assumption is that they must experience less discrimination than lesbians, gays and transgendered people, but that is absolutely wrong. There is no evidence that existing on the sexuality continuum closer to heterosexuality means that you experience less discrimination than those who identify as being lesbians or gays. There is a premium in the LGBT+ community for being as *super-gay* as you can be. An example is the veneration of a *gold star*: a person who has never had a sexual relationship with a member of the opposite sex. As a gay person dating, very little will get you farther with other LGBT+ people than declaring you are a *gold star*: a person who has never had a sexual relationship with a member of the opposite sex²⁷. This term and the culture that supports are not only biphobic, but also transphobic.

Bisexuality threatens monosexism

Bisexuality, and pansexuality²⁸ seems to threaten the position of both heterosexuality and homosex-

24. Emily Alpert, *Why Bisexuals Stay in the Closet*, L.A. TIMES (July 14, 2013), <http://articles.latimes.com/2013/jul/14/local/la-me-bisexuality-20130715>.

25. *Id.*

26. Becki J. Crossley, *The Art of Getting Bi: Feeling 'Valid' in Queer*, NOPEBOOK (July 08, 2017), <http://www.thenopebook.com/lifestyle/art-getting-bi-feeling-valid-queer-spaces>; Brent Chamberlain, *Bisexual People in the Workplace: Practical Advice for Employers*, STONEWALL WORKPLACE GUIDES (2009).

27. Riley J. Dennis, *6 Reasons We Shouldn't Say 'Gold Star Lesbian' or 'Platinum Gay'*, EVERYDAY FEMINISM (Sept. 30, 2016), <https://everydayfeminism.com/2016/09/gold-star-lesbian-platinum-gay>.

28. Pansexuality, which has received recent airplay due to celebrities like Jazz Jennings, Angel Haze, Laci Green, and most famously, Miley Cyrus, provides an interesting perspective on gender and sexual orientation. If bisexuality can be described as romantic, sexual, intellectual or other relational attraction to one or more genders, pansexuality (or omnisexuality) can be described as having romantic, sexual, intellectual or other relational attraction to all sexes, genders and gender identities. Pansexuality is starting to be considered part of the bi+ umbrella, given the plural nature of the attraction. Individuals identifying as pansexual would experience many of the same challenges that bisexuals do given the disruption to the binary paradigms of gender and sexual orientation that are prevalent in American norms. However, most people likely have never heard of pansexuality, let alone having met an individual identifying as pansexual, relegating it to a place of relative obscurity such that people are likely to be dismissive of the identity conceptually and actually. Pansexuals experience the pit stop myth, the poly myth, and the inability to commit myth. There are few pansexual spaces outside of informal gatherings set up on social media platforms. Pansexuality does have some greater acceptance within the LGBT+ community because of its definitional acceptance of some communities within the LGBT+ communities (e.g., trans) that some members of the LGB+ communities eschew.



The essence of bisexuality is that you do not feel the need to pick sides.

uality and other derivatives of monosexism²⁹. In my view, the threat to homosexuality is the more interesting exploration, because we often hear of the ways that alternative sexualities impact heterosexuality, traditional marriage, religion, etc.³⁰ Bisexuality may be viewed as offering a compromised view. Where lesbians and gays have asserted their openness and a stark contrast to heterosexuality, bisexuality is an argument for heterosexuals that maybe there is a mid-point of acceptability. Bisexuality is a blurring of the message that could be uncomfortable, and for those who have known their whole lives that they are homosexual, could be viewed as an equivocation.

From both the heterosexual and homosexual perspectives, there appears to be the view that bisexuals have not actualized into a mature position on their own sexuality³¹. In American culture, we are rooted in a binary discussion on sexuality, much the same way many of us tend to think about gender³². You are forced to pick sides. The essence of bisexuality is that you do not feel the need to pick sides. You are not accepting or providing a counterpoint to the societal thesis on gender. It is not black or white, it is gray. That makes people uncomfortable. It is not playing the game or rejecting the game, it is saying, "what game?" This challenges the fundamental premise of choosing a side. The idea of gay fragility is akin to white fragility in the racial identity and privilege conversation. The allowance of the bisexual counterpoint that does not buy into heteronormativity, but also does not provide an abject rejection, may mean that other members of the queer community may not have comfort as to whether a bisexual person is an ally or not. Without knowing, given all the challenges that already have to be dealt with, it is better to keep them at arm's-length or disempower through humor or exclusion. The idea that bisexuals do not play by the rules is one of the many stereotypes that lead to difficulties being perceived favorably in the workplace³³.

Biphobia has a real world impact

While the unique experience of bisexuals has not been as extensively researched as the experiences of individuals identifying as homosexual and transgendered, the limited research availability does reveal a bleak picture for bisexuals. Bisexuals are found to have the highest rates of violence against them.³⁴ They experience mental health challenges at higher rates than their LGBT+ community counterparts, in part as a result of the discrimination faced by them by both LGT+ and straight people.³⁵ Bisexual workers suffer from employment discrimination at rates higher than straight and

29. Yoshino, *supra* note 6.

30. Eric Zorn, *Seven Reasons Why Homosexuality is Immoral, and Seven Answers Change of Subject*, CHICAGO TRIBUNE (March 16, 2007), http://blogs.chicagotribune.com/news_columnists_ezorn/2007/03/seven_reasons_w.html.

31. A. J. Walkley, *Bi the Bi: Is Bisexuality a Choice?*, HUFFINGTON POST (June 9, 2017), https://www.huffingtonpost.com/aj-walkley/bi-the-bi-is-bisexuality-a-choice_b_3046039.html.

32. *Gender Binary*, SEXINFO ONLINE, <http://www.soc.ucsb.edu/sexinfo/article/gender-binary>.

33. Chamberlain, *supra* note 26, at 2–9. Other workplace issues for bisexuals include invisibility to the institutional structure, including traditional redress mechanisms (e.g., HR), lack of full inclusion in resources established for LGBT+ personnel, people's perceptions that bisexuals are deceptive if they choose not to come out to both LGBT+ and heterosexual communities, inability to be authentic at work, lack of openly available role models compared to lesbians, gays and straight people, etc.

34. MOVEMENT ADVANCEMENT PROJECT, UNDERSTANDING ISSUES FACING BISEXUAL AMERICANS 2 (2014), <http://www.lgbtmap.org/file/understanding-issues-facing-bisexual-americans.pdf>; Katherine Schreiber & Heather Hausenblas, *Why So Many Bisexuals Are Victimized: People Attracted to Both Benders Report Staggering Rates of Abuse and Violence*, PSYCHOLOGY TODAY (Oct. 25, 2016), <https://www.psychologytoday.com/us/blog/the-truth-about-exercise-addiction/201610/why-so-many-bisexuals-are-victimized>.

35. Ethan H. Mereish, Sabra L. Katz-Wise & Julie Woulfe, *Bisexual-Specific Minority Stressors, Psychological Distress, and Suicidality in Bisexual Individuals: the Mediating Role of Loneliness*, 18(3) PREVENTION SCI. 716 (2017).



Bisexuals are found to have the highest rates of violence against them.

LGT+ workers.³⁶ Socioeconomic factors like increased homelessness and less health insurance are more likely to impact bisexuals.³⁷ In fact, the Pew Research Center has noted that “[g]ays and lesbians are also more likely than bisexuals to say their sexual orientation is a positive factor in their lives.”³⁸ These disparate outcomes are generally not a part of the larger LGBT+ discussion inside or outside of the community. They also have not been a part of the conversation about the discrimination that diverse lawyers face.

Lawyering

The prior section detailing biphobia revealed a number of stereotypes that are attributed to bisexual people and their impact. This section will discuss how the characteristics attributed to bisexual lawyers can be problematic as they do not tend to reflect the temperament that is typically sought after in lawyers. I will start with a general discussion of the challenge of discussing sexual orientation in the workplace, then treat the aforementioned stereotypes attributed to bisexual people and the incongruity with the person we would consider to be an “ideal lawyer.”

Why do we talk about sexual orientation in the work context at all?

Sexual orientation is a strange beast to talk about in the workplace³⁹. In some ways, I have found that gender identity—e.g., cisgender, transgender, man, woman—are easier to talk about at work because gender is a social construct that people act on immediately when interacting with you on the basis of assumptions they make depending on their ideas of your conformity to traditional roles and gender expression, and we tend to be comfortable talking about gender at work. Sexual orientation is a bit different: it is about the romantic, intellectual or sexual attraction and relationships that you have⁴⁰. In some ways, it is easy to think that sexual orientation does not belong within scope of the workplace. However, in this day and age, we never leave work. There is, in addition, this mantra in the modern workplace about the idea of bringing your whole self to work. That means not leaving the stories about the new restaurant you tried with your significant other, or the fact that your children have dance recitals, or all of the other indicators about identity that are laden with stereotypes and mythology, and that come saddled with all sorts of bias, conscious and unconscious. When the stereotype prevails, homosexual men are more effeminate than heterosexual men and all the related underpinnings of misogyny. A partner or general counsel acting through conscious or unconscious bias may decide that a heterosexual man, or maybe a woman that is more masculine presenting, is better suited for an anticipated tough negotiation.

Myths and misperceptions of bisexuality do not reflect an ideal lawyer

The myths and stereotypes associated with bisexuality are extremely problematic for bisexual lawyers. The legal profession requires often dealing with grave individual and organizational chal-

36. MOVEMENT ADVANCEMENT PROJECT, *supra* note 34, at 2.

37. Andrew M. Seaman, *Barriers to Healthcare More Common for Lesbians, Gays, Bisexuals*, REUTERS (March 18, 2016), <https://www.reuters.com/article/us-health-lgbt-access/barriers-to-healthcare-more-common-for-lesbians-gays-bisexuals-idUSKCN0WK2OU>.

38. *Survey of LGBT Americans*, *supra* note 10.

39. Jen O’Ryan, *Why You’re Always Talking About Sexual Orientation at Work*, Good Men Project (Aug. 8, 2017), <https://goodmenproject.com/gender-sexuality/why-youre-always-talking-about-sexual-orientation-at-work-lbkr>.

40. *Id.*



It is easy to think that sexual orientation does not belong within scope of the workplace. However, in this day and age, we never leave work.

lenges. You are often helping a client in their most critical moments. A bias attribution where your identity is not taken seriously, is the subject of perpetual jokes, or is not decisive is not an asset.

I was once asked by a client about my weekend plans, the response from which the client inferred my bisexuality. As a result, the client asked that his matter be moved to another lawyer with less experience because they felt that the matter needed a leader with permanence. When pressed, the client suggested that I may “not be able to stick with things.”

Indecisive

The indecisive stereotype is also problematic⁴¹. Helping clients choose between complex options, choosing the right law(s) and regulation(s) that are applicable to the present situation and many other technical and advising skills have at their foundation the ability to be decisive. Clients appreciate nuance in their lawyers but they do not want lawyers who are perceived to be flaky. A midlevel bisexual lawyer practicing at a large law firm recounted a conference call with her internal deal team that comprised lawyers from entry level to partner at her firm. A partner with whom he had recently developed what he considered to be an informal mentorship relationship asked him to recount the status of the deal and make a recommendation. It was a complex matter and the client was wavering on some of the inputs that would allow one clear recommendation to be made. The associate provided two options and given the underlying shifts and presented all options without choosing. The partner made an offhand remark that “of course you couldn’t pick just one,” to which the rest of the team snickered.

Greedy

Another stereotype related to bisexuality that has serious implications for lawyers is that we are greedy⁴². Apparently having a romantic relationship or attraction to more than one gender may mean that you have not stayed in your place and you are asking for more than what you are entitled to. Bisexual lawyers have recounted stories where in negotiations they were advocating for positions that their clients wanted and were accused of overstepping or being greedy, and has been recounted to me, “that’s to be expected”. Bisexual lawyers at the negotiating table have articulated being viewed as automatically overzealous when advocating for their clients This undermines the position of both the lawyers and their clients by coloring them as a result of social identity flaw rather than as a legitimate request in the context of the client’s needs. Undermining one’s position due to the identity of the person who has delivered the message rather than on the merit of the request is inequitable and could undercut the ability of a bisexual lawyer to most effectively represent their clients, through no fault of their own.

41. Tania Browne, *Make up your mind! The Science Behind Bisexuality*, GUARDIAN (April 11, 2014), <https://www.theguardian.com/science/brain-flapping/2014/apr/11/make-up-your-mind-the-science-behind-bisexuality>.

42. Erin Tatum, *Monosexism: Battling the Biases of Bi/Panphobia*, EVERYDAY FEMINISM (Nov. 27, 2013), <https://everyday-feminism.com/2013/11/monosexism/>.



Clients appreciate nuance in their lawyers but they do not want lawyers who are perceived to be flaky.

Immoral

Bisexuality as immoral is another trope that is problematic for bisexual lawyers, and a stereotype that the broader LGBT+ community also often has to contend with⁴³. The sense is that bisexual people are perpetual cheaters given their attraction to multiple genders, even though sexual orientation has no relationship with a moral compass⁴⁴. The law and morality have a long and intimate history.⁴⁵ Lawyers are the clarions of justice—the people who are supposed to make sure all that is right and equitable prevails. The intensive character and fitness examinations that scrutinize unpaid parking tickets carried out by state bar administrators and stand in the way of entrance to the bar demonstrate this. Lawyers are expected to adhere to a higher moral standard than the rest of the population. It is easy to see, then, how some insinuation that you are fundamentally amoral or immoral based on loving more than one gender can be crippling. Lawyers that are viewed as being immoral are not in high demand.

As articulated above, the myths and misperceptions above are problematic in and of themselves, but also because of the negative inferences that others draw about who bisexual people are in relationships and in other contexts. Other bisexual lawyers I have encountered and I know this well. For instance, if people don't view you as being a person that can commit, then their inference may be that you are indecisive. If you alternate dating between genders, the inference may be that you are flaky. Deciding you have the right to have interest in more than one gender may imply to others that you are greedy or want more than what others think you should be entitled to. The worst implication is one we share with the LGBT+ community more broadly—that we are immoral and leading immoral lives. For a lawyer, whose job it is to uphold the law or change it through lawful means, and be the moral compass of our country, the immorality inference undercuts our ability to be seen as a bona fide member of the profession. Biphobia also has a deleterious impact on the positioning of bisexuals in society.

Conclusions

We have a lot of work to do. In the current climate where protections for LGBT+ people are being rolled back and stereotypes that had started eroding are now being reinforced, it is clear that the LGBT+ community needs support of the entire community and those outside of our community to make headway. It is difficult to air our dirty laundry, so to speak, and show the cracks in our communities, but we need to make sure that the hierarchies and norms that exist outside of the commu-

43. Tommy Christopher, *Poll: 45% Of Americans Think Homosexuality A Sin, But 60% Are Okay With It Anyway*, MEDIAITE (June 7, 2013), <https://www.mediaite.com/online/poll-45-of-americans-think-homosexuality-a-sin-but-60-are-okay-with-it-anyway/>.

44. Lara Rutherford-Morrison, *Why Is There A Stigma On Bisexuality? Here Are Some Major Stereotypes Bisexuals Face*, BUSTLE (May 16, 2016), <https://www.bustle.com/articles/161041-why-is-there-a-stigma-on-bisexuality-here-are-some-major-stereotypes-bisexuals-face>.

45. Ankita, *Relation between Law and Morality or Ethics*, PRESERVE ARTICLES, <http://www.preservearticles.com/201106248502/relation-between-law-and-morality-or-ethics.html>.



Deciding you have the right to have interest in more than one gender may imply to others that you are greedy or want more than what others think you should be entitled to.

nity do not cause damage and inequity within our community. For instance, gay men and cisgendered people have more political, social and economic power than lesbians and transgendered people, respectively⁴⁶. We need to make sure that we are speaking up for each other in the moment, even when it is difficult, and we do not perpetuate untrue stereotypes that are damaging to community members' lives and career trajectories.

The biggest challenge for bisexuals is that so many of the stereotypes that are perpetuated about us have a serious impact on skills, or the perception of skills required to be an effective lawyer, and it can be perpetuated through seemingly light-hearted jokes. In-group support and community building often happens through joking, but it seems to rise to another level in group for LGBT+ sub-communities. Being such a small percentage of the overall population, the truth in jest often wins the day and causes actual harm to the reputations and career trajectories of bisexuals. Until we get to a place where bi-erasure is not prevalent and where more truths than myths are present about bisexuality, I believe we need to actively interrupt jokes about bisexuals in the moment, just as happens—although not often enough—for other members of the LGBT+ community. It is doubly harmful when you being considered a joke is also the subject of the joke.

The primary lessons are that we need to continually seek and appreciate the perspectives and input of bisexuals as unique to those of other members of the broader LGBT+ community and quit the jokes. This is the first step toward making sure that bisexuals are more comfortable in being openly identified and are taken as seriously as every other lawyer is.

This is not meant to present a singular view of the bisexual experience. As a Black bisexual cisgender woman lawyer, I have many identities that intersect in a way that may give me a different set of experiences and perspectives than my transgendered, men, agendered, non-Black, disabled, skinny counterparts. There is some privilege I am afforded by some of my identities, such as educational attainment, and some additional discrimination that I may be subject to—such as being Black. This is one bisexual lawyer experience, and this is just another view that I hope will be taken into account as we further advance diversity in the legal profession.

46. Kittu Pannu, *Privilege, Power, and Pride: Intersectionality within the LGBT Community*, IMPAKTER (Aug. 14, 2017), <https://impakter.com/privilege-power-and-pride-intersectionality-within-the-lgbt-community>.

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Latinas in the Legal Profession: Navigating the Cultural Divide

Jill Lynch Cruz

Executive Coach & Career Development Consultant, JLC Consulting

Why are Latinas such an underrepresented attorney group in the legal profession? How do Latinas today overcome obstacles to their success? Based upon her work with Latina lawyers from across the U.S. Cruz discusses cultural obstacles and critical factors needed for success.

Introduction

As the United States population has become more diverse, there has been an increased interest in attracting, retaining and advancing more women attorneys of color throughout the legal profession.¹ Despite this desire for a more diverse attorney base, significant ethnic, racial, and gender barriers continue to impede their full representation and professional success across the legal profession.² This is particularly evident for Latina³ attorneys, who appear to be the most disproportionately underrepresented attorney group across the legal profession, especially at its senior leadership levels.⁴ The pronounced lack of Latina attorneys across the legal profession, particularly in leadership roles, is especially problematic and calls for a closer examination of unique challenges associated with their status as ethnically diverse women that may affect their access to and experience within the legal profession.

HNBA Commission Studies

In an attempt to better understand this problem, the Hispanic National Bar Association's Commission on the Status of Latinas in the Legal Profession ("HNBA Latina Commission") conducted a national study on Latina attorneys employed throughout the legal profession. This landmark study, entitled *Few and Far Between: The Reality of Latina Lawyers*, as well as a subsequent report on Latina attorneys in the public interest entitled, *La Voz de la Abogada Latina: Challenges and Rewards in Serving the Public Interest*, gathered quantitative and qualitative data on over 800 Latina attorneys from across the United States who were employed in a variety of legal sectors.⁵

1. ABA Comm'n on Women in the Profession, *Visible Invisibility: Women of Color in Fortune 500 Legal Departments* (2012); American Bar Association, ABA Comm'n on Women in the Profession, *Visible Invisibility: Women of Color in Law Firms* (2008); CATALYST, *WOMEN OF COLOR IN U.S. LAW FIRMS* (2009), available at <http://www.catalyst.org/knowledge/women-color-us-law-firms%E2%80%94women-color-professional-services-series>.

2. *Id.*

3. The terms "Latina(s), Latino(s), are used in this article to refer respectively to female and male individuals living in the United States who self-identify as being of Latin American and/or from Spanish descent. Latin America includes, but is not limited to countries of origin in Central America, Cuba, the Dominican Republic, Mexico, Puerto Rico, and South America. The term "Hispanic" while often used interchangeably with Latina/o(s), refers here to those values, norms or individuals associated with this population.

4. Jill L. Cruz, *Latina Lawyers – Still Too Few and Far Between: The Hispanic National Bar Association Latina's Commission's Efforts to Chart a More Open Path*, INST. FOR INCLUSION IN THE LEGAL PROFESSION 219 (2017) [hereinafter 2017 IILP Study]; see Jill L. Cruz, *Latinas in the Legal Profession, Challenges and Catalysts to their Career Success*, HISPANICS AT WORK: A COLLECTION OF RESEARCH, THEORY AND APPLICATION (Donna M. Blancero & Robert G. DelCampo eds., 2011) [hereinafter *Latinas in the Legal Profession*]; see Jill L. Cruz & Melinda S. Molina, *Hispanic National Bar Association, Commission on Latinas in the Legal Profession, Few and Far Between: The Reality of Latina Lawyers*, 37 PEPP. L. REV. 971 (2010) [hereinafter *Reality of Latina Lawyers*]; see also Jill L. Cruz, Melinda S. Molina & Jenny Rivera, *Hispanic National Bar Association, Commission on Latinas in the Legal Profession, La Voz de la Abogada Latina: Challenges and Rewards in Serving the Public Interest*, 14 CUNY L. REV. 146 (2010) [hereinafter *Public Interest Study*].

5. *Public Interest Study*, *supra* note 4, at 147; *Reality of Latina Lawyers*, *supra* note 4, at 971.



Latina attorneys may encounter additional challenges related to the significant cultural divide that exists between their heritage and legal profession worlds, whose values, norms, and behaviors are often in opposition.

Referred collectively as the *HNBA Commission Studies*, the purpose of this research was to document the demographic and professional status of Latina attorneys across this country and to explore how their formative and career-related experiences contributed to their continued underrepresentation in the legal profession.⁶ This research provided important insights into the key obstacles and critical success factors to Latina attorneys' educational achievement and career choice, as well as factors that contributed to or detracted from their retention and advancement in the legal profession.⁷

The empirical results of these studies, as well as other related and supporting research conducted on this population, provide an important perspective of the unique obstacles current and would-be Latina attorneys encounter as they attempt to navigate their entry into and progression within the legal profession. While Latina attorneys may encounter a multitude of barriers in their path to and within the legal profession, this article is particularly interested in those challenges Latina attorneys may encounter as *ethnically* diverse women. Specifically, it is argued by this author that Latina attorneys may encounter additional challenges related to the significant cultural divide that exists between their heritage and legal profession worlds, whose values, norms, and behaviors are often in opposition.⁸

The Cultural Divide

Latinas in this country are not a monolithic group. However, they often share common features related to their cultural identity—including connections to the Spanish language and group-specific cultural values, especially those related to collectivism.⁹ Key cultural values that may influence Latinas' career behaviors and perceptions include *familismo*, the importance of family and social groups and priority of group over individual goals;¹⁰ *personalismo*, the importance of harmonious and conflict-free interpersonal relationships;¹¹ and *respeto*, high power distance and deference to those in authority.¹²

6. See Reality of Latina Lawyers, *supra* note 4 at 1009; see also Public Interest Study, *supra* note 4, at 169.

7. Latinas in the Legal Profession, *supra* note 4, at 194.

8. Latinas in the Legal Profession, *supra* note 4, at 205.

9. GEERT HOFSTEDE, GERT VAN HOFSTEDE & MICHAEL MINKOV, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE NEW MIND* 91 (2005).

10. See Consuelo Arbona, *Theory and research on Racial and Ethnic Minorities: Hispanic Americans in CAREER DEVELOPMENT & VOCATIONAL BEHAVIOR OF RACIAL & ETHNIC MINORITIES* 37-66 (Frederick T. Leong, 1st ed. 1996); see also Lisa Y. Flores et al., *Career Counseling with Latinas*, in *Handbook of Career Counseling for Women*, 43, 271 (W. Bruce Walsh & Mary J. Heppner eds., 2d ed. 2006) (discussing research on Latinas' career development; suggesting that they may also view the world of work differently because of their gender-role socialization within their Latino communities and families, and noting that within the patriarchal Latino culture, women are expected to assume more traditionally feminine roles and careers, which are also viewed as secondary to those of men).

11. Elizabeth Ruiz, *Hispanic Culture and Relational Cultural Theory*, 1 J. OF CREATIVITY IN MENTAL HEALTH 33, 39 (2005) (Hispanics value of *personalismo* emphasizes personal and social relationships over status, material gain or institutional relationships).

12. *Id.* at 39 (Hispanics often display *respeto* (respect), a cultural value that emphasizes showing and reciprocating respect and deference to others, especially authority figures).



While Latinas are the fastest growing group of school-aged female youth, they were also found to be nearly twice as likely as their White and Asian female counterparts to drop out of high school.

These and other traditional Hispanic cultural values often contrast dramatically with those reflected and reinforced within corporate American institutions and workplaces that emphasize individual achievement, self-agency, competition, and power equality.¹³ Moreover, parents holding American cultural values tend to encourage their children to be more independent and less reliant on the family of origin.¹⁴ This disparity may create a significant cultural divide between Latinas' heritage and mainstream worlds, whose values, norms and behaviors are not always similarly aligned.¹⁵ In this way, as racially and *ethnically* diverse women, current and aspiring Latina attorneys may encounter unique challenges in their attempt to navigate this cultural divide in their path to and within the legal profession.

Navigating the Path to the Legal Profession

The Educational Divide

*"I think a lot of [becoming an attorney] ends up being about access to education . . ."*¹⁶

The dearth of Latinas in the legal profession is rooted in large part to barriers that exist along their educational pathway.¹⁷ Latinas are found to have high academic aspirations.¹⁸ However, a significant amount of research on the career development of Hispanics points to a lack of educational attainment as one of the most significant impediments to their access to professional positions, including those in the legal profession.¹⁹

While Latinas are the fastest growing group of school-aged female youth, they were also found to be nearly twice as likely as their White and Asian female counterparts to drop out of high school.²⁰ Furthermore, Latinas as a racial and ethnic group are found to have significantly lower higher education engage-

13. *Id.* at 39.

14. *Id.* at 52.

15. Latinas in the Legal Profession, *supra* note 4, at 205.

16. Reality of Latina Lawyers, *supra* note 4, at 1006.

17. Latinas in the Legal Profession, *supra* note 4, at 194.

18. See Alberta M. Gloria, Jeanette Castellanos & Veronica Orozco, *Perceived Educational Barriers, Cultural Fit, Coping Responses, and Psychological Well-Being of Latina Undergraduates*, 27 *HISP. J. OF BEHAVIORAL SCIENCES* 161 (2005); see also NAT. WOMEN'S L. CTR. & MEXICAN AM. L. DEF. & EDUC. FUND, LISTENING TO LATINAS: BARRIERS TO HIGH SCHOOL GRADUATION 6 (2009) [hereinafter *Barriers to Graduation*].

19. RICHARD FRY & PEW HISPANIC CENTER, *LATINO YOUTH FINISHING COLLEGE: THE ROLE OF SELECTIVE PATHWAYS* (2004), available at pewhispanic.org/files/reports/30.pdf [hereinafter Fry 2004]; Irma D. Herrera, *Raising the bar: Latino and Latina presence in the judiciary and the struggle for representation*, 13 *BERKELEY LA RAZA L.J.* 55 (2005).

20. See *Barriers to Graduation*, *supra* note 18, at 7.



Given the importance of familismo in the Hispanic culture, Latinas in high school are often socialized along traditional gender lines to place their families' needs above all else, which may discourage them from pursuing their own academic ambitions over family obligations.

ment rates as compared to Asian, White and Black women in their same age range.²¹ In particular, Latinas between the ages of twenty-five to twenty-nine are reported to be much less likely to have a bachelor's degree, compared to similarly aged White or Black females.²²

Hispanics may be disadvantaged educationally, in part, because of their relatively lower socioeconomic status in this country.²³ As such, Latina youth who live in poverty may face significant achievement gaps due to lower levels of educational preparation, including limited access to early childhood education and reading programs.²⁴ Latina youth may also be more likely to change or drop out of school to support their family's changing economic needs, especially children of migrant workers.²⁵ Furthermore, many Latina youth are more likely to attend more crowded schools with fewer resources, which limits their access to more rigorous academic programs or after-school enrichment activities.²⁶ As a result, Latinas who are economically disadvantaged or who have limited access to educational opportunities and resources at critical points during their educational progression often lack adequate preparation and the necessary skills to succeed in college, which, in turn, makes entry into law school unlikely.²⁷

There are also cultural influences that affect Latinas' decisions regarding higher education. Given the importance of *familismo* in the Hispanic culture, Latinas in high school are often socialized along traditional gender lines to place their families' needs above all else, which may discourage them from pursuing their own academic ambitions over family obligations.²⁸ Furthermore, expectations that Latinas live close to home during and after high school are often at odds with the prevailing trend for college students to live away at college for four or more years.²⁹ As a result of this pressure, Latinas with qualifications and aspirations to attend more selective, yet distant, academic institutions may ultimately choose to attend a local, but less rigorous school as a way to support and be closer to their families.³⁰

21. EPE RESEARCH CENTER, ANALYSIS OF DATA FROM THE AMERICAN COMMUNITY SURVEY (2012), available at www.ed-week.org/go/qc12.

22. JEFFREY S. PASSEL & D'VERA COHN, HOW MANY HISPANICS? COMPARING CENSUS COUNTS AND CENSUS ESTIMATES (2011), available at <http://www.pewhispanic.org/2011/03/15/how-many-hispanics-comparing-census-counts-and-census-estimates>.

23. See Flores, *supra* note 10, at 271; see also Fry 2004, *supra* note 19. See also Barriers to Graduation, *supra* note 18, at 9.

24. See Barriers to Graduation, *supra* note 18, at 10.

25. *Id.*

26. *Id.*

27. Latinas in the Legal Profession, *supra* note 4, at 194.

28. See Flores, *supra* note 10, at 271.

29. MICHELLE HUSTON & ANGELA GINORIO, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., *SI, SE PUEDE! YES, WE CAN: LATINAS IN SCHOOL* (2001), available at <https://history.aauw.org/files/2013/01/SiSePuede.pdf>.

30. This echoes other findings that Hispanics are more likely to attend postsecondary institutions that are less selective and have lower undergraduate completion rates than similarly prepared non-Hispanic Whites. Furthermore, Hispanics are



The Latina attorneys in the HNBA Commission Studies were often members of the first generation in their families to attend law school, or even college, and often experienced bicultural stress.

For those Latinas who do attend college and/or ultimately law school, they may confront additional attitudinal and psychosocial challenges associated with this cultural divide including bicultural stress, gender and ethnic discrimination, as well as social and cultural isolation.³¹ The Latina attorneys in the *HNBA Commission Studies* were often members of the first generation in their families to attend law school, or even college, and often experienced bicultural stress.³² This resulted in many Latinas feeling alienated and disadvantaged, both socially and academically, from their non-Latina peers.³³ Furthermore, the cultural divide associated with different Hispanic values and expectations related to power distance, self-agency, and individual versus group achievement may also foster a heightened level of bicultural stress.³⁴

Latina students' negative perceptions of campus climate can also contribute to academic challenges and negative self-beliefs that may prevent some from pursuing more challenging educational or career paths.³⁵ The *HNBA Commission Studies* illustrate how Latinas were often subjected to institutionalized discouragement by their college and law school teachers and school counselors to pursue less competitive paths.³⁶ These negative messages and assumptions about Latina law students' capabilities can manifest into psychological barriers, including lack of self-confidence and fear of failure.³⁷ Furthermore, these psychosocial impediments may negatively contribute to their occupational and academic self-efficacy expectations, which are predictive of career choice and academic achievement.³⁸ While many Latinas face significant educational-related burdens throughout their educational journey, they may also be hampered in their consideration and pursuit of careers in the legal profession due lack of information and exposure, as well as certain cultural and gender inhibitors that circumscribe career choice.³⁹

more likely to attend two-year community colleges and enroll in college part-time at a greater rate than any comparable group. See Fry 2004, *supra* note 19.

31. See Latinas in the Legal Profession, *supra* note 4, at 189; see also Herrera, *supra* note 19, at 55; Maureen Ebben & Norma Guerra Gaier, *Telling Stories, Telling Self: Using Narrative to Uncover Latinas' Voices and Agency in the Legal Profession*, 19 CHICANO-LATINO L. REV. 243 (2008); Sharon Foley & Deborah L. Kidder, *Hispanic law students' perceptions of discrimination, justice, and career prospects*, 24 HISP. J. OF BEHAVIORAL SCIENCES 23-37 (2002); Antoinette Sedillo Lopez, *Symposium: Latinas in Legal Education - Through the Doors of Opportunity: Assimilation, Marginalization, Cooptation or Transformation?*, 13 AM. U. J. GENDER SOC. POL'Y & L. 109 (2005).

32. See Reality of Latina Lawyers, *supra* note 4, at 1009; see also Public Interest Study, *supra* note 4, at 169. Hispanic youth are more frequently first-generation college students and therefore deal with more complex educational decisions and numerous challenges that limit their chance of attending or completing college. See also Jean S. Phinney, Jessica M. Dennis & Delia M. Gutierrez, *College orientation profiles of Latino students from low socioeconomic backgrounds: A cluster analytic approach*, 27 HISP. J. OF BEHAV. SCI. 387 (2005) [hereinafter Phinney Study].

33. Reality of Latina Lawyers, *supra* note 4, at 1009.

34. Jill L. Cruz & Donna M. Blancero, *Latina/o Professionals' Career Success: Bridging the Corporate American Divide*, 44 J. OF CAREER DEV. 485 (2016).

35. See Flores, *supra* note 10 at 271; Daniel G. Solorzano, Octavio Villalpando & Leticia Oseguera, *Educational inequities and Latina/o undergraduate students in the United States: A critical race analysis of their educational progress*, 4 J. OF HISP. HIGHER EDUC. 272 (2005).

36. Reality of Latina Lawyers, *supra* note 4, at 1009.

37. Herrera, *supra* note 19, at 55.

38. Arbona, *supra* note 9, at 37.

39. Latinas in the Legal Profession, *supra* note at 4, at 197.



Latinas encounter strong cultural and gender norms that their primary role is to support their families and to provide care for extended family members, including parents and elders.

Cultural Influences in Career Choice

“The role of the Hispanic family... [has] been the biggest push towards success, and also the biggest pull away from it sometimes...there’s a constant tension in fulfilling your [cultural and professional] role.”⁴⁰

Many Latinas may be hampered in their consideration and pursuit of legal careers due to lack of exposure to practicing attorneys or the legal profession during their formative years. Many Latina attorneys from the first *HNBA Commission Study* acknowledged they did not consider the legal profession as a viable career option before or even during college.⁴¹ Therefore, their route to the legal profession was indirect—a serendipitous result of timing and chance rather than as an intentional pursuit of a legal career.

Given their collectivist social values, Latinas may also defer to or be heavily influenced by the expectations or needs of family members, especially parents, in their career decision-making process.⁴² In contrast to the values of individuality and independence stressed in the dominant American culture, Latinas encounter strong cultural and gender norms that their primary role is to support their families and to provide care for extended family members, including parents and elders. Latinas’ strong orientation to family, while an important source of support and encouragement, can also result in lower college success rates because of their multiple role responsibilities and expectations.⁴³ The *HNBA Commission Studies* provided examples of how aspects of the Latinas’ school and career decisions were often based on familial needs, as opposed to the Latinas’ own personal and career goals.⁴⁴ Moreover, many Latinas in these studies often served as advocates, translators and representatives for family members, which placed additional responsibilities on them to support their families in this way.⁴⁵

In addition to the importance of family on Latinas’ career choice, women in patriarchal Hispanic cultures are also expected to assume more traditionally feminine roles and careers, which are viewed as secondary to those of men in their culture.⁴⁶ This cultural inhibitor is reflected in findings from the first *HNBA Commission Study* that throughout the Latina attorneys’ formative years and even in college, many reported feeling pressure from their families and supporting communities to restrict their career choice to more stereotypical feminine roles and responsibilities.⁴⁷ These cultural expectations may lead to circumscription of career choice for some would-be Latina attorneys because they are discouraged from pursuing non-traditional or male-dominated careers, such as those in the legal profession.

40. See Reality of Latina Lawyers, *supra* note 4, at 1008.

41. Reality of Latina Lawyers, *supra* note 4, at 1008.

42. Flores, *supra* note 10, at 271.

43. Susan R. Sy & Jessica Romero, *Family responsibilities among Latina college students from immigrant families*, 7 J. OF HISP. HIGHER EDUC. 212 (2008).

44. See Reality of Latina Lawyers, *supra* note 4, at 1009; see also Public Interest Study, *supra* note 4, at 169.

45. *Id.*

46. See Flores, *supra* note 10, at 271.

47. Reality of Latina Lawyers, *supra* note 4, at 1007.



The Latina attorneys referred to this form of gender and ethnic discrimination and bias as “cultural sexism” because it is rooted in Hispanic culturally gendered values and beliefs that women should be home supporting their families rather than working or assuming leadership roles.

Despite the barriers to their educational attainment and career choice, a small number of Latinas have successfully navigated this pathway in their consideration and achievement of attorney careers.⁴⁸ However, once within the legal profession, many Latina attorneys may experience discordance between their cultural values, norms and behaviors with those reflected and reinforced within their corporate American legal workplaces.⁴⁹ As such, Latina attorneys’ ability to successfully navigate this cultural divide shapes their experiences, as well as their ultimate career success and satisfaction.

Navigating the Cultural Divide within the Legal Profession

Cultural Sexism

“You’re just totally treated differently as a result of being a Latina female attorney. You . . . don’t get the same amount of respect. Your work isn’t given the same amount of respect, you’re not given the same amount of recognition.”⁵⁰

The Latina attorneys from the *HNBA Commission Studies* recounted how they often experienced overt and subtle forms of culturally gendered discrimination that fostered inhospitable workplaces and negative assumptions about their professional qualifications, capabilities and appropriateness for leadership roles.⁵¹ Many of these women experienced demeaning and condescending treatment by male attorneys, including Latinos.⁵² The Latina attorneys referred to this form of gender and ethnic discrimination and bias as “cultural sexism” because it is rooted in Hispanic culturally gendered values and beliefs that women should be home supporting their families rather than working or assuming leadership roles.⁵³

Related to cultural gender-role expectations of Latinas as primary family caregivers, many also confront mixed messages from family to pursue their educational and career goals as a source of self-sufficiency with the dichotomous need to *always* put family first.⁵⁴ Latina attorneys from the first *HNBA Commission Study* believed that unlike Latinos, regardless of many Latina attorneys’ level of professional responsibility or achievements, the support and approval they receive from their families, especially mothers,

48. Latinas in the Legal Profession, *supra* note 4, at 199.

49. Latinas in the Legal Profession, *supra* note 4, at 205.

50. *Id.* at 192.

51. See Reality of Latina Lawyers, *supra* note 4, at 1009; see also Public Interest Study, *supra* note 4, at 169.

52. Reality of Latina Lawyers, *supra* note 4, at 1015.

53. *Id.*

54. Julio Cammarota, *The gendered and racialized pathways of Latina and Latino youth: Different struggles, different resistances in the urban context*, 35 ANTHRO. & EDUC. Q. 53-75 (2004); See Sy & Romero, *supra* note 43, at 212.



Latina attorneys often encounter preconceived ethnic and gender stereotypes about their professional capacity and legitimacy as attorneys.

continues only if they perform as “good” mothers and wives, which requires shouldering most of the household, childcare and eldercare responsibilities.⁵⁵

While many women attorneys face normative expectations to assume more traditional gender roles as it relates to family responsibilities, this may be even more salient for Latina attorneys due to cultural values and gender ideology that reinforce traditional sex roles for women as primary family care-takers within collectivist and patriarchal cultures.⁵⁶ As a result, Latina attorneys identified the untenable goal of pursuing both a legal career and motherhood as one of the biggest anticipated challenges to their advancement in the legal profession.⁵⁷ However, Latina attorneys in the public interest did perceive this sector to be more accommodating of this dual role.⁵⁸ Furthermore, perceptions of Latina attorneys being more family-oriented may also lead to perceptions and bias from others that they are less committed and ambitious, which negatively impacts evaluations, work assignments, and access to career development opportunities that lead to advancement in the legal profession.⁵⁹

Devaluation of Qualifications and Professional Legitimacy

“People don’t expect all that much of [Latina lawyers].”⁶⁰

Latina attorneys often encounter preconceived ethnic and gender stereotypes about their professional capacity and legitimacy as attorneys. The *HNBA Commission Studies* provided examples of how their legitimacy, qualifications, and abilities as attorneys are often questioned or devalued by their employers, co-workers, clients, and the general population.⁶¹ Despite having graduated from elite law schools with high academic achievement, many of the Latina attorneys struggled to overcome perceptions that they were not as smart or qualified as others in the legal profession.⁶² They also combated lingering assumptions that their admittance into law school and entry and advancement into the legal profession were more likely a function of affirmative action and diversity objectives than actual merit or ability.⁶³ One particular Latina attorney from the second *HNBA Commission Study* recounted a colleague asking whether, “Yale had a good affirmative action program,” after seeing her law school diploma from this Ivy League school.⁶⁴

55. Reality of Latina Lawyers, *supra* note 4, at 1015.

56. Because Latinas are often ascribed responsibility as family care-takers in Latino cultures, they may also be more likely to experience conflict between work and family roles. See J.G. Grzywacz et al., *Work-family conflict: Experiences and health implications among immigrant Latinos*, 92 J. OF APP. PSYCH. 1119 (2007).

57. Reality of Latina Lawyers, *supra* note 4, at 1016.

58. See Public Interest Study, *supra* note 4, at 188.

59. Latinas in the Legal Profession, *supra* note 4, at 202.

60. See Reality of Latina Lawyers, *supra* note 4 at, 1010.

61. Reality of Latina Lawyers, *supra* note 4, at 1010; Public Interest Study, *supra* note 4, at 193.

62. *Id.*

63. Reality of Latina Lawyers, *supra* note 4, at 1010.

64. See Public Interest Study, *supra* note 4, at 193.



Latina attorneys are frequently misidentified as being someone other than attorneys in legal venues or within their legal workplaces, which reinforces their sense of “otherness” in the legal profession.

As a result of these perceptions, Latina attorneys often believe they must constantly perform at a higher level than their non-Latina counterparts to legitimize themselves and achieve parity in the workplace.⁶⁵ Interestingly, while these perceptions of being less capable and less qualified presented a challenge to their credibility as attorneys, some of the Latina attorneys from the first *HNBA Commission Study* used this faulty assumption of their capabilities to their advantage as a “secret weapon” strategy to disarm opponents who did not expect them to be as qualified or prepared as they actually were.⁶⁶

Outsiders & Tokens

“It is not uncommon that I am asked [by court officers, judges, and other attorneys] if I am the petitioner or have been told to wait for my attorney, simply because I am a Latina woman....”⁶⁷

Being among the few Latinas within their predominately White and male-dominated legal environments, Latina attorneys are frequently misidentified as being someone other than attorneys (e.g., defendants, interpreters, secretaries, or court reporters) in legal venues or within their legal workplaces, which reinforces their sense of “otherness” in the legal profession and serves to question and further undermine their professional legitimacy.⁶⁸ In addition, Latina attorneys reported they are often viewed and treated as *outsiders* or *foreigners* in the courtroom or in their workplaces.⁶⁹ Some even faced strong, but misplaced, anti-immigrant sentiments, where their legal presence in the United States is scrutinized.⁷⁰ Similar to their experiences in college and law school, these experiences of *othering* contributed to their feelings of invisibility, isolation, and alienation within the legal profession.⁷¹ Many Latina attorneys believed this lack of commonality disadvantaged them socially and professionally from their colleagues and influential others, including mentors, sponsors, and other developmental relationships that are critical to their retention and career advancement.⁷²

While many Latina lawyers believe they are viewed as outsiders in their legal workplaces, others reported being tokenized to serve as “window dressing to potential clients without fulfilling a more substantive

65. Similar to negative assumptions that prevail about Latina attorneys’ competence and professional legitimacy, Latina professionals in the science fields report how THIS need to “prove it again” results in their successes being discounted, mistakes being magnified, and ideas stolen by others. For a discussion of this and other forms of gender bias for Latinas and other women of color in the STEM fields. See JOAN C. WILLIAMS, KATHERINE W. PHILLIPS & ERIKA V. HALL, *GENDER BIAS AGAINST WOMEN OF COLOR IN SCIENCE* (2014), available at <http://www.uchastings.edu/news/articles/2015/01/double-jeopardy-report.pdf>; see also Gladys Garcia-Lopez & Denise A. Segura, “They are testing you all the time”: Negotiating dual femininities among Chicana attorneys, 34 *FEMINIST STUDIES* 229 (2008); see also Reality of Latina Lawyers, *supra* note 4, at 1011; Public Interest Study, *supra* note 4, at 198; Ebben, *supra* note 31, at 243; Lopez, *supra* note 31, at 590.

66. See Reality of Latina Lawyers, *supra* note 4, at 1011.

67. Public Interest Study, *supra* 4, at 195.

68. *Id.* at 204; see also Reality of Latina Lawyers, *supra* note 4, at 1011.

69. See Reality of Latina Lawyers, *supra* note 4, at 1017; see also Gladys Garcia-Lopez, “Nunca te toman en cuenta [they never take you into account]:” The challenges of inclusion and strategies for success of Chicana attorneys, 22 *GENDER & SOC’Y* 590 (2008).

70. See Reality of Latina Lawyers, *supra* note 4, at 1017.

71. *Id.*

72. *Id.*



Latina attorneys often develop behaviors and practices to minimize misidentification, othering, and to establish professional legitimacy.

role.⁷³ This tokenism further contributes to the sense of isolation they feel and places an enormous burden on them to be the representative for other Latinas, or even, for all women of color within their workplaces.⁷⁴

Related to their experiences of tokenism, the *HNBA Commission Studies* reported that while a source of professional pride and satisfaction, Latina attorneys believed their bilingual skills are not sufficiently recognized or rewarded by their employers and often created added non-attorney responsibilities—i.e., translation needs—that many of their non-Latina counterparts do not share.⁷⁵ These responsibilities may also serve to marginalize their more substantive legal talents, which may, in turn, inhibit their access to other career development opportunities that lead to career advancement in the legal profession.⁷⁶

Latina attorneys often develop behaviors and practices to minimize misidentification, *othering*, and to establish professional legitimacy.⁷⁷ The *HNBA Commission Study* demonstrated how some Latina attorneys attempt to assimilate themselves to the organizational norms reinforced within their legal workplaces, such as trying to *pass as White*, or adapting their workplace appearance and behaviors to conform more closely to those of majority attorneys.⁷⁸ This required many to mask or disavow certain aspects of their cultural identity, such as wearing more conservative *straightened* hairstyles, clothing, jewelry, etc., to avoid being sexualized or subjected to ethnic stereotypes.⁷⁹ Many Latina attorneys also took great measures to avoid being pigeon-holed into practice areas or attorney roles that are stereotypically gender- or ethnic-oriented such as immigration or family law.⁸⁰

Navigating Dual Identities

“You can either be the troublemaker, or you can be the assimilator... There’s not a lot of in-between for us, in terms of perception.”⁸¹

Individuals who participate in two cultures often maintain separate and sometimes conflicting identities.⁸² As such, many Hispanics living and working in the United States often develop a hybrid identity as a way to navigate between the values, behaviors and norms reflected within their Spanish heritage, as well as those within their corporate American workplaces. For Latina attorneys, the intersection of these two distinct values propels many to develop a number of strategies, including the development of dual femininities as a way to navigate this tension between the *shoulds* of their heritage culture and *musts* of the legal profession.⁸³ Illustrating this point, the first *HNBA Commission Study* documented how Latina attorneys struggled to find a balance between their cultural value of *respeto* to demonstrating humility

73. *Id.* at 1018.

74. *Latinas in the Legal Profession*, *supra* note 4, at 204.

75. *Reality of Latina Lawyers*, *supra* note 4, at 1019; *Public Interest Study*, *supra* note 4, at 191.

76. *Latinas in the Legal Profession*, *supra* note 4, at 204.

77. *Id.* at 205.

78. *Reality of Latina Lawyers*, *supra* note 4, at 1019.

79. *Id.*

80. *Id.*

81. *Id.* at 1013.

82. Jean S. Phinney, *Ethnic Identity in Adolescents and Adults: Review of Research*, 109 *PSYCHOLOGICAL BULLETIN* 499 (1990).

83. Garcia-Lopez, & Segura, *supra* note 65, at 229-258.

and communicating in a nonaggressive style with the dichotomous need to promote and assert themselves in their competitive legal workplaces.⁸⁴

Related to this, Latina attorneys also believed that they have to consciously work to overcome being stereotyped as either an *assimilator* or *troublemaker*.⁸⁵ Latina attorneys voiced their concern that they are either viewed as reticent and lacking self-confidence on the one hand, or too aggressive as a *fiery or hot headed Latina* on the other.⁸⁶ This finding is consistent with research conducted on Latina professionals in the science fields such that those Latinas who acted assertively risked criticism for appearing angry or too emotional, even when the women themselves reported that they were not actually angry, but deferential.⁸⁷

Considering the significant cultural divide Latina attorneys encounter in their pursuit of and throughout their careers, it is no surprise that Latinas are so disparately underrepresented across the legal profession. However, despite these obstacles, a few have defied the odds and achieved their educational and career goals.⁸⁸ The *HNBA Commission Studies* identified several critical success factors that helped Latina attorneys' more effectively navigate and bridge this cultural divide to realize more successful and satisfying legal careers.⁸⁹

Critical Success Factors in Bridging the Cultural Divide

This section highlights the critical success factors in bridging the cultural divide cited by Latina attorneys across the United States, as well as best practices advanced by legal scholars and other related research on this population.⁹⁰ These include, but are not limited to, the importance of family support, authentic bicultural identity, wide and diverse developmental networks, and embracing more cultural definitions of career success.⁹¹

Family Support & Encouragement

*"My Mexican mother always pushed me to go to school. Without her influence, I don't know what I would be doing today."*⁹²

Given the importance of *familismo* in the Hispanic culture, the support and encouragement of the Latina attorneys' families is perhaps one of the most important in their pursuit and success in the legal profession.⁹³ Many Latina attorneys from the *HNBA Commission Studies* commented on the sacrifices their families made so that they could pursue their educational and career goals.⁹⁴ While most of the Latina attorneys in this study were the first in their families to attend college or law school, they were raised to appreciate the value of education as a means toward self-reliance and a more promising future.⁹⁵ Furthermore, despite the lack of attorney role models in their formative years, many highlighted the importance of strong female role models, especially their mothers, in influencing their educational and career aspirations, including their decision to pursue their career as an attorney.⁹⁶

84. Reality of Latina Lawyers, *supra* note 4, at 1013.

85. *Id.*

86. *Id.*

87. See WILLIAMS, PHILLIPS & HALL, *supra* note 65.

88. Latinas in the Legal Profession, *supra* note 4, at 199.

89. See 2017 IILP Study, *supra* note 4, at 219-225; Reality of Latina Lawyers, *supra* note 4, at 1019-1022; Public Interest Study, *supra* note 4, at 200-203 (for a larger discussion of critical success factors and recommendations for Latina attorneys).

90. Latinas in the Legal Profession, *supra* note 4, at 207.

91. *Id.*

92. See Public Interest Study, *supra* note 4, at 185.

93. Reality of Latina Lawyers, *supra* note 4, at 1020; Public Interest Study, *supra* note 4, at 185.

94. *Id.*

95. Reality of Latina Lawyers, *supra* note 4, at 1006; Public Interest Study, *supra* note 4, at 185.

96. Reality of Latina Lawyers, *supra* note 4, at 1005; Public Interest Study, *supra* note 4, at 185.

Authentic Bicultural Identity

"[Bicultural identity] allows Latinas to become comfortable in their own skin."⁹⁷

Many Latina attorneys may be able to bridge the cultural divide and lead successful and satisfying careers by adopting an authentic bicultural identity throughout their educational process and legal careers. An integrated bicultural identity is theorized to be associated with different dimensions of Hispanic professionals' career success and satisfaction due to the instrumental and affective benefits associated with higher levels of psychological and sociocultural health, adjustment and well-being.⁹⁸ This requires a self-concept that authentically integrates ethnic and mainstream identities in a compatible and mutually beneficial way.⁹⁹ For example, Latina attorneys embracing a bicultural identity can embrace and leverage their cultural values associated with *familismo*, *personalismo* and *respeto* to achieve group goals and build and maintain network ties while simultaneously adopting the values associated with the legal profession around power equality, self-agency, and achievement to enhance their visibility, self-advocacy and opportunities that lead to career advancement.

Wide & Diverse Developmental Networks

"It is vital for attorneys and aspiring attorneys to have contacts they can trust to contact with questions, concerns, and problems. Mentors with similar experiences are vital."¹⁰⁰

Social connectedness and organizational sponsorship are theorized to be associated to different aspects of Hispanic business professionals' career success and satisfaction.¹⁰¹ As such, a critical component of Latina attorneys' successful cultural navigation may be their ability to establish a wide network of diverse developmental relationships with Latina and non-Latina colleagues inside and outside their organizations and school campuses. These individuals can serve as sponsors, protectors and champions for Latina attorneys to ensure that they have access to the challenging work assignments, networking, and professional development opportunities that lead to career advancement.

While wide and diverse networks are positively associated with career success, research has found that Hispanic professionals tend to pursue denser and less widely dispersed relationship networks.¹⁰² This suggests that Latina attorneys' networks may be more limited to individuals within their Hispanic communities and families. These relationships can provide Latina attorneys with the psychosocial support and comfort that can ease their cultural navigation. However, social ties with both majority and diverse members can provide Latina attorneys with greater access to a varied pool of potential sponsors, mentors and other developmental relationships that they often lack, but critical to their career mobility.¹⁰³

Cultural Definitions of Career Success

"[My] experience working in the nonprofit sector as a Latina attorney [has] been incredibly positive and fulfilling."¹⁰⁴

Hispanic professionals may view success more subjectively and prioritize cultural values associated with their family roles, social ties, as well as a sense of pride and satisfaction with their careers, rather than objective dimensions of career success that are traditionally valued by the individualistic business culture of the United States.¹⁰⁵ Given this perspective, there is some evidence that Latina attorneys may also broaden traditional definitions of success beyond prototypical monetary ambitions and goals to include more sub-

97. Public Interest Study, *supra* note 4, at 1023.

98. Cruz & Blancero, *supra* note 34, at 14.

99. *Id.* at 17.

100. Reality of Latina Lawyers, *supra* note 4, at 1020.

101. Cruz & Blancero, *supra* note 34, at 18.

102. Robert G. DelCampo, Donna Blancero & Harry J. Van Buren III, *The Social Networks of Elite Hispanic Professionals: DO Density and Ethnic Identity Matter for Career Success?*, 1 BUS. J. OF HISP. RES. 70 (2007).

103. *Id.*

104. See Public Interest Study, *supra* note 4, at 185.

105. Cruz & Blancero, *supra* note 34, at 18.



Research has found that Hispanic professionals tend to pursue denser and less widely dispersed relationship networks.

jective considerations including their desire to make a difference in their communities those associated with their families.¹⁰⁶ This finding is also evidenced from the *HNBA Commission Studies* that despite their relatively lower levels of objective career success in terms of compensation and professional status, Latina attorneys were found to be generally very satisfied with their careers.¹⁰⁷ Furthermore, for many of the Latina attorneys working in the public interest sector, this contentment stemmed from their sense of accomplishment and fulfillment gained through pride in their work and also the satisfaction from helping others.¹⁰⁸

Conclusion

Latina attorneys must bridge a significant cultural divide as they attempt to navigate their entry into and progression within the legal profession.¹⁰⁹ While women attorneys of color often encounter career-related challenges associated with their gender and race, this cultural divide may present an additional hurdle that Latina attorneys, as racially and *ethnically* diverse women, must bridge as they strive to become upwardly mobile and professionally successful within an industry that is largely White and male-dominated.¹¹⁰ While other factors are surely at play, this may partially account for why Latina attorneys are so disproportionately underrepresented throughout the legal profession.

To reflect the increased and growing diversity of this nation, the legal industry must have a better understanding of how these and other cultural barriers and supports contribute to Latina attorneys' educational and career achievement, including the important role that their families, educational institutions, and legal workplaces play in this process. Legal institutions looking to retain and advance more Latina attorneys within their ranks should adopt more dynamic diversity and inclusion programs and practices that prioritize cultural differences as a core value.

Moreover, the legal profession as a whole can better support Latina attorney's career development by valuing and leveraging rather than marginalizing and tokenizing the bicultural strengths and skills Latina attorneys bring to their legal workplaces. This is especially critical given today's global economy, where legal matters often take on multinational and cross-cultural dimensions. As such, lawyers who demonstrate broader cultural awareness and greater linguistic proficiency can achieve a more optimal competitive and representational posture for their organizations.

Finally, for Latina attorneys to perceive themselves as truly successful and therefore committed to their legal careers, they must be able to authentically integrate aspects of their bicultural identity and cultural values into their professional lives as well. This concept challenges traditional career models and professional ideology that compels many Latina attorneys to conform to the prevailing ideals of their legal workplaces. Otherwise, the legal workplace will continue to lose out on the vast untapped human and social capital Latina attorneys bring to bear.

106. Garcia-Lopez, *supra* note 69, at 590; Garcia-Lopez & Segura, *supra* note 65, at 229.

107. Reality of Latina Lawyers, *supra* note 4, at 1027; Public Interest Study, *supra* note 4, at 207.

108. See Public Interest Study, *supra* note 4, at 185.

109. Latinas in the Legal Profession, *supra* note 4, at 205.

110. *Id.* at 215.



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Phenomenal Women: Conversations with African American Women Senior Associates

Ellen Yiadom Hoover

Associate, Ropes & Gray LLP

Compared to their entry-level numbers as associates, the number of women of color who become partners in large law firms is staggeringly small. African American women senior associates share the high and low points of their careers, what has helped them succeed, and become prominent fixtures in their firms. Hoover breaks down what she's learned from these women and curates a must read for female junior associates and law firms in general.

It is no secret that law firms struggle with diversity, especially the retention of African American women. In fact, according to NALP's 2017 *Report on Diversity in U.S. Law Firms*, the percentage of African American women associates in law firms has declined from 2.93% in 2009 to 2.42% in 2017.¹ This decline is discouraging given the increase in representation of women during this same period.² While many law firms have found ways to address barriers to recruitment, the development and retention of attorneys of color, in particular African American women, still presents a challenge.³ While law firms must do the heavy lifting for solving this retention problem, African American women must also be empowered to think strategically about their careers.

I recently spoke to several African American women senior associates about the key to their longevity.⁴ While they attributed their longevity to various factors, I noticed some commonalities among the women. This article discusses those commonalities and provides some strategies for improving the development and retention of African American women that may be instructive for law students, junior associates, and law firms.

Choose Your Practice Area Wisely and Love What You Do

Rashida went to law school because she wanted to be a criminal defense attorney. After spending her first summer in law school at the public defender's office in her hometown, she realized it was not the career for her. Through this experience, however, she learned that she enjoyed "poking holes in someone else's argument" and wanted a practice that focused on people. When school started in the fall, she took classes that allowed her to explore her interest in defense work. She took an em-

1. NAT'L ASS'N FOR L. PLACEMENT, 2017 REPORT ON DIVERSITY IN U.S. LAW FIRMS 9 (2017), available at <https://www.nalp.org/uploads/2017NALPReportonDiversityinUSLawFirms.pdf>.

2. *Id.* While the percentage of representation decreased for African American women, the percentage of women in law firms slightly increased from 32.97% in 2009 to 34.54% in 2017. The percentage increased from 5.12% to 6.52% for Asian women and from 2.00% to 2.23% for Hispanic women during this same period.

3. DEEPALI BAGATI, WOMEN OF COLOR IN U.S. LAW FIRMS 1 (2009), available at http://www.catalyst.org/system/files/Women_of_Color_in_U.S._Law_Firms.pdf.

4. I interviewed nine African American women senior associates. These women are eighth year associates or above and represent several firms in major U.S. cities. The discussion focuses on the lessons these women have learned during the course of their legal careers rather than on them as individuals. To that end, and to ensure they felt comfortable sharing their stories with me, I have not included any personal identifiers. The names used in this paper are not their real names.



(Law students) should also use their time as summer associates to determine which practice areas align with their skills and interests.

ployment law class, fell in love with the subject matter, and selected a firm with a strong labor and employment practice. As a summer associate, she was clear about her interest in this area and she received most of her work from the labor and employment group. She accepted an offer to join this group and she is now an eighth-year associate at the same firm.

Mary was unsure about which practice area to pursue after graduation. She did not have any professionals in her family to guide her. She did not know how to make the transition from law school to a legal career. As she acknowledged, “I didn’t know what lawyers do . . . I felt like a fish out of water for this process.” She, like many of her classmates, was focused on getting good grades and securing an offer from a firm. She initially ruled out litigation because she was afraid of public speaking and settled on corporate work. Unfortunately, she did not receive an offer from the corporate group. Her only option, if she wanted to work at her firm, was to join the litigation group. She accepted the offer and grew to love her litigation practice. Mary now believes that litigation is a better match for her skills and interests than corporate. She stated, “I’m more suited to litigation than corporate because I’m organized . . . and litigation gives me the freedom to make my own schedule.” She realizes that she is incredibly fortunate to have landed in litigation, but concedes that she was not thoughtful or strategic about how she landed there.

Rashida’s and Mary’s stories illustrate the ways the women I interviewed selected their practice areas. About half of the women knew exactly what practice area they wanted to pursue before law school and made decisions during law school and their summers that prepared them for success at their law firms. For example, Riley fell in love with mock trial during high school and continued to participate in mock trial while in college and law school. She is now in a white-collar defense lawyer and looks forward to opportunities to participate in trial work. Janaya is another example. She knew she wanted to pursue a corporate practice because she worked as a paralegal for a few years prior to law school. She decided that she was not interested in litigation because of the protracted nature of some court cases. Janaya is now a finance associate and enjoys her transactional practice. While the other half of the women landed in practice areas in which they did not have an initial interest, most of them grew to like—and for some, even love—their practice areas over time.

Strategies for Law Students: Law students should use law school as an opportunity to examine where they want their careers to go and what goals they want to achieve. They should also use their time as summer associates to determine which practice areas align with their skills and interests. If unsure about a practice area, summer associates should ask partners at their firms which areas they believe will grow in the next few years and take classes in the fall to determine whether a given practice area matches their interests and skills. Summer associates should also speak with junior associates about the nature of their work assignments. If a particular practice area continues to pique their interest at the end of the summer, they should continue to stay abreast of developments in that area.



Law students should be mindful about selecting firms that offer the best learning opportunities.

Strategies for Junior Associates: New attorneys, even when faced with limited options, should give careful consideration to their choice of practice area. Junior associates who do not enjoy their assignments or the nature of their practice should consider switching to another practice area as soon as possible. It is never too late to make a career change, but it becomes more difficult over time. For example, Samantha switched from a corporate practice to labor and employment after a few months because she did not like the lack of flexibility she had with her corporate practice. She also realized she would thrive in the labor and employment practice because it was “about people and stories.” She noted that while she had to deal with some political backlash for making the transition, her firm ultimately accommodated her request.

Strategies for Law Firms: To ensure that associates select practice areas that align with their skills and interests, law firms should consider working with summer associates and junior associates to help them determine which practice area would be a good fit for them. For example, firms might provide guidance in the form of workshops or reading materials for summer associates, if they are not already doing so.

Make Your Billable Hours and Get the Training You Need

As was the case with Mary, Rebecca’s firm picked her practice for her. She initially wanted to join the litigation practice but received an offer from the bankruptcy practice instead. Upon advice from her mentor, she decided to accept the offer. After a few months, she realized that she enjoyed the varied nature of bankruptcy work. She was the only associate in her practice group and, as a result, partners asked her to work on many matters. This lack of competition allowed Rebecca to build her skills rapidly. As she acknowledged, “Even if my boss hated me, I was her only option.”

While she fell slightly short of her hours her first year, Rebecca has made her hours every year since then. She prioritizes surpassing her billable requirement each year: “I never thought making my hours was a choice. I wanted to keep my job.” To that end, she systematically keeps track of hours. Instead of simply looking to make her billable goal, she sets a higher goal for herself and monitors it each week to ensure that she is on target. She is always willing to work on assignments from other practice groups, especially if her hours are low for a particular week. Last year, Rebecca was the only associate in her practice group who made her hours.

Most of the women I spoke with made their billable hours consistently as junior associates. Making their billable hours also meant that they were receiving the training they needed to progress in their careers. It was not simply about qualifying for a bonus, but rather a measure of the learning opportunities they were receiving.

Additionally, many of the women were at law firms with formal assignment systems for junior



Firms should consider reviewing their formal assignment systems to ensure that work is equitably distributed.

associates or were on teams that were leanly staffed. A formal assignment system tracks hours worked by associates to ensure that work is evenly distributed. For example, Aria's first firm did not have a formal assignment process, and she noticed that she was not receiving as many assignments as her counterparts. This changed, however, after she transitioned to a firm with a formal assignment process.

Strategies for Law Students: During the interview process for summer associate positions, law students should be mindful about selecting firms that offer the best learning opportunities. They should base their decisions on where to summer or work full-time primarily on the kinds of learning opportunities available. It is also important to consider whether a firm has a formal assignment process, and whether teams are leanly staffed. Law students should also ask for examples of assignments given to junior associates, and should take full advantage of lunches and other opportunities to interact with junior associates and learn about their assignments.

Strategies for Junior Associates: While selecting a practice area that you enjoy is essential to longevity at a firm, having opportunities to hone your skills is also important. Because it may take firms a few months to integrate first-year associates into client teams, new associates should not be anxious if they are not staffed as soon as they start. However, they should be mindful about being staffed on assignments and billing hours within a few months of starting.

Junior associates should also gauge the kinds of assignments that are appropriate for their year by speaking with senior attorneys in their practice groups. Conversations with other junior associates about their assignments could also provide some insight into the caliber of work expected from them. Any junior associate who believes that she is falling behind her classmates in terms of skills must be vocal about the opportunities needed to close that gap. If partners at their firms are unresponsive after repeated requests for additional assignments, junior associates should consider opportunities at other firms. If not, they may continue to fall behind their class year, especially as new classes of associates arrive and the competition for work increases. Ultimately, they may no longer be on the partnership track and may be asked to leave the firm. As Mary noted, this can happen very early in an associate's career: "You could be cast aside really early in your career . . . by the time you get to your third year . . . you have a reputation."

Strategies for Law Firms: While many firms have formal assignment processes, some firms do not properly utilize them. Firms should consider reviewing their formal assignment systems to ensure that work is equitably distributed. They should also ensure that associates receive meaningful assignments and are fully integrated into client teams. It is understandable that junior associates will not be leading corporate transactions or taking depositions, but they should be integrated into a team where possible. Samantha noted that at her old firm, she was given discrete assignments on very large issues and no one provided any feedback. She believes she was not trusted with anything of significance, which deeply eroded her self-confidence. Her second firm offered a dramatically different experience, giving her more responsibility and autonomy.

While many of the women believe they have had meaningful assignments, a few in transactional practices noted being overlooked for staffing on larger deals, even after repeatedly asking to be staffed on those deals. Kenya, while she believes she has mastered the technical aspects of leading



One of the common factors that contributed to these women's longevity was their confidence.

a corporate transaction, believes that she lacks the experience with larger deals that will be instrumental for partnership considerations. Despite, having excellent reviews, she continues to hear excuses about client staffing needs or promises of opportunities with future deals. Kenya is currently at her fourth firm and has experienced this obstacle at each firm.

Firms must be intentional about how work is distributed in order to address retention for African American women associates. They must develop mechanisms for ensuring African American women are receiving assignments that are helpful in developing their careers and that there are metrics for evaluating the success of their assignment systems.⁵

Recover from a Bad Review

During her fourth year, Julia noticed that a partner stopped sending her assignments. She previously tried talking to him about improving her performance, but he rebuffed her and suggested that she speak to another partner and senior associate instead. When she approached him again, he told her he did not have any confidence in her work and that he would never work with her again. She was devastated. She struggled with her confidence after that experience, but continued to work with other partners. After a lot of support and encouragement from her mother and close friends, Julia regained her confidence and moved forward with her career. As she noted, "I wasn't going to let one person stand in the way of my career or drive me out of the group or the firm." Thankfully, she received great reviews from other partners. Ultimately, she realized that this was a blessing because it gave her the opportunity to work with other people. She is also thankful that the partner who gave her the review did not share his negative opinion of her work with other partners and taint their perception of her abilities as an attorney.

Associate life can be difficult. As Rebecca acknowledged, "The work days can be long, you have to be perfect every moment of every day, and the stakes are high. People will stop giving you work very early on, and you'll get bad reviews." Although most of the women I spoke with received negative feedback at some point in their careers, they also spoke of great relationships with partners. Having a reputation for good work will shield associates from some of the negative experiences that come with associate life. Partners at law firms are often under a lot of pressure. There is a lot of competition between firms, and partners are ultimately responsible for managing client relationships and work product. This can create a tense environment that leads some partners to pass on their stress and anxiety to associates. Junior associates often see only a small piece of the entire picture, and may not be aware of the dynamics at play.

One of the common factors that contributed to these women's longevity was their confidence. This confidence came from years of plugging away at their craft and simply not giving up. As Samantha noted, "If anything defeats you, it's because you don't trust yourself and others don't trust you. You're never going to do this work well [if you are not confident]." For example, Mary described criticism she received about her writing and how, as a junior associate, she took the criticism very

5. See ARIN N. REEVES, FROM VISIBLE INVISIBILITY TO VISIBLY SUCCESSFUL: SUCCESS STRATEGIES FOR LAW FIRMS AND WOMEN OF COLOR IN LAW FIRMS (2008), available at https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility_vs.authcheckdam.pdf.



Firms should encourage partners to provide feedback directly to associates by requiring ongoing feedback from partners on matters on which associates have worked.

personally and often believed she was setting herself up for failure. Over time, however, she gained confidence in her writing and now believes any criticism she receives is the result of stylistic differences in communication, rather than a condemnation of her writing skills.

Strategies for Junior Associates: Another important hallmark of these women's success was their ability to move beyond the negative feedback they received. While this can be difficult, having a support system like Julia's can be helpful. Mary, for example, found support from a fellow associate at her firm who is now her closest friend. Junior associates must also remember to not take negative feedback of their work personally, and to focus on helping their clients. Over time, they will see their confidence increase as their work product improves. As Julia noted, she "feels more valued because she can provide more value."

Strategies for Law Firms: Many of the women described instances in which they did not receive negative feedback directly, but noticed, for example, that they stopped receiving work from partners. Firms should encourage partners to provide feedback directly to associates by requiring ongoing feedback from partners on matters on which associates have worked. Direct feedback allows associates to have constructive conversations with partners about how they can improve. It is not helpful to leave an associate in the dark when a mistake or misunderstanding can instead serve as a teaching moment. Firms should also discourage partners from sharing negative reviews about associates with other partners. Simply because one partner does not have a good working relationship with an associate does not mean that no partner will.

Finally, law firms should provide implicit bias training to all supervising attorneys. Implicit bias can best be defined as cognitive shortcuts that can be riddled with stereotypes or misinformation about a particular person related to race, gender or other personal characteristics.⁶ For example, stereotypes about African Americans may lead a senior attorney to unconsciously believe that the work product of an African American associate is subpar. In fact, research exploring implicit bias suggests that supervising attorneys are more likely to find mistakes in the writing of African American associates than white associates.⁷ While implicit biases cannot be eliminated, supervising attorneys have to find ways to interrupt their biases and challenge assumptions underlying their approach to allocating assignments and reviewing associate work.⁸

Find Mentors to Support Your Career

When Riley started at her firm, she was assigned a senior partner as a formal mentor. He was supposed to help her get her first assignment, since her practice group did not have a formal assignment process. While he was away on business, however, Riley received work from another associate

6. Arin N. Reeves, *The Ineffectiveness of Efficiency: Interrupting Cognitive Biases for Critical Thought*, 54 THE JUDGES' J. 35 (2015).

7. ARIN N. REEVES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2014), available at <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf>.

8. *Id.*

on a matter for which her partner mentor was the billing partner. When she went to tell the partner about working on the matter, he was less than enthusiastic, and distanced himself from her after that. Several months into her first year, she transitioned off a large case and was able to work with a small team of partners with whom she shared a similar working style and working hours. She has worked with the same team ever since and they continue to support her endeavors including helping her with her current business development efforts. For Riley, this group of partners made an impact on her career and are the primary reason she is still at her firm: “I recognized the difference between being busy and being able to make your hours, and working with people you enjoy working with. That’s why I’ve been at the firm for as long as I’ve been.”

Many of the women acknowledged the importance of having good working relationships with senior attorneys to ensure longevity. These strong relationships can sometimes shield associates from negative reviews, as discussed above. Although most new associates at firms are given formal mentors, almost all the women acknowledged that they did not have great relationships with their formal mentors, but rather found their informal mentor relationships more helpful. Some of the women also acknowledged that it is especially important for women of color to make sure that they have good working relationships with people in positions of power. Unfortunately, many of those in positions of power are not women, or people of color. As Samantha noted, “You need someone who is advocating for you, someone who is going to toot your horn, someone who will make sure that the mistakes don’t ruin you—especially for Black people. If you don’t have a personal champion, it’s more difficult when the work dries up.”

Strategies for Junior Associates: In addition to their formal mentors, junior associates should develop relationships with senior attorneys who can help guide their career. Junior associates must also earn these mentoring relationships by providing good work product, prioritizing work assignments, and by being courteous and responsive. Associates must also be mindful that they have someone, often referred to as a sponsor, who has enough political capital to speak on their behalf and provide them with the necessary opportunities to advance their careers. Kenya feels her career has stalled because the partner who she has worked primarily with throughout her career does not have enough influence to help advance her career. She has moved to several firms with this partner and now feels like she should have connected her destiny to someone with a bit more political capital.

Strategies for Law Firms: Firms should encourage informal mentor pairings by providing associates with opportunities to network internally and cultivate relationships with attorneys and staff with whom they work. One way to encourage good working relationships is to provide a stipend for junior associates to invite senior associates or partners for coffee or lunch. Firms can also encourage these informal pairings by hosting events where junior associates can invite senior attorneys to join them.

Surviving Non-Diverse Spaces

Six months into her first year, Samantha realized that she did not like her practice group or her firm. This was partially due to the nature of the practice area itself, but a significant part of it was the firm’s culture. Everyone seemed miserable. She recalls one partner who would come into her office and complain about how much he hated his job and his life. She wondered if being an attorney was the right career for her because many of her co-workers seemed miserable and reveled in this misery. Also, as an African American woman, she felt alienated. She was prepared for the long hours, but not the sense of isolation she experienced. This was a very different experience from her time as a summer associate. During her summer, African American associates gave her advice and offered to review her work before she submitted it to a partner. In fact, the diversity of her firm was one of the reasons why she selected her firm. Unfortunately, many of the associates she met while she was a summer had left before she arrived as a first-year, or were considering leaving. Her sense of self-worth suffered, and she considered not practicing. She left the firm after two years. Samantha is now at a firm where she works with a diverse group of partners and associates and feels supported by her team.

Many of the women seemed to anticipate the isolation that Samantha experienced. In fact, most of the women did not expect their firm to be diverse, and some had lived and worked in places where they were either the only African American or one of a few African Americans. As Rashida stated, “I’ve been alone as a Black woman my entire life.” She did not expect firm life to be any different.

While many of the women did not expect their firm to be a diverse space for them, some of the women at larger firms found support from their affinity groups and diversity professionals. For example, while diversity was not a factor in selecting her firm, Rashida found support from African American women staff members and diversity professionals in navigating her firm’s politics. Mary also received support from her firm’s diversity manager as she became more senior. Both Rashida and Mary currently serve in leadership roles for their firms’ affinity groups.

Strategies for Junior Associates: In addition to building relationships with attorneys, junior associates should also build relationships with staff members, including diversity professionals at their firms, especially as they become more senior. Diversity professionals can provide career development insights that will be helpful in navigating a law firm career. Junior associates should also participate in affinity group events when possible. They can provide the support and encouragement, as discussed above, that is essential to longevity in a traditionally non-diverse space. Junior associates should also be vocal about their work experiences with others in their affinity groups. Kenya believes that participants in these groups are often not transparent about their work experiences because they may be embarrassed about falling short of expectations such as billable hour requirements, for example. The more open associates of color can be with each other in their affinity groups, the more helpful affinity groups will be to their career development.

Strategies for Law Firms: While most of the women acknowledged that their current firms have invested in diversity professionals and affinity groups, a few commented about working at smaller firms and the lack of support for diverse associates in those firms. While smaller firms may not have the resources to support a full-time diversity professional, they can support their diverse associates by suggesting professional development and networking conferences for them or supporting their membership in local diversity organizations. They can also encourage diversity initiatives and affinity groups that are tailored for their size to help diverse associates feel fully supported.

Conclusion

The challenges faced by associates—such as making their hours, receiving meaningful learning opportunities, and building meaningful work relationships with senior attorneys—can be amplified for associates of color, especially African American women. To overcome these barriers, African American women must be mindful of their career decisions each step of the way. As Samantha said, “You have to be conscious of the brand you’re building.”

About half of the women are interested in partnership and have received some support in that regard. Most of them, however, are concerned about whether they would have successful careers as partners. Janaya shared the story of a close friend, an African American woman, who recently made partner on time—a remarkable achievement, given that most of the African American partners at her firm were lateral partners, and her friend had started at the firm as a first-year associate. Despite achieving this milestone, Janaya’s friend faced significant challenges as a partner and left the firm a year after becoming a partner. It took her some time to regain her self-confidence after her experience at the firm. Being an African American woman at a law firm can be a difficult experience to navigate,⁹ but it can be a rewarding one. Almost all the women love their careers and the opportunities their careers have provided. As Rebecca noted, “If you can make it past the first few years, it opens up a world of opportunity.”

9. See generally Keith H. Early, *A Qualitative Study of the Lived Experiences of Black Women Equity Partners in Elite Law Firms*, 2017 IILP REVIEW 226 (2017).



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Following the publication of the 2017 Review, IILP presented Symposia on the State of Diversity & Inclusion in the Legal Profession in Cincinnati, Chicago, Dallas, Los Angeles, and Seattle, among other cities.



Sweet Harmony: Substantive Diversity, Disability Rights, Millennials, and the Shape of Tomorrow's Inclusiveness

I. Edward Marquette

Partner, Kutak Rock LLP

Kimberly McKelvey

Director of Strategic Focus and Director of Diversity, Kutak Rock LLP

Patricia Kinaga

Principal, Kinaga Law Firm

What changes should we expect as millennials become nearly 46% of the workforce by 2025? Read about the changes to expect in the approach to diversity and inclusion, focusing on authenticity and a “fully-functioning collaborative work environment inclusive of multiple perspectives.”

Abstract

As the number of Millennials in the workforce and in law firms continues to grow, the model for inclusiveness and diversity efforts will conform to the unique views of the Millennial generation. The current diversity model derives in large part from the Civil Rights Movement's focus on adequate representation of socially-constructed categories of people, including race and ethnicity, gender, and ability and disability categories. Millennials, who are described as the “inclusion generation,” view such traditional categories and identifiers as inaccurate, unimportant to one's self-image, an unnecessary reinforcement of an individual's relative social standing, and unable to encompass the broad scope of an individual's experience. Instead of relying on categorization and representation, Millennials expect diversity-in-fact and inclusiveness-in-practice, manifested as a fully-functioning collaborative work environment inclusive of multiple perspectives in which differences are maximized, listened to, and used to innovate and excel. The Disability Rights Movement, which focused less on representation and equal opportunity as a matter of right, and more on a fully-participatory seat at the table as a matter of – and as a means of – achieving a better product, can serve as a model for inclusiveness and diversity efforts as we enter the Millennial era.

Arrival of the Millennial Wave

Millennials were born between 1980 and 1999,¹ with variations in the starting and ending year de-

1. U.S. CHAMBER OF COMMERCE FOUND., THE MILLENNIAL GENERATION RES. REV. (2012), available at <https://www.us-chamberfoundation.org/reports/millennial-generation-research-review> [hereinafter *Chamber*].

pending on the source.² The largest cohort in history³ at 83,700,000 people,⁴ Millennials have been in workplaces since 2004 and will climb in numbers until 2022.⁵ Simultaneously, 10,000 baby boomers will become eligible for retirement every day.⁶ In 2020, an estimated forty-six percent of the workforce will be Millennials,⁷ rising to seventy-five percent by 2025.⁸

The *Millennial wave*⁹ has arrived across all employment sectors, including law firms where Millennials already hold forty-three percent of attorney positions¹⁰ and eighty-eight percent of associates and where five percent of partners are Millennials.¹¹ In the top firms by profit per partner, sixty-one percent are Millennials.¹² Immediately upon hitting the shore, the *Millennial wave* has begun to reshape norms in America's workplaces, including within the legal sector.

Researchers have spent over a decade identifying the primary characteristics of Millennials, with descriptors such as "altruistic," "team-oriented," and "connected,"¹³ and "optimistic" and "future-oriented."¹⁴ Researchers hone in on technology use as the primary defining characteristic of the Millennial generation.¹⁵ Unlike prior generations, digital technology and, in particular, the internet, are integral to a Millennial's relationships and interactions, whether personal, academic, or professional.¹⁶

Additionally, researchers assert that "racial diversity will be the most defining and impactful characteristic of the Millennial generation."¹⁷ Millennials are the "most ethnically and racially diverse cohort" of workers in America's history.¹⁸ In 2014, forty-four percent of Millennials were non-white and non-Hispanic,¹⁹ and twenty-seven percent come from an immigrant background.²⁰ Millennials will be largely responsible for the point in time, predicted to occur in 2044, when the majority of the nation's population will consist of members of "minority" groups.²¹

2. E.g., compare CHRISTIE SMITH & STEPHANIE TURNER, *THE RADICAL TRANSFORMATION OF DIVERSITY AND INCLUSION THE MILLENNIAL INFLUENCE 5* (2015), available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-inclus-millennial-influence-120215.pdf> (Millennial generation defined by birth years 1980 to 1995), with U.S. CENSUS BUREAU, *MILLENNIALS OUTNUMBER BABY BOOMERS AND ARE FAR MORE DIVERSE*, CENSUS BUREAU REPORTS (June 25, 2015), <https://www.census.gov/newsroom/press-releases/2015/cb15-113.html> (Millennial generation defined by birth years 1982 to 2000).

3. CHAMBER, *supra* note 1.

4. U.S. CENSUS BUREAU, *SUMTER COUNTY, FLA., IS NATION'S OLDEST*, CENSUS BUREAU REPORTS (June 23, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-107.html>.

5. Sanghamitra Chaudhuri & Rajashi Ghosh, *Reverse Mentoring: A Social Exchange Tool for Keeping the Boomers Engaged and Millennials Committed*, 11 HUM. RESOURCE DEV. REV. 55-6 (2012).

6. *Id.*

7. Erin Perugini, *Let's Talk: Promoting Disability Inclusion in Today's Multigenerational Workplace*, BLOOMBERG BNA (Jan. 27, 2017), <https://www.bna.com/lets-talk-promoting-b73014450241/>.

8. SMITH & TURNER, *supra* note 2, at 6.

9. See Janet Hook, *The Millennial Wave Unsettles Presidential Race*, WALL ST. J. (Feb. 15, 2016, 9:51 AM), <https://www.wsj.com/articles/millennial-wave-unsettles-presidential-race-1455577532>; see also CUSHMAN & WAKEFIELD GLOBAL BUSINESS CONSULTING, *FACING THE MILLENNIAL WAVE* (2014), available at <http://www.cushmanwakefield.com/~media/reports/corporate/Global%20Reports/Facing20the20Millennial20WaveCW2014.pdf>.

10. Lizzy McLellan, *The Millennial Wave Floods into Big Law*, THE AM. LAW. 9 (Dec. 2017).

11. *Id.*

12. *Id.*

13. FORD ET AL., *A MILLENNIAL PERSPECTIVE ON DIVERSITY & MULTICULTURALISM*, AM. ADVERTISING FED'N. 2 (April 2012), available at <http://aaftr.com/wp-content/uploads/2012/04/Millennial-White-Paper.pdf>.

14. RUY TEIXEIRA, *GREENBERG MILLENNIAL STUDY SYNTHESIS OF DEMOGRAPHIC AND PSYCHOGRAPHIC FINDINGS*, ERIC H. GREENBERG AND PACHATUSAN, LLC (Feb. 11, 2008), available at <http://genwe.com/sites/default/files/Greenberg%20Millennial%20Study%20-%20Demographic%20and%20Psychographic%20Synthesis.pdf>, at 1.

15. *Id.*

16. *Id.* at 1-2.

17. William H. Frey, *Diversity Defines the Millennial Generation*, BROOKINGS (June 28, 2016), <https://www.brookings.edu/blog/the-avenue/2016/06/28/diversity-defines-the-millennial-generation/>.

18. FORD ET AL., *supra* note 13, at 2.

19. U.S. CENSUS BUREAU, *supra* note 2; See also PEW RESEARCH CENTER, *Multiracial in America: Proud, Diverse, and Growing in Numbers* (June 11, 2015), <http://www.pewsocialtrends.org/2015/06/11/multiracial-in-america/#fn-20523-3> (noting that approximately six and one-ninth percent of adults are multiracial; ten percent of babies in 2013 were multiracial).

20. SMITH & TURNER, *supra* note 2, at 5.

21. Frey, *supra* note 17.



Where prior generations seek representation of diversity categories or identifiers to achieve compliance, Millennials seek “cognitive diversity.”

The Millennial Inclusiveness Mindset

The two potential primary characteristics of the Millennial generation, technology use and racial diversity, may drive the documented differences in “just how much tolerance of diversity and difference defines this generation’s perspective”²² and likely will increase the desire for and importance of inclusiveness and diversity in the workplace.²³ As the “inclusion generation,”²⁴ Millennials consistently demonstrate “high levels of tolerance”²⁵ and acceptance of people from different backgrounds, including gender equality, racial and ethnic backgrounds, sexual orientation, and immigration.²⁶ They also consistently demonstrate a different view of inclusiveness and workplace diversity efforts that, over time, will reshape inclusion and diversity efforts in the workforce generally, including in law firms.

Diversity Is More than Categories

Millennials view identity as multifaceted,²⁷ and diversity as “incorporating all the differences that exist within people from religion, language, geography, nationality, sexual orientation, and interests.”²⁸ Eschewing prior generations’ definitional diversity categories²⁹ and demographic identifiers, Millennials view categories and identifiers like race, ethnicity, and gender as unimportant in one’s self-image and fear such categorization becomes “a rough proxy for an individual’s relative social standing.”³⁰ Research specific to Millennial viewpoints on diversity has focused largely on race and ethnicity and indicates that Millennials “have never seen themselves in racial terms.”³¹ Viewing themselves as post-racial, they believe racial categories to be largely meaningless. In one study, Millennial law students, when asked to identify by race, questioned the racial categories provided—too broad, too narrow—and suffered “dignitary injury” in identification, expressing concern that even discussing diversity may “unfairly reduce the individual to a representative of a given racial group instead of encouraging us to focus on more socially relevant facets of personal identity.”³²

22. TEIXEIRA, *supra* note 14, at 26.

23. Sarab Kochhar, *Millennials@Work: Perspectives on Diversity & Inclusion*, INSTITUTE FOR PUBLIC RELATIONS (Dec. 6, 2016), <http://www.instituteforpr.org/millennialswork-perspectives-diversity-inclusion/>.

24. *Inclusion Insights*, Deloitte at <https://www2.deloitte.com/us/en/pages/about-deloitte/articles/radical-transformation-of-diversity-and-inclusion.html> (phrase coined by Deloitte.).

25. FORD ET AL., *supra* note 13, at 2.

26. Chaudhuri & Ghosh, *supra* note 5, at 60-61.

27. Perugini, *supra* note 7.

28. FORD ET AL., *supra* note 13, at 9.

29. *E.g., id.* (Millennials insisting on a nuanced approach because current categories are too broad (e.g. “Asian”) and too narrow (e.g. failing to include additional differences).

30. Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 561 (2009) (sample answer: “I don’t want it to matter. I want it to be a non-issue. Maybe more people are feeling that way, and maybe that means we are making progress.”).

31. *Id.* at 549.

32. Rich, *supra* note 30, at 570.



As imprecise and speculative as the future looks for inclusiveness generally, the challenge is even greater for persons with disabilities.

Diversity Is Not a Numbers Game

Perhaps it is to be expected, then, that Millennials do not place emphasis on demographic representation as a measure of an inclusive environment. Where prior generations seek representation of diversity categories or identifiers to achieve compliance, Millennials seek “cognitive diversity,”³³ a blend of perspectives generated by diverse experiences.³⁴ Millennials appreciate complexity, commonality, and shared beliefs in conversation, and they value multiculturalism rather than homogenized views.³⁵

Millennials bring to the workplace their social and cultural expectations about diversity and inclusiveness. Rather than talking about diversity in the abstract (i.e. numbers, categories, and representation), Millennials expect a fully-functioning collaborative work environment that includes multiple perspectives.³⁶ Teams meet for business purposes, focused on bottom-line results, and encourage different ideas and perspectives.³⁷ The culture develops teams to “talk, listen, reflect, evaluate, ideate,” resulting in professional growth and positively affecting business outcomes.³⁸

Structural, not Superficial Diversity

Authenticity at work is a key ingredient to productive “organizational social exchange.”³⁹ Team members do not have different identities in their personal and professional lives. For a Millennial, it is both inappropriate and counterproductive to downplay one’s personal differences in order to conform to a particular workplace image. Rather, each team member’s full identity brings value to the business and, to the extent diversity and inclusiveness “programming” occurs, it should focus on improved business outcomes and opportunities. Millennials believe that, “with differences in background, experiences, and style, a team is more likely to create innovative and groundbreaking products and services.”⁴⁰

Millennials and Persons with Disabilities

Given the documented attitudes and perceived orientation of Millennials and the wave of people that has rolled – and will continue to roll – into the workforce, including the ranks of associates and partners in law firms, diversity and inclusiveness programs and strategies may need to change to remain relevant and effective. This applies to what, today, we refer to as the disability category of diversity. What inclusiveness strategies and programs will look like is only now starting to coalesce into anything recognizable. We know that, based on the significant research on Millennial attitudes toward racial and gender bias, there needs to be a shift from what Millennials regard as dehumanizing, impersonal definitional

33. SMITH & TURNER, *supra* note 2, at 7.

34. Alison Reynolds & David Lewis, *Teams Solve Problems Faster When They’re More Cognitively Diverse*, HARV. BUS. REV. (Mar. 30, 2017), <https://hbr.org/2017/03/teams-solve-problems-faster-when-theyre-more-cognitively-diverse>.

35. FORD ET AL., *supra* note 13, at 7.

36. *Id.* at 12.

37. SMITH & TURNER, *supra* note 2, at 3.

38. *Id.* at 17.

39. Chaudhuri & Ghosh, *supra* note 5, at 61 (asserting that a social exchange occurs between employees and the organization and between employees and their supervisors that is discretionary; the social exchange leads to positive results when the “organization values unique competencies and expertise.”).

40. SMITH & TURNER, *supra* note 2, at 7.



When asked to identify the five most important considerations in the workplace, the largest number identified compensation/benefits and reasonable work hours/lifestyle balance/flexibility.

categories.⁴¹ As imprecise and speculative as the future looks for inclusiveness generally, the challenge is even greater for persons with disabilities. There is, as noted above, significant research regarding the attitudes of Millennials with respect to race and gender; however, when it comes to the attitudes of Millennials regarding persons with disabilities, there is a serious paucity of findings. Research is needed to substantiate what we discuss here, as this paper admittedly contains an inferential leap or two.

What We Found

We conducted an informal survey of thirteen female and eleven male Millennial attorneys working in small to large law firms, in the judiciary, and in-house, across California, Texas, Washington, and New York. Ten respondents self-reported as white, one black, and four Asian. Seven respondents, however, reported as “other,” which may indicate their conscious choice not to identify with any particular race/ethnicity category and/or that they identify as multi-racial/multi-ethnic.

When asked to identify the five most important considerations in the workplace, the largest (seventy-one percent) number identified compensation/benefits and reasonable work hours/lifestyle balance/flexibility. This was followed by opportunities for advancement (sixty-six percent). The third most popular category was collegial atmosphere/sense of community within the organization. Although “value placed on differing points of views” ranked in the top five of only twelve and one-half percent of responses and “collaborative environment/teamwork” ranked in the top five of only sixteen and one-sixth percent of respondents, when asked to furnish a narrative description of their definition of diversity, responses consistently reported “embracing people from all backgrounds and finding value in their unique experiences and perspectives.” Eschewing legally-defined categories, respondents consistently saw diversity as comprising long lists: race, ethnicity, heritage, sex/gender orientation, geographic region, socioeconomic status, family composition, age/generation, and physical/mental/emotional/linguistic/intellectual ability. Continuing this non-traditional theme, another respondent described diversity as encompassing “individuals with different physical attributes (e.g., race), preferences (e.g., sexual orientation), beliefs (e.g., liberal and conservative), and background (those who grew up in well-off families and those who grew up not knowing anyone who was college-educated).”

Picking up on the theme of workplace contributions from varying viewpoints, one respondent stated that diversity “means a group of co-workers with varying viewpoints, beliefs, methods of problem-solving, and personalities,” and another said “workplace diversity projects – as political projects – should take a bottom up approach,” one that does not “tokenize” individuals of certain identities. Instead, they should seek to install discriminated members of our society as critical contributors to the workplace who have something to offer because of, rather than in spite of, their non-normative difference.” All of the respondents stated that diversity initiatives should include people with disabilities.

41. See Rich, *supra* note 30, 570, 582; see also Lidia Jean Kott, *For These Millennials, Gender Norms Have Gone Out of Style*, NAT'L. PUB. RADIO (Nov. 30, 2014, 8:55 PM).

The Extra Challenges of Disability

As noted above, there is a dearth of research regarding Millennials and persons with disabilities, but that should not be surprising. Throughout corporate America, diversity programs, to the extent they exist, focus invariably on race, usually on gender, and quite often on sexual orientation. Rarely is disability even included as a category of diversity. Law firms, responding to their clients' requirements, not surprisingly, develop their own programs based on race, gender, and sexual orientation. A majority of the time, even in the most successful companies, disability is not expressly acknowledged as a diversity category or is absent altogether.⁴²

At the same time, it must be conceded that, to include persons with disabilities as a diversity category in one's inclusiveness strategy, a different approach is needed. Although gender and racial characteristics may be, in some or most instances, readily apparent or visible, characteristics identifying sexual orientation, gender fluidity, and disability may be invisible. In one estimate, seventy-one percent of all disabilities were thought to be "non-apparent or hidden."⁴³ Moreover much of the response to issues of racial, gender, and sexual orientation bias is simply to stop: stop asking certain questions in interviews, stop actively skipping over names that are obvious indications of race or gender, stop discriminating, and stop making assumptions about persons based on their speech or mannerisms. Just stopping something is far easier than is making something happen, and where disability rights are concerned, doing something affirmative is imperative. As Lord Blunkett, then Secretary of State for Work and Pensions in the United Kingdom, said in a speech in British Columbia, Canada, "active inclusion means overcoming barriers to normal living rather than simply accepting, and then compensating for, exclusion from what others take for granted ..."⁴⁴ In addition, the disability category of diversity requires greater intentionality. When offering tools to employees to do their jobs, issues of gender, race, or sexual orientation rarely – if ever – come up. Similarly, in selecting or designing facilities, issues of gender, race, and sexual orientation almost never matter. To be truly inclusive for persons with disabilities, however, an extra step is required when it comes to the choice and deployment of tools and the selection and design of facilities.⁴⁵ Finally, at least historically, the specific inclusiveness strategies for each of the other diversity categories have been fairly homogenous.

In other words, what one does with respect to gender bias is essentially the same for all identified members of a particular gender. The same is true for race and, for the most part, sexual orientation. This is manifestly untrue when it comes to the disability category. Inclusiveness strategies for persons with a visual impairment are completely different from inclusiveness strategies for persons with hearing loss. Strategies for persons with mobility challenges differ entirely from strategies for persons with mental or emotional-related disabilities.

All that said, there remains one factor that – even for the purely self-interested – should produce impetus for disability inclusion: no one is exempt from potentially becoming a part of this group. In addition, although intuition suggests those with disabilities are few in number, statistics demonstrate that, on average, one in four persons has a disability,⁴⁶ and one-third of Millennials identify themselves as having a disability.⁴⁷

42. Phoebe Ball *et al.*, *Disability as Diversity in Fortune 100 Companies*, 23 BEHAV. SCI. LAW 97, 104 (2005).

43. Sarah Babineau & Jason Goitia, *Disability Diversity: A Primer for the Legal Profession*, INST. FOR INCLUSION IN THE LEGAL PROF. REV. 191, 194 (2017); *see also* Sherbin *et al.*, *Disabilities and Inclusion Global Findings*, CENTER FOR TALENT INNOVATION 19 (2017) (reporting results from a survey of over 3,500 full-time employees ages twenty-one to sixty-five as follows: a total of 1,083 individuals reported having a disability; eighty-eight percent of those reporting a disability defined their disabilities as "invisible" (sixty-two percent) or "can be visible or invisible, depending on the circumstances" (twenty-six percent) on a workforce survey; only thirteen percent of those reporting a disability defined their disabilities as "visible."

44. David Blunkett, Speech in Canada on Disability (Sept. 16, 2005), *transcript available at* <http://www.ukpol.co.uk/david-blunkett-2005-speech-on-disability>.

45. Agnes Fletcher & Nick O'Brien, *Disability Rights Commission: From Civil Rights to Social Rights*, 35 J. L. & Soc'y 520, 525 (2008), (referring to compliance with disability rights legislation, "The onus is upon those with obligations (employers, service providers, educational institutions) to take a deliberate part not just in accommodating disabled people but in actively adjusting so that they enable their participation.")

46. Babineau & Goitia, *supra* note 43, at 192 (twenty-six percent of non-institutionalized working-age 18-65 have a condition that meets definition of disability).

47. Sherbin *et al.*, *supra* note 43.

Although the points in the preceding section may seem reasonable to a baby boomer – or other generation – those points may be entirely irrelevant to a Millennial. Because they reject defining categories, the potential advantages of a homogenous approach to a diversity category will likely be meaningless. Similarly, that inclusiveness strategies for persons with disabilities may take more mental energy and more resources is likely to be irrelevant. If the inherent benefits of a diverse team approach are to be realized, what it takes to get those benefits is just a reasonable cost of operations. This itself suggests that, to be effective with Millennials in the future, one must climb into and operate from the mindset of a Millennial. And for Millennials, this may indeed mean allocating resources to create a truly diverse workforce. As a respondent in our informal survey stated, it is important for employers to acknowledge different viewpoints, be supportive when new ideas are presented, and be open to changing the *status quo*.

Liberation, Not Patronization

Interestingly, and perhaps not entirely coincidentally, the theoretical underpinnings of the disability rights movement seem to mesh with the Millennial mentality better than do the theoretical underpinnings of the civil rights movements of the 1960s and 1970s, which were almost entirely gender or race-based. The gay rights movement (now more broadly defined as sexual orientation/sexual identity or LGBTQ) largely embraced and still embraces the civil rights movement's theoretical foundations. By contrast, the disability rights movement differentiated itself – and continues to differentiate itself – from traditional gender and race rights movements. Whether this was a deliberate strategic choice, historical accident, or simply the inevitable consequence of the inherent differences between disability rights and traditional civil rights (as suggested above), is not particularly relevant for purposes of this paper. It is enough that things turned out the way they did and that the focus on “an ideal of equal social and cultural participation ...,”⁴⁸ a crucial concept in the disability rights movement, harmonizes well with the Millennial mindset. The assertion of “rights to identity, equal opportunity, or non-discrimination”,⁴⁹ a bedrock civil rights principle, seems not to register with Millennials who reject defining – and confining – categorization. With the disability rights movement, this quota-oriented approach was bypassed in favor of “substantive equality based upon the need for different treatment rather than the same treatment as everyone else.”⁵⁰ Again, David Blunkett seemed to capture the essence of the *quid pro quo* approach to diversity for both the disability rights movement and Millennials when he said:

Ultimately we are talking about what sort of society we want for ourselves; inclusive and supportive but not paternalistic and confining. We want to liberate people, not patronize them. We want to create independence, but with mutual help – something for something – which is not about abandoning those of working age facing illness or disability but helping them to overcome the additional barriers to a full life.⁵¹

The Disability Model

Fundamental to an understanding of the theoretical support for disability inclusion is an understanding of the disability model. Rejecting a purely medically-focused characterization of disability – the “Medical Model” – the disability rights movement looked more to the response of society (the “Social Model”) to understand the phenomenon of disability. Disability is seen as “[T]he failure of a structured social environment to adjust to the needs and aspirations of citizens with disabilities rather than from the inability of the disabled individual to adapt to the demands of society.”⁵²

Related to the above is the important distinction between impairment and disability, with the former being simply descriptive of physical function or lack thereof and the latter a condition or set of conditions imposed by society. Stated another way, impairment as lacking part of or all of a limb, or having a defective limb, organ or mechanism of the body. By contrast, disability as the disadvantage or restriction of activity caused by a contemporary social organization that takes no or little account of people who have

48. Fletcher & O'Brien, *supra* note 45, at 546.

49. *Id.*

50. *Id.*

51. Blunkett, *supra* note 44.

52. HARLAN HAHN, UNIV. OF S. CAL., TOWARD A POLITICS OF DISABILITY: DEFINITIONS, DISCIPLINES, AND POLICIES (1985), available at <https://www.independentliving.org/docs4/hahn2.html>.



For instance, some deaf groups maintain they are not disabled at all; they simply communicate with a different language.

physical impairments, thereby excluding them from participation in the mainstream of social activities.

This Social Model is probably too broad to be fully descriptive, partly because persons with disabilities and their disabilities are so diverse. For instance, some deaf groups maintain they are not disabled at all; they simply communicate with a different language.⁵³ The Social Model also has a kind of strident, almost Marxist ring to it. Yet some aspects of it are undoubtedly accurate. For instance, no one would conceive of overhead lights as an *accommodation* for persons not used to navigating the darkness. A video display is standard on a computer, but voice synthesis is an accommodation. If, however, the majority of persons were sightless, the opposite would be the case. Similarly, if the majority traveled by wheels instead of by shoes, stairs – not ramps – would be the accommodation. It is a matter of the perspective of the majority.

What is important for purposes of this paper is the wider focus of the Social Model. Instead of identifying some differentiating characteristic, using that as a basis for a defining category, and then prohibiting discrimination, the Social Model and the Millennial mindset take a broader approach. Both would identify that which makes a situation suboptimal and then take needed measures to approach the optimal, without ever having to define or categorize anyone.

The Differing Tracks of History and, perhaps, the Future

It has been posited that the failure to include people with disabilities within the express coverage of the Civil Rights Act of 1964 had the effect of channeling disability rights advocacy down a separate path from the civil rights movement – with that separate path reflecting both the particular needs and interests of persons with disabilities and the peculiar nature of disability-based inclusion issues.⁵⁴ Internationally, this separate path, by the turn of the century, had developed the distinguishing monikers: “Civil Rights” and “Social Rights.” In reviewing the establishment of the Disability Rights Commission in the UK and the legislation surrounding it, Fletcher and O’Brien observed:

What distinguished disability rights from existing rights on gender and race when the DRC [Disability Rights Commission] came into existence in April 2000 was their encapsulation in primary legislation that looked beyond equal treatment to an ideal of equal social and cultural participation. More than the assertion of rights to identity, equal opportunity, or non-discrimination, disability rights invited an approach that looked forward to substantive equality based upon the need for different treatment rather than the same treatment as everyone else. In addition, it was not concerned merely with equal opportunity, equal treatment or even reasonable adjustment to overcome barriers to participation, but with equality of outcome and experience.⁵⁵

Continuing, Fletcher and O’Brien contend that disability rights focus on matters such as “common goals rather than the assertion of purely minority interests.” This shifts the focus from a “win/lose” situation

53. See, e.g., Rebecca Atkinson, *Is Deafness a Disability?*, BBC (Apr. 2, 2008), http://www.bbc.co.uk/ouch/features/is_deafness_a_disability.shtml.

54. See Fletcher & O’Brien, *supra* note 45, at 546.

55. *Id.*

– too often cited by opponents of the civil rights movement – to a “win/win” scenario. In other words, inclusion is good for everyone. As Fletcher and O’Brien put it, “increasingly, the argument can be made that if it is good for disabled people, it is good for everyone.”⁵⁶

A Better Result; Not a Guilt Trip

That the inclusion of persons with disabilities is “the right thing” and “the moral” thing to do has been conspicuously – and likely deliberately – absent from the disability rights movement. Millennials, probably for an entirely different reason, similarly are not moved by arguments about morality and “the right thing to do.” Millennials have the fundamental and intuitive belief that a diverse team, ultimately, will come up with a better and more creative solution or set of solutions than would be possible with only one person or, the equivalent, a homogenous team of similarly-situated persons.

In the absence of irrefutable empirical proof, this conviction at least finds common sense and anecdotal support. Persons with disabilities, out of necessity, have almost daily experience in solving problems. In a world that largely makes little-to-no accommodation for their disabilities, persons with disabilities must find creative solutions to activities of daily life that others simply take for granted. Persons with disabilities are used to solving problems, scaling walls, and getting around barriers. Engaging the skills of veteran problem-solvers just makes sense.

Again, more anecdotally than empirically, persons with disabilities are thought to come up with creative solutions more readily. For a person who has never had to overcome a disability, the direct and seemingly obvious approach may obscure the existence – or even the possibility – of an alternative solution. By contrast, a person with a disability, used to figuring out alternative solutions to seemingly ordinary tasks, are well-equipped for finding alternative – and often creative – solutions.⁵⁷

No Gain; No Pain?

Seeing inclusiveness as simply the required price for getting better and more creative – and likely more profitable – solutions has what some might identify as a dark side. Just as arguments of morality and “doing the right thing” lack motivational influence for many Millennials, so it is that the absence of a benefit will likely be a disincentive for a Millennial. In other words, if the strategy or the program does not positively affect the bottom line, the program may lose support or be scrapped, even if it is “the right thing to do.” While a baby boomer or Generation Xer might feel compelled to take action because it is the right thing to do, Millennials look for diversity in action and assume heightened creativity and innovation will result, leading to better work product and bottom-line results.⁵⁸

Just as Millennials seem to be impatient with an “us versus them,” win/lose approach, preferring a collaborative team solution, persons with disabilities, generally, do not seek a place at the table as a matter of right or representation, but rather, as a means for contributing to a better result. This is not to say that diversity categories other than disability do not also contribute to an overall better result. It is just that the case for inclusion for persons with disabilities is not based on the demand for basic human or civil rights, but instead, on the substantive benefits all will enjoy by virtue of having diverse input in the workplace. There is, therefore, a kind of harmony between the outcome-based approach to diversity of the disability rights movement and the Millennial mindset.

Inclusiveness and a Crystal Ball

With all of that, we still have to ask what programs to employ to encourage inclusiveness for all people, including persons with disabilities, and we have to ask what these programs will look like. Perhaps it is

⁵⁶ *Id.* at 547.

⁵⁷ Sherbin *et al.*, *supra* note 43 (quoting the Managing Director of Human Resources at Accenture: “For persons with disabilities, innovation is not an option, it is a requirement to get through the day. I think that people who live with disabilities bring incredible ideas and creative solutions to the workplace, and I want them at my table.”).

⁵⁸ SMITH & TURNER, *supra* note 2, at 16 (*e.g.*, “programs aimed at diversity and inclusion should instead focus on improved business opportunities and outcomes as a result of the acceptance of individualism, collaboration, teamwork, and innovation”).



For a person who has never had to overcome a disability, the direct and seemingly obvious approach may obscure the existence – or even the possibility – of an alternative solution.

easier to start by identifying what they probably should not look like. The resistance to defining categorization probably means that so-called affinity groups may play a very limited – if any – role in the future.⁵⁹ A respondent in our informal survey cautioned against mentorship programs that pair “diverse” candidates or associates with “diverse” senior attorneys/partners. Reporting practices that identify and qualify success in terms of numbers or percentages, because they rely on categories and sound like quotas, likely will be deemphasized. Arbitrary rules mandating inclusion for the sake of satisfying prescribed quotas likely will meet with resistance and may even produce resentment toward the inclusion efforts. Moral appeals about the right thing to do may not disappear, but diversity programs, including programs for persons with disabilities, should not rely on moral arguments.

Diversity and inclusiveness efforts of the future will need to capitalize on the team approach to recruitment and problem solving. In almost every industry – and surely the legal profession will join – there is an emphasis on teams and collaboration. Team composition suggestions, not arbitrary rules, will need to emphasize inclusion of the greatest range of diversity that is possible. More care should be given to the composition of interview teams. Educational programs, rather than focusing on the need to increase numbers in key categories, will need to focus on how a diverse team produces better results. Attorneys with and without disabilities should be judged on the quality of contributions and work product.

With an emphasis on teams with widely diverse members, genuine thought will need to be given to conflict resolution and group dynamics. Although increasing diversity may increase creativity, it may also increase conflict. The common goal of reaching better solutions and increasing inclusiveness will be thwarted if conflict gets in the way and is not managed. Similarly, just because work teams consist of an array of diverse persons, that does not mean diverse viewpoints will either be voiced or heard. To produce the optimal outcomes desired and intended from diverse work groups, skills in group dynamics will need to be acquired and honed. In addition, recruiting, rather than focusing on categories, may need to focus on needed perspectives. Homogeneity, if it is the enemy of creativity, will need to be identified, not merely as a bad statistic, but as a potential profit inhibitor, and persons who have demonstrated problem solving skills will need to be moved up on the list of candidates.

Conclusion

Millennials, by sheer numbers alone, will change workplaces including law firms, and industry attitudes and endeavors going forward. Moreover, the change is not likely to be gradual or incremental. Rather, there will likely be a sudden transformation from the civil rights model, with its focus on representation and legal structures, to something more closely resembling the social rights and disability rights movements, with their foci on genuine participation and voice at the table. We are seeing this leap already in the #MeToo and Times Up movements, both started by Millennials. The status quo and incremental change is no longer sufficient; millennials will demand equality-in-fact and inclusiveness without qualification. Millennials and employers would do well to consider looking to the social rights and disability rights movements in shaping their inclusiveness efforts going forward.

59. E.g. Erik Oster, *Deloitte Is Ditching Affinity Groups for Women, Minorities, and LGBT Employees*, AGENCY SPY (July 19, 2017, 4:43 PM), <http://www.adweek.com/agencyspy/deloitte-is-ditching-affinity-groups-for-women-minorities-and-lgbt-employees/134435>.



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Importance of Feedback: The Tale of Two Scenarios

Melinda S. Molina

Associate Dean and Professor of Law, Capital University Law School

How should law firms and partners work to combat implicit bias against Latinas and women of color? How do we give feedback up front and connect personally with new attorneys? Molina shares how to do it and what a big difference these efforts can make.

A law firm partner is working with a summer associate on a client memorandum.¹ This is the first time the partner has worked with a Latina summer associate. He has worked with only a handful of diverse attorneys throughout his career. The partner recently attended a conference on the dearth of women of color in the legal profession. He was somewhat startled by the statistics. He hopes the tide would soon turn. The summer associate then emails a draft of the client memorandum to the partner and waits for a response. The partner and the summer associate may interact in one of two ways.

Scenario 1

The partner notes a grammatical error on the third paragraph of the client memorandum. He views the error as evidence of the summer associate's incompetence. The partner asks an associate to revise the memorandum. He does not provide feedback to the summer associate. Instead, the partner emails the summer associate saying, "Good effort. Hopes all goes well with the rest of your summer." The partner later submits to the hiring committee a somewhat vague evaluation of the summer associate. The partner feels that a critical evaluation will hurt the summer associate's chance at an offer. The summer associate is the first Latina to clerk for the law firm. The partner is also concerned that others will perceive his critical evaluation as a reflection of his bias towards Latinas.

The summer associate does not ask for feedback. She rarely receives or asks for it. She is uncertain if the lack of feedback is due to a bias the partner has towards Latinos. The hostile climate towards Latinos has only exacerbated her concerns. She knows that there are a few attorneys of color at the law firm. She feels enormous amount of pressure to represent all Latina lawyers.

Implicit Bias

Implicit bias could be influencing the partner's assessment of the summer associate. Implicit bias "refers to attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner."² Implicit bias is based in a human tendency to categorize and associate groups with certain positive or negative traits.³ We use these associations often unconsciously as mental shortcuts to make quick judgments in unfamiliar situations.⁴ Generally, these mental shortcuts are formed by "a combination of early experiences, affective experiences, and learned cultural biases."⁵

1. Scenarios discussed in this article were based on several found in these two articles. See Rachel D. Godsil, *Answering the Diversity Mandate; Overcoming Implicit Bias and Racial Anxiety*, N.J. LAW 44 (February 2014); see also Lory Barsdate Easton & Stephen V. Armstrong, *How to Minimize Implicit Bias (and Maximize Your Team's Legal Talent)*, 58 No. 9 DRI FOR DEF. 80 (2016).

2. Cheryl Staats, *Understanding Implicit Bias What Educators Should Know*, EDUCATOR 29 (2015-2016).

3. Barsdate Easton & Armstrong, *supra* note 1, at 80.

4. *Id.*

5. See Caisa Royer, Daniel Hido, & Michael Slotnick, *Defining Implicit Bias*, CORNELL U. L. SCH. SOC. SCI. & L. (2010). See generally Kirwan Institute, *State of the Science: Implicit Bias Review 2013*, IMPLICIT BIAS REV. (2013).

For example, the partner, when assessing the summer associate, may draw conclusions about her performance without a legitimate basis to do so. The partner may associate all Latinos as immigrants who are unwilling and unable to speak English. The grammatical error shows that the summer associate does not have a basic understanding of English grammar. This association may have been formed early on from watching TV and the news, listening to family members, or otherwise simply living in a society with biases towards people of color. How often are Latinos depicted on T.V. with an accented English? Or depicted as an attorney? What attributes do you associate with someone speaking with an accent? If you close your eyes and picture an attorney—how do they look?

The summer associate's grammatical error viewed under the clouded lens of implicit bias proves that she is incompetent. The summer associate may not speak Spanish at all. The same error committed by a white summer associate—if noted at all—is viewed as a simple oversight that is correctable.⁶

In addition to implicit bias, the interaction between the partner and the summer associate might also be affected by racial anxiety. Racial anxiety refers to the heightened stress levels a person experiences when interacting with a person of a different ethnicity or race.⁷ The summer associate may have experienced discrimination in the past and may fear that this interaction is also discriminatory.⁸ At the same time, the partner may be concerned that others, including the summer associate, will assume that he is biased.

Under this scenario, everyone loses. The heightened stress that they feel may discourage them from interacting further. The summer associate does not ask for feedback. The partner does not provide it. A lack of meaningful feedback for the summer associate leaves her unsure of her performance. She has no idea if her assignment was satisfactory or not, more importantly how to improve. She does not have the opportunity to learn, grow and improve. It also impedes the law firm and partner's professional growth.

Effective feedback boosts associate productivity and aptitude, and in turn enhancing the quality of their work.⁹ Better-trained associates working in law firms that invest in their growth are less likely to leave.¹⁰ Law firms and businesses that invest the time and energy to provide meaningful feedback to all of its associates reap the benefits of a diverse and inclusive workforce that is better prepared to deal with an increasingly global marketplace. A more diverse profession may also lead to better access to legal services in underrepresented communities, which often face structural and cultural barriers.

Scenario Two

The law firm trains all its associates and partners on implicit bias including guidance on how to ask and give feedback across racial-ethnic differences. Under this scenario, the partner notes the summer associate's grammatical error. Implicit bias training can help educate attorneys on what it is, how it negatively affects the legal profession, and how to avoid it. He also notices that she adeptly spotted and explained a thorny legal issue. He meets with the summer associate to review the client memorandum. The partner goes over the goals for the client memorandum. He explains that the law firm sets a high expectation for all of their associates, assures the summer associate that she is can meet them, and that all new associates face similar challenges.¹¹

The partner then goes over the strength and weakness of the memorandum including the grammatical error. He provides useful tips on how to avoid them. During the meeting, the summer associate asked probing questions like, "Can you explain what you mean?" The summer associate also asked for specific examples on how to improve. In concluding the meeting, the partner asked her to revise the memorandum

6. Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, Nextions Yellow Paper Series (2014), <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf> (a recent study that found that the mistakes of attorneys of color are often viewed in this way. While, their white counterparts are not. Sixty partners rated identical memos lower in quality and identified more errors when told that the author was black. When told that the author was white the partners commented that the author was a "good writer but needs to work on" or "has potential." While the same errors on the part of black authors was evidence of incompetence).

7. Barsdate Easton & Armstrong, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. Barsdate Easton, *supra* note 1 (discussing and using the "wise" approach to providing feedback across differences in a similar scenario).

by the end of the week. The summer associate took the opportunity to ask if they can meet again to review it, and the partner looked for a date within the next two weeks to schedule the meeting.

The partner conveys his feedback as a reflection of the law firm's high standards and not his bias.¹² The partner assures the summer associate that she can reach those high standards.¹³ The partner then provides the tools to do so. This way of providing feedback creates a way for the summer associate to understand and later use his feedback. A way that might lessen the belief that the partner's feedback is a result of a bias.

Under this scenario, everyone gains. To be useful, feedback needs to be clear, tangible, and actionable, as well as timely—meaning that it relates to a current project so that it can be used while the context is fresh. This better enables the summer associate to take immediate actionable steps to use the feedback. The summer associate, by posing specific questions, helped elicit helpful information and examples. The weariness and anxiousness that both parties faced at the outset is somewhat ameliorated. It may be the initial steps towards a mentoring relationship. Both parties have learned a great deal from this experience.

The following are some tips for giving and receiving meaningful feedback. The hope is that the tips in Part A will provide some guidance on how to avoid implicit bias and give critical feedback. Part B provides tips on how to seek feedback. These tips may not eliminate the effects of implicit bias and racial anxiety—it does propose small steps to address them.

A. Providing Feedback

Be thoughtful. If you find yourself quickly concluding that a person cannot competently perform a task, ask yourself, "On what basis have I drawn that conclusion? Have I offered that person an opportunity to either demonstrate their ability or to improve it?" Think about specific instances where you measured others using the same criteria.

Be explicit and concrete. Make the goals and the high expectation of the task explicit. When giving feedback, provide examples that demonstrate when the goal was achieved and explain why. Do the same with mistakes and areas for improvement. Provide at least one tangible way of improving.

Be timely. Provide feedback when the person has the opportunity to learn and grow from it and at points when they can use the feedback on a related or new project.

B. Asking for Feedback

Be thoughtful. Ask for the specific feedback that you need. Rather than asking broadly, "How did I do?" Ask yourself, "What do I want to achieve from the discussion?" Focus narrowly on an area where you want help.

Explicit and concrete examples. Feedback needs to be clear, tangible, and actionable. Ask for specific examples on how to improve. For example, if you are looking to improve your client interviewing skills then ask, "How do you deal with a client that is being vague or evasive?"

Be timely. Whatever you are told, take notes, thank them and follow through. Try out a suggestion on a related or new project soon after the feedback is given while the context is fresh in your mind. Let the person know that you tried their suggestion. If you find the feedback helpful, build a rapport so that you develop a relationship with the person that will help you navigate your legal career.

12. *Id.* See also Geoffrey L. Cohen, *Breaking the Cycle of Mistrust: Wise Interventions to Provide Critical Feedback Across the Racial Divide*, 143 J. EXPERIMENTAL PSYCHOLOGY 804, 806 (2014).

13. *Id.*

Coffee, Anyone?

An Insider's Look At The Gender Disparity In International Arbitration

Maria Eugenia Ramirez

Partner, Hogan Lovells

Juliana de Valdenebro-Garrido

Foreign Law Clerk, Hogan Lovells

International arbitration is a fascinating area of practice but when one is a Latina or other woman of color, the gender disparities with which one must deal are decidedly more complex than typical gender issues. Ramirez and Valdenebro-Garrido share their thoughts on how women lawyers practicing in an international arena can not only survive but thrive.

I. Introduction

During an important client meeting not too long ago, the Chairman of the Board of Directors of an important Latin American company asked a Hispanic woman, who was present at the meeting, to bring him a cup of coffee, with cream and lots of sugar. The woman happened to be an arbitration practitioner, and was actually one of the company's outside counsel presenting at the meeting, whom the Chair had spoken to on the phone and via email, but had never met in person. A few minutes later, that same Hispanic female attorney gave an impressive hour-long presentation, in Spanish, before the entire Board of Directors, explaining why the company had indeed complied with local law. Notably, she was the only woman in that meeting, which was attended by more than fifteen male members of the company's Board of Directors. During the presentation it became evident that the Chair of the Board was not expecting a Hispanic female attorney to be taking the lead at this meeting. Instead, he saw her as the one responsible for coffee duties.

A few years later, another Hispanic female attorney and arbitration practitioner attended a separate client meeting with a few of her male colleagues. During the meeting, the client, a Latin American man in his mid-50's, was supposed to provide a full description of the relevant facts to his attorneys for a potential arbitration matter. During the meeting, however, the client suddenly stopped his explanation and nervously stated that he did not feel comfortable narrating a conversation he had with the counterparty in front of a woman given the "context" and "intensity" of the conversation. The Hispanic female attorney explained to him that there was nothing to worry about, as all information was covered by the attorney-client privilege, and that it was important for her to know all the relevant facts to adequately represent him. Despite her reassurances, the client, still hesitant to proceed with the story, asked the Hispanic female attorney to step out of the meeting so he could explain all the facts to the "boys in the room," as they would "better understand" the context of the conversation. The "boys in the room," however, made it clear that the Hispanic female attorney was part of the legal team, and that it was essential that she remain in the meeting to hear and learn the full background of the facts of the case.

Four years ago, the same Hispanic female attorney whose client asked her to bring him coffee, was in the middle of a cross-examination of an expert witness during a final arbitration hearing in Latin Amer-



Sexism, gender discrimination and inequality, and lack of diversity continue to be a challenge in international arbitration, a legal field predominantly led by older, white men.

ica when one of the male arbitrators got up from his chair, approached the woman, and started talking to her. He wanted to make sure that she prayed for him and his family next time she attended church services. The Hispanic female attorney very politely and professionally told the arbitrator that she could not talk as she really needed to continue her cross-examination of the expert.

The authors of this paper are the women who went through the experiences narrated above. Sexism, gender discrimination and inequality, and lack of diversity continue to be a challenge in international arbitration, a legal field predominantly led by older, white men. Having collectively worked in more than 30 arbitration proceedings over the years, we have witnessed how time and time again, women practicing in the field of international arbitration are either ignored or belittled by their male counterparts. In fact, out of the more than 30 arbitration proceedings we have worked on, only one proceeding has had a woman serve as an arbitrator, and almost all have had men as lead opposing counsel.

The above is disappointing, considering that the field of international arbitration is, by definition, a mix of various legal systems, cultures, and languages, and, as such, you would expect diversity to be an intrinsic part of its practice. Yet, it was not until recently that gender diversity was brought to the limelight as an issue in international arbitration that needs to be tackled and addressed.

II. The Movement to Diminish Gender Disparity in International Arbitration

In this respect, different stakeholders of dispute resolution practice, such as arbitral institutions, arbitration associations, law firms, and law schools, recently decided to raise their voice in order to seek more gender and geographical diversity in the field of dispute resolution. As part of this movement, the Equal Representation in Arbitration Pledge (the “Pledge”) was launched in 2016 as a call for “counsel, arbitrators, representatives of corporates, states, arbitral institutions, academics and others involved in the practice of international arbitration” to commit to gender diversity in international arbitration.¹ In particular, the Pledge seeks “to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity.”²

ArbitralWomen, an international, non-governmental organization that brings together women who actively practice international arbitration, similarly launched its objective of “advancing the interests of women and promoting female practitioners in international dispute resolution.”³

1. See *Take the Pledge*, EQUAL REPRESENTATION IN ARBITRATION, <http://www.arbitrationpledge.com/take-the-pledge> (last visited February 25, 2018).

2. See *About the Pledge*, EQUAL REPRESENTATION IN ARBITRATION, [HTTP://WWW.ARBITRATIONPLEDGE.COM/ABOUT-THE-PLEDGE](http://www.arbitrationpledge.com/about-the-pledge) (LAST VISITED FEBRUARY 25, 2018).

3. See *ArbitralWomen Outline*, ARBITRALWOMEN, <https://www.arbitralwomen.org/AboutUs> (last visited February 25, 2018).

Arbitral institutions have also been working towards increasing both gender and geographical diversity in international arbitration. For example, as part of its efforts to increase transparency and diversity, the ICC published, in 2016, its first gender statistics, which show how the percentage of women arbitrators has slightly increased from 9.7% (in 2013) to 14.8% (in 2016). In the case of the London Court of International Arbitration (the “LCIA”), the number of women arbitrators appointed by the court also increased from 16% (in 2015) to 20.6% (in 2016).⁴

These efforts have continued to grow worldwide. In fact, just a few days ago (in February 2018), the Hong Kong International Arbitration Centre (the “HKIAC”) launched the “Women in Arbitration” initiative aimed at increasing Chinese women’s participation in the field. The program offers “a chance to discuss issues, network, and develop the next generation of female arbitration practitioners.”⁵

All of these initiatives work together towards a common goal: increasing women representation in international arbitration and generating a network of female arbitration practitioners from diverse backgrounds. Diversity, however, is not only about the number of women arbitrators or women initiatives; diversity requires much more so that sexism, discrimination, and inequality can be abolished. Initiatives like the Pledge and the commitment by arbitral institutions are certainly an important first step towards changing the inequality mindset, but fair parity and full diversity will depend on a collective, proactive effort by the arbitration community at large.

Thus, even if female participation increases in response to the initiatives described above, there will remain various diversity issues (such as sexism and inequality) that will also need to be tackled. In the field of international arbitration, these issues need to be addressed directly by practicing lawyers and arbitrators (not just women, but also men), as these are the professionals who are ultimately responsible for enforcing the Pledge, the arbitration initiatives, and gender diversity awareness. In fact, a recent survey regarding diversity and equality showed that lawyers are aware of the important role that they play in achieving greater gender diversity. When asked about who should be responsible for promoting this diversity change, “[t]he responses received indicate[d] that change is the responsibility of everyone involved in the arbitration process [not just the women].”⁶

III. Bringing About Change

Although it may be difficult to understand how one can contribute to gender diversity and equality in international arbitration, as it may seem to be a problem beyond one’s reach, in our experience there are several ways in which lawyers can bring about change. Marc Galanter’s analysis of the legal field and the role that different players can have in changing the legal landscape proves helpful in this endeavor. In his essay, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, Galanter divided the players of the legal field into two different categories:

- (i) Repeat-Players, or “RPs”, that is, those who “are engaged in similar litigations over time.”⁷ Due to their continued practice and involvement in the legal system, RPs have advantages like “expend[ing] resources in influencing the making of the relevant rules.”⁸
- (ii) One-Shotters, or “OSs,” that is, those who “have occasional recourse to the courts” as they do not generally have access to it. As such, these individuals cannot play an important role in changing the system.⁹

4. Mirèze Philippe, *How Has Female Participation at ICC Evolved?*, ICC DISPUTE RESOLUTION BULLETIN (ISSUE 3), 1, 3 (2017).

5. Shayna Posses, *HKIAC Launches Initiative To Support Women In Arbitration*, LAW 360 (Feb. 16, 2018), <https://www.law360.com/articles/1012917>.

6. BERWIN LEIGHTON PAISNER, INTERNATIONAL ARBITRATION SURVEY: DIVERSITY ON ARBITRAL TRIBUNALS 12 (2017), http://www.blplaw.com/media/download/BLP-Diversity_on_Arbitral_Tribunals_-_Survey_Report.pdf.

7. Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 THE LAW AND SOCIETY REVIEW 95, 97 (1974).

8. *Id.* at 100.

9. *Id.* at 97.



When asked by the client or by the lead counsel to put together a list of candidates to serve as party-appointed arbitrator or Chair, all lawyers should ensure they compile a truly diverse list of candidates.

Galanter considers attorneys to be RPs.¹⁰ This suggests that attorneys, as repeat players, have the ability to control, to change, to affect, and to modify the legal system and the legal profession. In other words, lawyers and international arbitration practitioners, as repeat players, are in a privileged position to promote gender diversity and equality. The fact that they can influence the making of relevant rules on a daily basis gives them the power to encourage the fair and equal participation of women in the field of international arbitration.

That said, how can attorneys add more gender diversity in the international arbitration playing field? The suggestions below can be put into practice immediately, so that we can continue to make a difference in achieving gender diversity and full parity in the field of international arbitration:

- **Provide a diverse list of potential candidates to serve as arbitrators:** When asked by the client or by the lead counsel to put together a list of candidates to serve as party-appointed arbitrator or Chair, all lawyers should ensure they compile a truly diverse list of candidates. In this respect, counsel should make an effort to include as many capable, female practitioners from different regions as possible in the list of potential arbitrators.
- **Create diverse legal international arbitration teams that include female practitioners:** Change starts by way of example. Therefore, take advantage of the diverse background of lawyers who are interested and involved in international arbitration, and make sure that legal teams working in an international arbitration are composed of lawyers from different regions, cultures, and genders. In addition to contributing to diversity and equality, this will likely result in a better performance of the team as it will promote creative, unique, and diverse perspectives, ideas, and strategies.
- **Demand equality in the daily practice of international arbitration:** Make sure you demand equal participation and equal opportunities to the extent possible. Sometimes just asking to include female practitioners in a pitch, a client meeting, or a hearing helps raise awareness as we try to achieve real gender equality.
- **Actively advocate for gender diversity:** Become an active agent of change and advocate for gender diversity and equality in order to increase awareness in others.

Although we still have a long way to go to achieve true gender diversity in international arbitration, we can at least say that we have started to move in the right direction. Notwithstanding, we will only achieve full diversity when all lawyers involved in the field acknowledge the need for change and assume the responsibility of making that change a reality.

10. *Id.* at 114.



About the Authors



Lawrence R. Baca

Lawrence R. Baca is a Pawnee Indian and a past three-term president of the National Native American Bar Association. Now retired, he served for 32 years in the Civil Rights Division, United States Department of Justice, and was detailed to the Office of Tribal Justice as Deputy Director for the last four years of his career. He served as an adjunct professor of federal Indian law at both American University and Howard University School of Law. In 2008, he received the American Bar Association's Thurgood Marshall Award and in 2017 he was presented with the Federal Bar Association's Sarah T. Hughes Award for Civil Rights. In 2008, the Indian Law Section of the Federal Bar Association created the Lawrence R. Baca Lifetime Achievement Award for Excellence in Federal Indian Law. He was, of course, its first recipient.



Christina Blacklaws

Christina studied Jurisprudence at Oxford and qualified as a solicitor in 1991. She has developed and managed law firms including a virtual law firm and setting up the first ABS with the Co-op. More recently, she was Director of Innovation at a top 100 firm.

She holds a range of public appointments including member of the Family Justice Council, trustee of LawWorks, member of the Judicial Diversity Forum and chair of the government's Lawtech Delivery Panel.

Christina is the President of the Law Society of England and Wales and performs a range of ambassadorial and representative functions both domestically and internationally.

She is passionate about diversity and inclusion, technology and access to justice and uses every opportunity to advocate and progress positive change in these areas.

On access to justice, Christina leads on a number of high profile campaigns to protect and empower some of the most vulnerable in our society.

On innovation and the future of legal services, Christina chairs the Law Society's Legal Technology Policy Commission and has also been asked by the government to chair their Lawtech Delivery Panel. She is heavily involved in the technological issues relating to supra-national legislative and regulatory frameworks as well as the need to demystify lawtech and empower all lawyers to embrace relevant technology. Christina leads on the Society's relationship with Barclays to develop lawtech incubators.

On diversity and inclusion, Christina has developed and leads on a programme focused on women in leadership in law. The project has already produced the largest ever global survey on the issue and a toolkit to support the 100 roundtables which are taking place to over summer 2018. A global academic literature review and men's roundtable in autumn 2018 will follow and the work will culminate in an international symposium in June 2019. Christina represents the Women Lawyer's Division and is an active committee member. She also sits on the Thomson Reuters Women in Law Advisory Board and on the advisory boards for women in law (Legal Week) and for LawSmart (a social mobility collective).

Christina is an award winning (for innovation and diversity and inclusion) published author, speaker and lecturer and frequent media commentator.



Diego Carvajal

Diego Carvajal is a Diversity & Inclusion consultant with VallotKarp Consulting in New York. He provides a broad range of services to corporations, law firms, cultural institutions, and other organizations on issues relating to diversity and inclusion, cultural competence, mentoring/sponsorship, gender dynamics and conflict resolution.

Mr. Carvajal began his career as an associate with Cadwalader, Wickersham & Taft and then with Hogan Lovells, both in New York. His practice focused on cross-border finance, representing corporations, financial institutions, and sovereign countries on a broad range of international finance transactions in the U.S., Europe, Latin America, and Asia. Before joining VallotKarp, Diego worked as in-house counsel for Sterling National Bank.



Eliazar Chacha

Eliazar Chacha is a Government Contracts Attorney in the Washington, DC office of Sheppard, Mullin, Richter & Hampton LLP. His practice encompasses litigation, investigations, and white collar matters. He received his undergraduate degree from the University of California, Berkeley, his Master's degree from the New York University (NYU), and his juris doctorate from Columbia Law School, where he was a member of the Law Review.



Rockwell ("Rocky") Chin

Rocky Chin is a labor, community and civil rights activist. Rocky served 25 years as a government civil rights attorney at the New York City Commission on Human Rights and the New York State Division of Human Rights, retiring as the SDHR's Director of the Office of Equal Opportunity & Diversity in 2015. Rocky founded the Asian American Bar Association of New York (AABANY) and taught some of the first law school courses addressing "Asian Americans, Civil Rights & the Law". As civil rights chair of the National Asian Pacific American Bar Association (NAPABA), Rocky help draft its position on affirmative action. He currently serves on the Board of the Asian American Law Fund of New York, the Executive Council of AARP New York, & recently served on the Yale Alumni Task Force on Diversity, Equity & Inclusion.



Jill Lynch Cruz

Jill Lynch Cruz of JLC Consulting helps her clients unleash their full potential to achieve higher levels of career success and satisfaction. As a certified executive coach and career development consultant, Jill advances the development of those she serves in the areas of leadership, executive presence, business and practice optimization, time management and productivity, interpersonal and group communications, work-life balance, as well as career planning, exploration, transition, and change.

As a preeminent scholar and thought leader on the key barriers and critical success factors for Latina lawyers, Jill has published over a dozen academic, professional, and law review articles and book chapters on this topic. Her scholarship in this area has informed her company's mission to help self-empower current and would-be Latina attorneys to better navigate, enhance, and advance their careers. Over the past decade, Jill has also been actively involved with the Hispanic National Bar Association's Latina Commission as a researcher, author, Leadership Academy Co-Chair and Latina Commissioner. She has also served as a member of the Research Advisory Board for the American Bar Association's Commission on Women in the Profession. Jill is also an Associate Professor, Dissertation Chair, and Research Affiliate for the University of Phoenix Graduate School of Business and Technology and School of Advanced Studies.

Jill has over 20 years of senior level human resource management experience, including as an HR executive for several AmLaw 100 DC-based law firms. She is a Certified Professional Coach (CPC), Global Career Development Facilitator (GCDF) and Senior Professional in Human Resources (SPHR). Jill holds a PhD in Organization and Management from Capella University, an MS in Human Resource Management from the University of Maryland, as well as a BS in Psychology from the University of Maryland.



David L. Douglass

Mr. David Douglass is a partner in the Government Contracts, Investigations & International Trade Practice Group in the firm's Washington, D.C. office.

David is an experienced trial attorney who has won trials as a prosecutor, plaintiff, and defense counsel. David has represented numerous companies and individuals in criminal and civil, investigations and litigation. A large portion of David's practice consists of representing health care companies, government contractors, and individuals in criminal and civil fraud investigations and litigation including False Claims Act litigation.

David is a Fellow of the American College of Trial Lawyers. The College is composed of the best of the trial bar from the United States and Canada. Fellowship is extended by invitation only and only after careful investigation to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Membership in the College cannot exceed one percent of the total lawyer population of any state or province.

A distinguishing feature of David's practice has been working on behalf of the government, as well as private companies. In 2013, David was appointed by the U.S. District Court for the Eastern District of Louisiana as the deputy federal monitor over the New Orleans Police Department responsible for reviewing, assessing, and reporting publicly on the NOPD's compliance with a far reaching Consent Decree. David has also led two high-profile government investigations. In 1994, he served as executive director of the White House Security Review, which resulted in the closing of Pennsylvania Avenue in front of the White House. In 1993 he served as assistant director of the Treasury Department's investigation of the raid on the David Koresh compound in Waco, Texas. David served as a Department of Justice Trial Attorney in the Civil Rights Division, Criminal Section. Prior to that he served as an Assistant

United States Attorney for the District of Massachusetts.

David received his J.D. *cum laude* from Harvard Law School and his B.A. from Yale College.



Jeannette Espinoza

Jeannette Espinoza is an attorney admitted to practice in New York State and the United States District Court, Southern and Eastern Districts of New York State. She received her Bachelor of Arts degree from Stony Brook University and her law degree from Albany Law School. As a practicing attorney for over twenty-five years, she has experience in government and private sectors as well as higher education.

Ms. Espinoza started her career as a Legal Aid attorney defending children's rights in Family Court. In private practice she expanded upon her experience into other areas such as matrimonial law, bankruptcy, immigration, small business and real estate matters. During her years in private practice, she became an active board member of the Puerto Rican Bar Association and taught courses as an adjunct professor at community colleges.

In 2006, Ms. Espinoza began teaching for the City University of New York at New York City College of Technology where she currently is an assistant professor in the Law and Paralegal Studies department. Her area of scholarship is in the legal profession and has published articles relating to the practice, ethics and education of paralegals. She has been active on university wide diversity projects and was awarded a grant where she developed Access to Legal Assistance, a pilot program providing legal assistance to the local Latino community. She is the faculty advisor to the students' law club facilitating experiential learning activities as well as mentoring students.



Kimberly Forte

Kimberly Forte is a SOGI/E Inclusion Consultant and Cultural Humility Trainer. For seven years and until recently, Kim served as the Supervising Attorney for The Legal Aid Society's LGBT Law and Policy Unit. This groundbreaking SOGIE diversity and inclusion legal unit, which she created, is one of the first of its kind within a social justice organization. In her role, Kim investigated, developed and served as lead or contributing counsel for class action litigation that benefits low income LGBTGNCQ+ New Yorkers. She was responsible for integrating LGBTGNCQ+ cultural humility through-out the organization and was the primary author and lead trainer of LGBTGNCQ+ cultural humility trainings for both the Society and outside stakeholders to improve legal and social services for the LGBTGNCQ+ communities. She conducted SOGIE inclusion trainings at the local, state and national levels. Additionally, Kim represented Legal Aid on public policy efforts for the Society's three practices: Juvenile Rights, Civil Legal Services and Criminal Defense. She served with the Society for 18 years and previously served in various positions representing youth in the foster care and juvenile justice systems. Kim received her B.A. in Political Science from the University of Florida and her J.D. from SUNY at Buffalo School of Law. Kim resides in Brooklyn, NY where she shares her life with her spouse Tina, their twin three year olds, and their beloved dog Rufus.



Mark C. Gordon

Mark C. Gordon is the President and Dean of Mitchell Hamline School of Law in St. Paul. Prior to his arrival in the Twin Cities in July, 2015, Gordon served as President of Defiance College, a small, liberal-arts based undergraduate institution in rural Northwestern Ohio, and before that as Dean of University of Detroit Mercy School of Law in Detroit.

Gordon is originally from New York, where he worked as an aide to New York's Governor Mario Cuomo in the mid-1980's and then, during the first Clinton Administration, as Chief of Staff to Andrew Cuomo at the US Department of Housing and Urban Development.

Gordon has also served as Associate Professor in the Practice of Public Affairs at Columbia University's School of International and Public Affairs. He received his B.A. and his Masters in International Affairs from Columbia University, and his law degree from Harvard Law School.



Lea S. Gutierrez

Lea S. Gutierrez is Senior Litigation Counsel and Director of Diversity and Inclusion at the Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC), where she investigates and prosecutes allegations of lawyer misconduct. In addition to her role as a litigator, Ms. Gutierrez leads the ARDC's efforts to recruit diverse attorneys, promote a culture of inclusion, and create methods for increased public accessibility to the ARDC. She received her undergraduate degree from Hampton University in Virginia, her law degree from Temple University School of Law in Pennsylvania and her Masters of Forensic Sciences from The George Washington University in Washington D.C. She also received her certificate in Strategic Diversity and Inclusion Management from Georgetown University in Washington D.C. For three years, she served as Co-Chair of the YLS Professional Responsibility Committee of the Chicago Bar Association and she is currently a member of the American Bar Association Standing Committee on Professional Discipline. She has been a presenter at various bar association and law firm events on topics related to professional responsibility, lawyer regulation, and diversity and inclusion.



Ellen Yiadom Hoover

Ellen Yiadom Hoover is an associate in Ropes & Gray LLP's corporate department and a member of the firm's investment management group. Ellen's practice focuses on counseling registered investment companies (including exchange-traded funds, open-end mutual funds and closed-end funds) and independent directors of registered investment companies on a range of regulatory, compliance and transactional matters arising under the Investment Company Act of 1940. In addition to her practice, Ellen is passionate about counseling law students and junior associates through the challenges of law firm life and improving diversity in the legal profession and beyond. She also writes and speaks on these topics.

While a student at Harvard College, Ellen served as a student liaison for the Harvard Foundation for Intercultural and Race Relations where she facilitated communication among and organized events for various racial and cultural groups on campus. After graduating from college, she worked for The Film Posse, Inc. as a production assistant on a documentary about high infant mortality rates within the African American community. The documentary, titled "When the Bough Breaks," is part of the award-winning PBS series *Unnatural Causes...Is Inequality Making Us Sick?* While with The Film Posse, she also assisted with the feature-length documentary, *Lorraine Hansberry: Sighted Eyes/Feeling Heart*, about the life of the legendary playwright of *A Raisin in the Sun*. While in law school at the University of Virginia School of Law, Ellen served as president of the Black Law Students Association and was on the Board of the Center for the Study of Race and Law.

Ellen currently serves on the Board of the Daniel Murphy Scholarship Fund and the Associate Board of The Chicago Committee on Minorities in Large Law Firms. She is also a co-founder of Diversity & Chill, which hosts gatherings of Chicagoans from different racial, cultural and socio-economic backgrounds for brunch or happy hour in different neighborhoods as a way to encourage dialogue.



Derek K. Ishikawa

Derek K. Ishikawa is an associate in the Santa Monica office of Hirschfeld Kraemer LLP. He represents and counsels employers in all areas of labor and employment law, including discrimination, harassment, retaliation, wrongful termination, as well as trade secret, breach of contract and employment-related tort claims. Derek represents employers from a wide variety of industries, including hospitality, food and beverage, banking and finance, retail, higher education and information technology. Derek also represents employers before administrative agencies such as the Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing. Derek regularly presents training to and counsels colleges and universities on employment matters, as well as Title IX, student affairs, risk-management, data privacy and other compliance issues.

Previously, he was a litigation association at Loeb & Loeb LLP, where he defended against consumer class actions. Derek graduated from UCLA with a joint J.D. /M.P.P. degree and served as Co-Chief Managing Editor for the Asian Pacific American Law Journal. In addition, Derek externed for U.S. District Court Judge Dean D. Pregerson. Prior to law school, Derek worked as a Management Aide for the City of Torrance, as a California Senate Fellow in Sacramento, and as an assistant English teacher in Ibaraki, Japan. Derek graduated from Pomona College with a B.A. in Public Policy Analysis-Politics. He currently serves on the Board of Governors for the Asian Pacific American Bar Association of Los Angeles County.



Steven T. John

Steve is the Founder and Principal search consultant at Steven John & Associates, LLC, an executive search firm exclusively focused on recruiting talented lawyers for a diverse mix of organizations including corporations, universities, non-profits, and law firms.

Steve brings deep experience in the recruitment of attorneys from a wide range of disciplines with a focus on attorneys who are expert in Corporate, Real Estate, Intellectual Property, Energy, and Higher Education law. That experience reflects a broad range of industries and includes both private and public companies as well as academic and not-for-profit institutions.

Over the course of his consulting career, Steve has worked with, and placed, a diverse and talented group of attorneys. He is deeply committed to principals of fairness in every search he conducts and believes the best recruitment efforts generate interest from a diverse group of professionals, whatever the role.

While Steve works with his clients to define what diversity means to their organizations, he is steadfast in his efforts to reach out to all qualified prospects, including those who come from underrepresented communities and/or personal identities.

Steve believes his clients are best able to achieve their financial and operational goals *and* live up to their mission statements when their organizations reflect the diversity of the communities they serve.

Steve earned his J.D. from the University of California, Hastings College of the Law and is a former Trustee of the University of California, Hastings College of the Law Foundation.



Hannah Kelly

Hannah Kelly is currently a master's student in Education Policy and Management at the Harvard Graduate School of Education, where she studies leadership and organizational learning, teacher quality, and quality in early childhood programs. Prior to her graduate studies, she worked as a program coordinator for the Extended Day program at the University of Chicago Laboratory Schools. Hannah worked with the program's administrative team to lead a group of teaching interns and to support professional development efforts across teaching teams. Before Laboratory Schools, she was a program associate for the Institute for Inclusion in the Legal Profession and for Lawyers Lend-A-Hand to Youth. She planned and organized events, assisted in fundraising efforts, and edited articles for publication. Hannah graduated with honors from the University of Chicago and holds a Bachelor of Arts in Interdisciplinary Studies in the Humanities. She currently resides in Cambridge, MA, and is a train ride away from her childhood home in Rhode Island.



Patricia Kinaga

Former prosecutor Patricia Kinaga is an employment attorney who has represented corporations in numerous industries, including retail, healthcare, restaurant, and banking. She was one of the first Asian American female partners with Seyfarth Shaw, Jones Day, and LTL Attorneys LLP. Recognized for her extensive state and Federal court trial experience in employment law, Ms. Kinaga has been retained to handle high profile complex matters. She received her B.A. from UCLA, has a Master's degree in City Planning from UC Berkeley and received her J.D. from Georgetown University. Co-founder of the Asian Pacific American Dispute Resolution Center and the Asian Pacific Women's Center domestic violence shelter, Ms. Kinaga is co-founder and Chair of Asian Pacific Islanders with Disabilities of California, and is an appointed member of the ABA Commission on Disability Rights. She received Public Service Awards from Asian Americans Advancing Justice and the NOW Legal Defense & Education Fund, and the Women in Business Award from the State Assembly. Ms. Kinaga is recipient of the UC Berkeley Haas Public Service Award, which recognizes an alumna who has made significant contributions to improving society in the United States.



Chris M. Kwok

Chris M. Kwok was born in China and raised in Queens, New York. A graduate of Stuyvesant High School, he majored in Government and minored in Asian American studies at Cornell University. Mr. Kwok was active in the student body, serving in leadership positions in the Cornell Asian Pacific Student Union and Asian American Coalition. He was also a staff member of Cornell's Asian American Resource Center, where he developed research and teaching resources. He graduated from UCLA Law School, where he served on the staff of the Asian American Pacific Islander Law Journal. During law school, Chris worked for the Consent Decree Monitor for the San Francisco Unified School District, where he worked on civil rights issues as related to education access.

Chris Kwok worked at the U.S Equal Employment Commission, New York office for 15 years. As a coauthor, Mr. Kwok has published an essay in the January 2008 issue of the Fordham Urban Law Journal: *"Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field."*

Mr. Kwok is currently a Mediator & Arbitrator in private practice at JAMS.



Deanna Kwong

Deanna Kwong is IP Litigation Counsel within the Office of Legal and Administrative Affairs at Hewlett Packard Enterprise Company ("HPE"). She and the rest of the IP Litigation team are responsible for managing all IP lawsuits that are filed against or by HPE worldwide. Prior to joining HPE, Deanna was a patent litigator for over a decade at Covington & Burling LLP. Deanna was a Regents' and Chancellor's Scholar at the University of California at Berkeley, where she also received her law degree. In her spare time, she serves on the Board of Directors for Asian Pacific Islander Legal Outreach, the California Minority Counsel Program Ambassadors' Council, and the Advisory Board for the Tahiri Justice Center, and enjoys running and training for marathons. Deanna was the 2017 HPE Leadership Council of Legal Diversity Fellow.



Philip Lee

Philip Lee is a professor of law at UDC David A. Clarke School of Law. He teaches Property I and II, Constitutional Law I, Torts II, Education Law, and Race and the Law. Professor Lee has won the “Outstanding Faculty Award” for teaching. He has served as faculty advisor to the Asian Pacific American Law Students Association, American Constitution Society, National Association against Police Brutality, Academic Collaboration for Excellence, and Black Law Students Association’s Moot Court Competition Team.

Prior to starting his law teaching career, Professor Lee earned his doctorate at the Harvard Graduate School of Education, where he was a Harvard University Presidential Scholar and a student convocation speaker. While a doctoral student, he was counsel of record for an amicus curiae brief in support of the respondents in *Fisher v. University of Texas*, a case before the U.S. Supreme Court that posed a challenge to race-conscious admissions in higher education. In addition, Professor Lee taught a course at Harvard titled Race, Law, and Educational Access.

Before starting his doctoral studies, he was the Assistant Director of Admissions at Harvard Law School, where he was a member of the admissions committee and led the office’s diversity outreach initiatives for four years. He also served as an adjunct faculty member at New England Law | Boston, teaching appellate advocacy to second year law students in the fall semesters for two years. Prior to his teaching and administrative work at Harvard and New England Law, he was a trial attorney for five years—working first as an Assistant Corporation Counsel at the New York City Law Department and later as an associate at a white-collar criminal defense boutique in Manhattan.

Professor Lee is a magna cum laude Phi Beta Kappa graduate of Duke University in psychology and sociology, with a minor in religion, and holds a J.D. from Harvard Law School, where he interned at Harvard Defenders, the U.S. Attorney’s Office in Boston, and the Criminal Justice Institute. He is admitted to practice law in the state of New York and the commonwealth of Massachusetts, federal courts in New York and Massachusetts, and before the Supreme Court of the United States.

Professor Lee’s research and writing centers on academic freedom, diversity and educational access, school law (K-12), higher education history and law, and property law and race.



Bendita Cynthia Malakia

Bendita Cynthia Malakia is a dynamic and highly sought after professional coach, trainer and diversity consultant with the Malakia Movement LLC. Bendita also has undertaken a joint venture to launch the Institute of Excellence, whose vision is to cultivate leaders that change cultures through Leadership Development Training, Change Management Consulting and Coaching for Results. She empowers aspiring executives, executives and diverse professions to achieve their personal and professional goals and provides leadership development training to organizations. Bendita provides the individual and organizational keys to unlock the potential of each professional.

Bendita has over a decade of professional coaching and diversity training experience, having coached and trained countless attorneys from newly barred and midlevel attorneys to partners and general counsel, and myriad other professionals. She has trained lawyers in the legal departments of Fortune 500 companies, national for-profit and non-profit organizations, AmLaw 100 law firms and mid-size law firms. Bendita considers having mentored nearly 100 women throughout her career to be one of her greatest achievements to date.

Bendita's clients call her coaching "dynamic and authentic" (senior associate at a top 10 law firm) and "transformative" (deputy general counsel for a \$250+ million revenue energy company), providing a "shift that is truly life changing" (managing partner of an AmLaw 200 law firm). 94% of Bendita's organizational clients are extremely satisfied with her services, and 100% of her clients are satisfied and agree that her services are "well worth" the investment.

Prior to founding the Malakia Movement LLC, Bendita spent many years practicing international project finance law at Norton Rose Fulbright (formerly Fulbright & Jaworski LLP). Bendita also served as Counsel at International Finance Corporation (World Bank Group) and Vice President & Assistant General Counsel at Goldman Sachs. Bendita has received accolades for her legal acumen, including being named a 2015 Rising Star by Super Lawyers, to Who's Who Legal – Project Finance in Washington, DC for 2015, and to Who's Who in Black Dallas in 2016. The Chief Diversity Partner of an AmLaw 100 firm has lauded her large law firm and in-house counsel experience as being "instrumental in her ability to fully understand the diversity and inclusion challenges" that legal organizations face.

Bendita currently serves on the Board of Directors of the National LGBT Bar, and previously spent nearly a decade as a member of the Board of Directors of the Harvard Real Estate Academic Initiative. Bendita is a proud graduate of Barnard College and Harvard Law School. She enjoys exotic travel, Tina Turner, wine and loves spending time with her amazing wife Chauntel, an Aetna pharmacist.



I. Edward Marquette

Ed Marquette is a partner with Kutak Rock LLP, in the firm's Kansas City, Missouri office. He is the senior partner for intellectual property law. He is a member of the ABA'S Intellectual Property Law Section and has served as the chair of numerous different IPL Section committees and subcommittees. Presently, he is the Chair of the Section's Diversity Action Group, and is the current Liaison to the ABA'S Commission on Disability Rights. He has shaped or helped shape numerous programs, policy changes, and initiatives for increasing diversity and inclusiveness in the legal profession and has led or facilitated in an array of inclusiveness educational/motivational programs.

Mr. Marquette earned his J.D. in 1976, *cum laude*, from Harvard University Law School.

His practice today is largely focused on crafting complex multiparty development agreements for a range of technologies, including computer chips, electronics, mechanical devices, aviation-related electronics and other

components, medical diagnostic probes, LED displays, and computer programs. His background in trade regulation law assists him in guiding clients around the unique antitrust and international law pitfalls inherent in multiple party transactions and alliances, including franchising, distributorships, and other alliances and joint venture arrangements.

He also heads the firm's dentistry law practice, assisting numerous clients through the complex tangle of federal and state laws and regulations pertaining to the corporate practice of dentistry.



Kimberly McKelvey

Ms. McKelvey serves as both the Director of Strategic Focus and Director of Diversity for Kutak Rock.

As the Director of Strategic Focus at Kutak Rock, Ms. McKelvey works with our leadership to maintain the firm's culture and values and position our firm for continued and long-term success. She serves as a convener and facilitator to Kutak Rock's attorneys, whether in one-on-one conversations or in working groups, departments, national practice groups or committees.

Prior to joining our firm, Ms. McKelvey served as the Executive Director of ALPS Foundation Services for seven years. In that role, she consulted with attorney groups nationwide on strategic and business planning, with a focus on designing individualized planning processes to match the needs of each client.

In her role as Director of Diversity, Ms. McKelvey coordinates the National Inclusiveness and Diversity Committee and Forum. The Committee focuses on targeted, firm wide strategic diversity and inclusiveness goals designed to continuously support and improve our diverse and inclusive environment. The Forum, open to every person in the firm, is comprised of small groups generated by individual interest; each Forum Group develops activities specific to the interests and goals of the Group members. Together, the Committee and Forum comprise a firm wide effort to manifest a value our firm has held dear since its inception: creating a truly inclusive work environment for people of all backgrounds and experiences and broadening the depth of experience and opinion for the benefit of our workplaces, clients and communities.

Ms. McKelvey works closely with the Chairperson of the Diversity Committee and Forum, the Chairperson of the firm and the Executive Committee to support the efforts made by our attorneys and staff to improve diversity and inclusiveness at Kutak Rock and in our communities.

Prior to joining Kutak Rock, Ms. McKelvey served for 10 years as a trainer, Board member and Chairperson for the National Coalition Building Institute-Missoula, a statewide and regional nonprofit dedicated to reducing institutional prejudice and discrimination. She worked for four years with the Missoula City/County Office of Planning and Grants as a crime victim advocate, grant writer and court system advocate. In those roles, Ms. McKelvey provided diversity, anti-bullying, prejudice reduction training and conflict resolution facilitation for numerous institutions, including The University of Montana School of Law, The University of Montana, the National Forest Service, court systems and public school systems.



Brandon R. Mita

Brandon R. Mita is an Associate in the Washington, D.C. office of Littler Mendelson, P.C. In his practice, Brandon counsels and represents employers across multiple industries on a wide array of labor and employment issues. He has appeared before various state and federal courts, the American Arbitration Association, JAMS, the Equal Employment Opportunity Commission (EEOC), and other state and local agencies responsible for investigating discrimination, harassment, and retaliation. Brandon also devotes a substantial part of his practice to representing employers in complex class and collective actions involving overtime and other wage-related claims.

As part of his practice, Brandon has written and presented on various labor and employment topics primarily related to ways in which employers can reduce employment-related litigation and develop innovative compliance measures that increase productivity and workplace morale. He is also a regular contributor to Littler's Annual Report on EEOC developments.

In addition to his work representing and counseling employers, Brandon regularly provides his services to several non-profit organizations on a *pro bono* basis. He previously served as the National Legal Counsel for the Japanese American Citizens League, the nation's oldest and largest Asian Pacific American civil and human rights organization, and he is the current *pro bono* General Counsel for the National Japanese American Memorial Foundation.

Brandon is an active member of numerous organizations and bar associations, including the Chicago Bar Association, the Asian Pacific American Bar Association of the Greater Washington, D.C. Area, the D.C. Bar Association, the National Asian Pacific American Bar Association, the National Native American Bar Association, and the National Employment Law Council. Moreover, he is an Associate Member of the U.S.-Japan Council, and a board member and membership chair for the Washington, D.C. Chapter of the Japanese American Citizens League.

Brandon received his J.D. from Howard University and his B.A. from the University of Illinois at Chicago. He is admitted to the Illinois and District of Columbia bars.



Melinda S. Molina

Professor Melinda S. Molina is an associate professor at Capital University Law School. Her scholarship focuses on how the law impacts subordinate and marginalized groups in the United States. She coauthored two national studies on Latina lawyers: *National Study on the Status of Latinas in the Legal Profession*, 37 PEPP. L. REV. 971 (2010) (with Jill Cruz) & *La Voz de la Abogada Latina: Challenges and Rewards in Serving the Public Interest Sector*, 14 N.Y. CITY L. REV. 147 (2010) (with Jenny Rivera and Jill Cruz). Professor Molina was a fellow at the Ronald H. Brown Center for Civil Rights and Economic Development at St. John's University School of Law. Before joining academia, she was an associate in the New York office of Sullivan & Cromwell LLP. Professor Molina serves as the faculty advisor to the Hispanic Law Students Association. She is also the Chair of the Hispanic National Bar Association (Region X) MetLife Mentoring Program.



Laurie A. Morin

Laurie Morin is a Professor of Law at the University of the District of Columbia David A. Clarke School of Law (UDC-DCSL). She is also the founder and director of the Gender Justice Project (GJP), an educational and advocacy organization dedicated to ending gender-based violence and exploitation.

The GJP sponsored a conference in October 2017 entitled “Nine Months Post-Inauguration: Moving Beyond Resistance. Creating an Action Plan for Gender Justice in the New Political Reality.” This conference brought together legal scholars, practitioners, law students, and activists to discuss the pressing issues of the day, including reproductive justice, campus sexual violence, the gender wage gap, marriage equality, hate crimes against Muslim women, and immigrant women in detention. A highlight of the conference was a panel discussion on “Intersectionality in Political Leadership,” featuring women candidates and representatives from Emerge America and She Should Run. The theme of the 2019 conference will be “Ending Modern Slavery and Human Trafficking.”

Professor Morin is also co-founder of the law school’s Service-Learning program, in which faculty members and students travel together to parts of the country that need legal assistance to recover from natural and man-made disasters. She has accompanied students on trips to New Orleans to provide services to survivors of Hurricane Katrina, Mississippi to provide legal services in the wake of the BP oil spill, and Texas to assist women and children refugees from Central America who were detained at the Karnes Detention Center.

Professor Morin joined the faculty of UDC-DCSL in 1996 and has served many roles since that time. She currently teaches in the Legislation Clinic, supervising students on policy projects for non-profit and community organizations that are working to lift vulnerable populations out of poverty with improved economic security and workplace protections as well as access to other civil rights. She also teaches courses on Women in the Law; Gender, Sexuality and the Law; and Professional Responsibility. Professor Morin served as Associate Dean for Academic Affairs from 2012 until 2016. Prior to taking on that role, she was a supervising attorney in the Community Development Law Clinic (CDLC), which represents low-income entrepreneurs, nonprofit organizations, and community-based organizations in a variety of transactional law matters.

Professor Morin is committed to education, empowerment, and equality for women and girls around the world. She has engaged in a variety of volunteer activities to further those goals, including serving as a volunteer mentor for Empowered Women International, and a member of the leadership team of the Enterprising Women Mentoring Forum for high school girls.



Randall R. Murphy

Mr. Murphy grew up in Nebraska and graduated from the University of Nebraska-Lincoln in 1985 and the Yale Law School in 1989. While at UN-L he served as Chairmen of the Native American Student Association for several years and as the University Program Council Chair for Native American Cultural Events. At Yale he served on the Steering Committee of the Latino/Asian/Native American Student organization and the American Indian Law Students Association.

He currently sits on the Los Angeles City/County Native American Indian Commission as a mayoral appointee and is a Director of the Wawokiye Foundation, which serves the Native Community of Los Angeles, particularly during the holiday season, focusing on Native children in the foster care system and TANF recipients.

He is employed as a Deputy Attorney General with the California Department of Justice. He can be contacted at Murphyr2murphy@aol.com.



Emily D. Murray

Emily D. Murray serves as Chief Marketing Officer and Director of Intellectual Property for Winterfeldt IP Group. She has nearly 20 years of experience in supporting legal practices, primarily working in the intellectual property arena for large global law firms.

Emily directs Winterfeldt IP Group's marketing and business development activities. Her responsibilities include preparing client development materials, coordinating participation in RFPs and other business development opportunities, and managing the firm's brand presence. She facilitates opportunities for team members to participate in industry activities such as professional association memberships, and organizes internal client advisories and webinars as well as external publications and speaking engagements. Emily also develops and executes client relations events, such as mini-conferences and receptions. In addition, Emily ensures Winterfeldt IP Group's resources are allocated to allow robust support for pro bono clients as well as participation in diversity and inclusion and other CSR activities, in keeping with the firm's core values.

Emily, who holds a BA in English and an MBA, also provides non-legal business advice to clients in the brand protection, Internet and policy arenas. She serves as an advisor on client communications, ensuring they offer guidance that is both thoughtful and business-minded and that can be implemented easily by clients' in-house teams. Emily's professional activities include participation in the International Trademark Association, where she has served on several committees, and membership in the American Apparel & Footwear Association's Brand Protection Council and ICANN's Intellectual Property Constituency. She has co-authored articles relating to the diversity experience in law firms, and has spoken on domain name enforcement issues at INTA's Trademark Administrators Conference.



Fran Ortiz

Fran Ortiz is Professor of Law at South Texas College of Law Houston and adviser to the school's Animal Law Clinic. She joined STCLH in 1996 and teaches animal law, environmental law, natural resources management, water law, and property. Before teaching full-time, Professor Ortiz practiced law with the Austin offices of Jones Day and Baker Botts and taught as an adjunct professor at the University of Texas at Austin. Professor Ortiz's research interests lie largely in the area of animal law, land use, conservation, and endangered species, and she has written several articles and amicus briefs on these issues. She currently serves as the immediate past chair of the Animal Law Section of the American Association of Law Schools and is chair-elect of the ABA-TIPS Animal Law Committee. She has previously served as a director on the board of the Texas Humane Legislation Network, a council member on both the Animal Law and Environmental Law Sections of the Houston Bar Association, and as chair, vice chair and treasurer of the State Bar of Texas Animal Law Section. Professor Ortiz received her J.D. from Harvard Law School and her B.A. from the University of Texas at Austin.



Enrique Ortiz Ortega

Enrique is Vice-President in the Regulatory Reform Strategy group of Morgan Stanley's Legal and Compliance Division. In this role, Enrique works on the interpretation, advocacy, and implementation of major regulatory initiatives in the US and the EU. Most recently, Enrique helped lead Morgan Stanley's implementation of the Markets in Financial Instruments Directive II ("MiFID II") in the Americas across the Fixed Income and Institutional Equities businesses.

Prior to his role at Morgan Stanley, Enrique was a Manager in the Regulatory Enforcement practice at KPMG where he advised global US-based investment banks on the establishment of model risk frameworks in adherence to OCC and Federal Reserve Board guidance, counseled major US broker-dealers on the reorganization of compliance and AML programs in the US and the EU, and advised multinational wealth management firms on matters before US regulators in relation to enforcement matters involving Latin American businesses.

Before joining KPMG, Enrique was Assistant General Counsel at the Clearing House Association and The Clearing House Payments Company where he was responsible for advocacy before the European Commission, leading all advocacy related matters before the US Department of the Treasury, and serving as payments counsel for the systemically important CHIPS system.

Enrique is actively involved in Pro Bono efforts involving violence against women and immigration related clinics with the Volunteers of Legal Service Organization and Her Justice in New York City.

Enrique holds a J.D. from the University of North Carolina at Chapel Hill School of Law, a Master's of Science in the Politics and Government of the European Union from the London School of Economics, and a Bachelor of Arts from the Pennsylvania State University in Political Science and Communications. Enrique is admitted to the bar of the state of New York. Whilst in law school, Enrique was part of the 2L Honors Program at the US Com-

modity Futures Commission in Washington, DC and legal summer associate at the British Bankers Association advising on trans-Atlantic financial reforms.

Enrique has lived in the United States, Canada, Mexico, the United Kingdom, and Greece, and speaks English, Spanish, and Portuguese fluently. In addition to enjoying skiing, soccer, and practicing conversational French; Enrique is a member of the World Affairs Council of Northern California, Young Professionals in Foreign Policy in New York City, and the Young Professionals of the Americas in Washington, DC.



Maria Eugenia Ramirez

Born and raised in Puerto Rico, Maria Eugenia Ramirez is passionate about international law. In 2002, she joined our newly opened Miami office, where Hogan & Hartson (now Hogan Lovells) was seeking bilingual lawyers to establish an international arbitration practice. Maria Eugenia helped create and develop the practice, which over the years has grown exponentially not just in Miami but around the world.

Today, Maria Eugenia still focuses her practice on international arbitration, with an emphasis on Latin America and the Caribbean. She has represented clients from El Salvador, Panama, Venezuela, Ecuador, Mexico, Guatemala, Chile, Argentina, Dominican Republic, and Puerto Rico with respect to contract, construction, and telecommunications disputes. She handles international arbitration matters in both English and Spanish before the International Centre for Dispute Resolution of the American Arbitration Association (ICDR), the International Court of Arbitration of the International Chamber of Commerce (ICC), and the International Centre for Settlement of Investment Disputes (ICSID).

Maria Eugenia began her legal career in the litigation group of the largest law firm in Puerto Rico. She moved to the mainland United States in the hopes of working with more international clients, choosing Miami due to its proximity to Latin America. Her current practice allows her to travel all around Latin America and the world, an opportunity she did not have in previous positions.

Before entering private practice, Maria Eugenia worked for the Honorable Juan M. Pérez-Giménez, U.S. District Court Judge for the District of Puerto Rico, in San Juan. She also served as legal counsel and sat on the board of directors of the March of Dimes, Puerto Rico Chapter, also in San Juan.

She is the only lawyer at Hogan Lovells licensed to practice law in Puerto Rico state courts.

She has been ranked in Chambers Global, Dispute Resolution (Puerto Rico) and Litigation (USA) (2013-2014) and received the Daily Business Review's Most Effective Lawyers - Pro Bono Award (2007) for successfully representing a pro bono client in a federal jury trial concerning disability discrimination and retaliation claims.



Meredith Emerson Ritchie

Meredith Ritchie, a Chicago native, graduated from Hamilton College in Clinton, NY and obtained her JD from DePaul College of Law in Chicago.

Meredith has had a diverse legal career in Chicago starting out in private practice where she litigated tort actions. A large portion of her litigation included defending a Fortune 100 petroleum company.

Meredith then served as an Assistant State's Attorney for Cook County, Illinois in both the civil and criminal divisions. She then took her experience to the State of Illinois where she contributed to the Illinois Department of Public Aid and then served as Deputy General Counsel to the Department of Central Management Services.

Meredith then served as in-house counsel for Accenture, an international technology consulting firm.

Currently, Meredith is VP, General Counsel & Chief Ethics Officer for Alliant Credit Union, a \$10 billion dollar financial cooperative, in Chicago, Illinois. There, she oversees the Legal Department, the Ethics Program and is a member of the Senior Leadership Team. Meredith is known for bringing pragmatic and creative business and legal solutions to her clients. Her consultative approach, coupled with her energy, positivity and thorough knowledge of the law, enable her to add value to the management team of her organization. Meredith enjoys leading her diverse team and helping them realize and maximize their potential.

Meredith chaired the Standing Committee on Women and the Law of the Illinois State Bar Association as well as the Young Lawyers Division. She served on the Board of Managers of the Chicago Bar Association. Currently, Meredith is on the Board of Directors of the Coalition of Women's Initiatives in Law, the Board of Directors of the Alliant Credit Union Foundation and is Chair of the Operations Sub-committee of the American Bar Association Credit Union Committee.



Mona Mehta Stone

Mona Mehta Stone serves as Senior Vice President, General Counsel and Chief Compliance Officer of Goodwill of Central and Northern Arizona. She has twenty years of wide-ranging experience as an attorney and compliance specialist. Ms. Stone has the rare ability to look beyond litigation and dispute issues in order to provide integrated business strategies and a practical, efficient approach to problem-solving. Having successfully defended numerous complaints at administrative hearings, arbitrations, mediations, and trial, Ms. Stone is a published author and frequent speaker at seminars and training sessions on labor and employment, compliance, and business law topics.

Ms. Stone has served on a number of non-profit boards, including the Association of Corporate Counsel In-House Counsel Pro Bono Commission (Libraries Group Leader), ATHENA International, and the Institute for Inclusion in the Legal Profession.

Ms. Stone graduated from Bradley University in 1994 and earned her J.D. from Tulane University School of Law in 1997, where she served as busi-

ness editor of the *Tulane Environmental Law Journal*. Based on her many professional accomplishments and civic leadership, Ms. Stone was peer-nominated as one of 2008's "Top 40 Illinois Attorneys Under 40 To Watch." She practiced law in Chicago for 13 years and was named the first Indian American equity partner at the Locke Lord firm before moving to Phoenix in 2010 and joining another large, international law firm. She was recognized as a Team Member, *Law360* "Employment Practice Group of the Year" in 2011, and was named one of the Top 25 Arizona Women attorneys by 2016 Southwest Super Lawyers. Ms. Stone is an AV®-Preeminent rated attorney and is licensed to practice law in Illinois and Arizona.



Amber C. Thomson

Amber C. Thomson is an associate in the Intellectual Property Practice Group in Sheppard Mullin's Washington, D.C. office. Ms. Thomson's practice encompasses general litigation, international arbitration, and privacy and cybersecurity law. She has experience counseling public and private companies on international disputes, as well as representing companies in investor-state disputes (ICSID arbitration). Ms. Thomson also counsels companies on cybersecurity and data breach matters, as well as US and international data privacy, data transfer and "Big Data" issues. She is a member of Sheppard Mullin's Diversity and Inclusion Working Group and coordinates diversity and inclusion training in the Washington, D.C. office.



Juliana de Valdenebro-Garrido

Juliana de Valdenebro-Garrido focuses her practice on international commercial and investment arbitration. Juliana has experience in arbitration before various arbitral institutions and rules, such as the International Court of Arbitration of the International Chamber of Commerce (ICC), the International Center for Settlement of Investment Disputes (ICSID), the UNCITRAL rules (UNCITRAL), as well as arbitrations under the Rules of the Arbitration and Conciliation Center of the Chamber of Commerce of Bogotá (CCB) In May 2015, Juliana received her LL.M. from Harvard Law School, where she was awarded the Dean's Award for Community Leadership. During her career at Harvard, Juliana was one of the founders of the International Arbitration Association -Harvard International Arbitration Law Students Association, HIALSA-. In 2010, Juliana graduated as a lawyer from the Universidad de los Andes, receiving magna cum laude honors and first in her class. During her career, she was awarded the Ramón de Zubiría scholarship on four occasions, in recognition for maintaining the highest grade point average in law school. Juliana also studied a semester of exchange at the Carlos III University of Madrid, participated in a course at the London School of Economics and attended the first session of the Arbitration Academy in Paris.

Prior to joining Hogan Lovells, Juliana practiced at one of the leading firms in Bogotá, Colombia, where she focused on domestic and international arbitrations in construction and infrastructure, corporate, distribution and contractual breaches, among others. Juliana is founder of the organization Colombian Very Young Arbitration Practitioners, and has published articles in relation to arbitration agreements in corporate statutes and to the Convention for the International Sale of Goods.



Michael A. Wilder

Michael Wilder is a Shareholder in Littler Mendelson, P.C.'s Chicago Office practicing management-side labor and employment law. He currently serves on Littler's Diversity and Inclusion Council, Shareholder Profitability Committee, and Chairs the Chicago Hiring Committee. He has the high distinction of being named one of the "Top 40 Lawyers Under 40" in Illinois, "One of the Most Influential Minority Lawyers in Chicago," and has received numerous other awards such as Chicago-Kent College of Law's Outstanding Young Alumni Award, Chicago-Kent's Distinguished Service Award, the Cook County Bar Association's Presidential Award, and the CCBA's Junior Counselor Award. Michael was recently inducted into the American Bar Foundation as a Fellow – a distinction reserved for the top 1% of lawyers in the country. Michael also serves as an Adjunct Law Professor at Chicago-Kent College of Law teaching Legal Writing IV for Labor and Employment. Michael received his law degree from Chicago-Kent College of Law and his undergraduate degree from Michigan State University.



Angela C. Winfield

Angela Winfield is the Associate Vice President for Inclusion and Workforce Diversity at Cornell University. In this role, she provides leadership, vision, energy, and a unified philosophy to the university's diversity, inclusion, and engagement efforts. With a focus on Cornell's over 7,000 staff members, Winfield develops and implements strategies to create an inclusive environment that supports Cornell's commitment to a diverse workforce. She oversees and implements the university's affirmative action program, is the equal employment compliance officer and one of three Americans with Disabilities Act coordinators for the campus.

Winfield is admitted to the New York bar and is Of Counsel with Barclay Damon in its Commercial Litigation practice group and previously served as Program Manager for the Northeast ADA Center where she provided information, training and technical assistance on the Americans with Disabilities Act to stakeholders in New York, New Jersey, Puerto Rico and the U.S. Virgin Islands. She is a past commissioner for the American Bar Association's Commission on Disability Rights. She also is an advisory board member for the Burton Blatt Institute at Syracuse University and sits on the board of directors for Gadabout Transportation Services, Inc. and Law NY Winfield is also a certified success and leadership coach and motivational speaker.

Winfield earned her J.D. from Cornell Law School and her B.A. from Barnard College of Columbia University.



Brian J. Winterfeldt

Brian J. Winterfeldt, the Founder and Principal of Winterfeldt IP Group, has practiced trademark and Internet law for nearly 20 years. Building on his years of experience in large, global law firms, Brian has brought his vision to life, creating a firm dedicated exclusively to providing organizations and individuals with to the highest caliber trademark and Internet-related legal and policy services. Brian has assembled a team of top talent that provides a personalized, concierge-style client service experience at an exceptional value.

Brian advises clients on the creation of global trademark and branding strategies. He also develops programs to register and enforce clients' intellectual property rights and protect against infringement of their trademarks and other branding elements in the US and internationally, including domestic and international trademark counseling, clearance, prosecution and enforcement. In addition, Brian advises clients on trade dress, copyright, Internet governance and domain name issues, including domain name disputes such as Uniform Domain Name Dispute Resolution Policy (UDRP) and Uniform Rapid Suspension System (URS) complaints, and other similar processes for country code top-level domains (ccTLDs), to disable or recover infringing domain names. He regularly counsels global leaders across a broad variety of industries.

Brian dedicates substantial time to support of diversity-related clients and causes, particularly in connection with the LGBT community. He has been an active member of the LGBT Bar for many years, and has chaired the IP Law Institute at the Lavender Law conference for the past several years. Brian also serves on the Board of Directors for The Trevor Project, the nation's leading provider of suicide prevention and crisis intervention services for LGBTQ youth.



Margo Wolf O'Donnell

Margo Wolf O'Donnell is a partner and Vice Chair of Benesch's Labor & Employment Practice Group, Chicago. She is a nationally recognized trial lawyer who handles litigation involving restrictive covenants, business torts, employment issues, intellectual property and class action defense. Margo's experience includes federal, state and administrative agency litigation involving allegations of sex, race, national origin, disability and age discrimination, wage-and-hour violations and breach of contract. She has represented her clients from the initial litigation stages through trial and appeal. Margo received her J.D. from the University of Michigan Law School and her B.A. *magna cum laude* with distinction from Yale University.

Margo also acts as a business adviser to her clients, helping them to anticipate and prevent disputes. She regularly counsels clients and drafts agreements relating to a variety of employment-related issues, including corporate governance, individual and group discharges, releases, confidentiality agreements, noncompetition agreements and internal investigations. She is a frequent speaker and has been widely quoted by various national media outlets on topics relating to the prevention of litigation.

Margo has received numerous accolades for her work. *Crain's Chicago* included Margo in its inaugural list of "Most Influential Women Lawyers in Chicago." She has been recognized as one of *The Best Lawyers in America*, and as one of the "Top 10 Women Employment Management Attorneys in Illinois" by *Leading Lawyer*. *Chambers & Partners* recognized Margo as an "Inspiring Role Model Promoting Gender Diversity." *Best Lawyers* named Margo as one of fifteen "Women of Influence" in the legal profession nationwide, and Law Bulletin Publishing Company selected Margo for its inaugural "40 under 40 Hall of Fame" edition and as one of 15 "Women Making an Impact" in its edition of *Women in Law*. *Illinois Super Lawyers* has recognized Margo as one of the "Top 100 Attorneys in Illinois" and "Top 50 Women Attorneys in Illinois." Margo holds an "AV Preeminent" Peer Rating by Martindale-Hubbell (the highest possible rating).

Margo also is a Past President and recipient of the Leadership Award of the Coalition of Women's Initiatives in Law, and she is a Life Fellow of the American Bar Foundation and a Fellow of the Litigation Counsel of America. Margo serves on the Boards of the Coalition of Women's Initiatives in Law, Yale Chicago, the Woman Athletic Club of Chicago and the Auxiliary Board of the Art Institute of Chicago.



Jennifer H. Zimmerman

Jennifer Zimmerman is an Executive Director in the Legal and Compliance Division of Morgan Stanley. She heads Morgan Stanley's ERISA and Employee Benefits Legal Group and also provides expertise in connection with related executive compensation, employment, human resources and other matters.

Ms. Zimmerman's responsibilities extend to all legal issues related to Morgan Stanley's employee benefits, including pension, defined contribution, employee stock ownership, executive benefits and health and welfare plans. She covers employee benefits matters in transactions, litigation and financings, related corporate, tax and securities laws, compliance, disclosure and employee issues, global benefits contracting.

Ms. Zimmerman joined Morgan Stanley in 1998. She received a J.D. with a concentration in Business Law and Regulation from Cornell Law School in 1988 and an LL.M. in Taxation from New York University in 1991. Prior to joining Morgan Stanley, Ms. Zimmerman was an attorney with the law firms of Paul, Weiss, Rifkind, Wharton & Garrison (1989-98) and Botein, Hays & Sklar (1988-89). Ms. Zimmerman is admitted to practice law in New York and Connecticut and is a member of the American Bar Association, the ERISA Committee of the American Bankers' Association and the National Association of Women Lawyers. She is a member of Morgan Stanley's Women's Business Alliance, Legal and Compliance Division Philanthropy and Diversity and Inclusion Committees, and a former co-chair of its Women's Committee. In addition to employee benefits, she writes and speaks on women's leadership and advancement, retirement planning and allied topics.



2019-2020 DIVERSITY AND INCLUSION IN PRACTICE ROUND-UP

2019-2020 Diversity and Inclusion in Practice Round-Up

There is an abundance of programs, projects, and strategies all aimed at increasing diversity and inclusion in the legal profession. The sheer volume can seem overwhelming and, not surprisingly, many bear similarities to each other. Indeed, ours is a profession that is happy to take a good idea and run with it. With that thought in mind, for each of its Reviews on the State of Diversity and Inclusion in the Legal Profession, IILP includes a Practice Round-Up wherein we invite the legal profession to share its most promising, interesting, and effective efforts to advance diversity and inclusion within its ranks in the hope that these efforts will inspire, encourage, and otherwise motivate others to join in or collaborate or adopt good ideas, perhaps even improving upon them.

Each time we issue our Call for Submissions for the Practice Round-Up, we are pleased to see the wide array of interesting, innovative, and practical efforts being implemented around the US and abroad. We are pleased to offer the following programs and projects as examples of some of the most promising, innovative, and attention-worthy diversity and inclusion efforts for your consideration.

For more information about how to submit an item for the next Practice Round-Up, please visit www.TheIILP.com.

PIPELINE EFFORTS

Ready to Rise

The Ready to Rise academy is Ms. JD's initiative created to help young girls see themselves as future members of the legal profession. Ready to Rise is a one-day academy in law and leadership for middle school girls, grades 6-8, with fun and engaging workshops, inspiring speakers, and great snacks! By providing opportunities for education and interaction with women law students and attorneys, Ms. JD's Ready to Rise academy allows girls to see themselves as future members of the legal profession advocating for clients, serving as members of the judiciary, running for political office, launching innovative businesses and reaching back to share their education with other girls in their communities.

The daylong workshop features attorneys, thought leaders, and professional development professionals speaking on their personal experiences as women in leadership positions and their advice on developing the professional skills required to become and support women in leadership. Participation in the Leadership Academy enhances the participants' national law school network, equips them with tools necessary for professional development, and will generally provide opportunities that would not have existed otherwise. The girls feel inspired to pursue a legal career and are able to see themselves as future lawyers.

Approximately 85 participants are involved in Ready to Rise. Girls attend at no charge. The program is funded by law firms, women's bar groups, and other not-for-profit organizations and covers the cost of three staff, one who is full time and two others who average 10-20 hours weekly as well as other costs associated with a daylong program: AV, catering, office supplies, staff travel, etc. Ms. JD would welcome the identification of potential host schools and other support.

For more information, contact Danielle Allison, Executive Director, Ms. JD, at director@ms-jd.org or (617) 460-5311.

Street Law Legal Diversity Pipeline Program

The Street Law Legal Diversity Pipeline Program isn't new but it's gratifying to be able to report that it is still going strong! Street Law tackles the lack of diversity in the legal profession by focusing on strategies that will encourage students of color to enter the legal profession. It provides students with role models, connections with legal professionals, and the opportunity to experience the types of work lawyers and other legal professionals do. Students are able to broaden their impressions of the legal profession and fuel their interest in legal careers. The program achieves these objectives through four components: a training session for those leading and participating in the program, classroom visits by the legal professionals, a field trip to a conference at the company or law firm, and program extensions for the most promising students.

Street Law partners corporate legal departments and law firms with nearby, diverse high school law classes. Through classroom visits and a field trip to corporate headquarters or law firms, volunteers teach lessons and lead activities designed to increase students' knowledge and interest in the law and legal careers. As current education practices focus on "college and career," this program offers a relevant and practical learning experience for secondary educators. Collaborating with the legal volunteers in their community, participating teachers provide career exposure to their students from experts in the field. This is especially critical at schools that are under-resourced.

Street Law pairs each participating corporate legal department and law firm with one or more high school classes. Street Law provides training to the legal volunteers—both practicing and non-practicing—and participating teachers, as well as guidance on topic selection and lesson plans. There are four components to this program:

- **Training:** Street Law provides a 2.5 to 3-hour training session for all volunteers and the partner teacher. At this session, program stakeholders choose topics to teach and plan out the semester.
- **Classroom Visits:** Legal department volunteers visit their partner classroom 2-4 times over the course of the semester to teach about topics in civil law and the legal profession.
- **Conference at the Company or Law Firm:** Students attend a day-long field trip. They participate in interactive, authentic workshops on legal topics where they utilize the skills and knowledge acquired over the course of the semester. The students also attend a career fair at the conference, where they learn about the variety of legal jobs in the corporate sector.
- **Extensions:** In the second year of the program, many corporations and firms offer some sort of follow-up with the most promising students—several have offered job shadow days, mentoring, internships, or scholarships.

Participation in Street Law continues to grow; during the 2017-2018 academic year, 5,052 high school students, 95 partner teachers, 1,899 legal professionals, and 12 law students participated in the Pipeline program at 87 sites across the U.S.

The Legal Diversity Pipeline Program requires a professional team of five. Their time commitment varies depending upon the needs of the individual sites with the senior members spending anywhere between 25 to 85% of their time on the administration of the program. Street Law incurs costs due to the staff time needed to search for suitable schools, locate partner teachers, and produce and deliver training materials; and for travel to program sites to conduct trainings and observe capstone activities. Both the Association of Corporate Counsel and the National Association for Law Placement support this collaboration financially. Participating companies and firms make a financial contribution to Street Law, Inc., to offset the costs of the program. Because of the process involved in matching each law firm office with an appropriate high school class or classes, costs are greatest in the first year of participation.

While the initial investment might give one pause, the outcome is well worth it. More than 50% of

participating students report an increased interest in pursuing legal careers upon completion of the program. On average, between two-thirds and three-fourths of students at each site felt inspired and encouraged by the legal professionals with whom they interacted. Students who felt that they learned a good deal from the legal volunteers were more interested in legal careers after the field trip or capstone conference; were the ones that received more hours of programming; and reported that they received encouragement from the legal professionals to consider legal careers.

Recent anecdotal evidence suggests that students feel that the program produces meaningful impact. Some comment on how the program helps them explore career pathways. “[The program] showed me that a job done at [your company] might be the right one for me.” A different student remarked, “I liked the part when you talked about your college experience with my group.” For others, it is the participation in legal simulations that resonates: “We were able to put ourselves in the shoes of people who take cases to court and fight for what is right.” Some benefit simply from an opportunity to be acknowledged in a professional setting: “All the questions I asked got answered, and I appreciate all the responses.” Most significant is that the horizons of the students expand as a result of their experience: “You provided us with great information that gives us a chance to think about the future.”

Assuming there is sufficient funding, replicating the effort is fairly easy. To launch a new program site, the most significant areas to focus on are high-quality training and a commitment of time from a dedicated partner teacher and volunteers. Partner teachers can anticipate about 10 hours of time over the course of one semester to participate in training, collaborate with volunteers, and chaperone students. The site volunteer coordinator can anticipate about 15 hours for training and planning. Legal volunteers can anticipate about 8-10 hours for training and visits to the classroom and participation in the capstone conference.

Alternatively, one can easily support, participate in, or help expand existing Street Law programs:

- Support: Continuing to research when young people make career decisions. Advocating for equal opportunities within K-12 education.
- Participate and expand: Speaking with Street Law about the opportunities available and adding this to existing community outreach, pro bono, and diversity and inclusion programming.

To find out more about Street Law or to volunteer, contact Joy Dingle, Director of Legal Diversity Pipeline Programs at Street Law at jdingle@streetlaw.org or (240) 821-1323.

PROGRAMS FOR LAW SCHOOLS/LAW STUDENTS

A National Study on How Career Opportunities for Women of Color Are Shaped in Law School

The Center for Women in Law (“CWIL”) and the National Association for Law Placement Foundation (“NALP”) have joined forces to examine the experiences of women of color in law school. This study is critical because nearly 50% of law firm offices have no partners who are women of color. We think law schools have a pivotal role in changing this distressing statistic. Our hope is that the data collected through a survey and focus groups will shed light on the unique obstacles and challenges women of color law students face and how law schools can better address those issues. A report on the research will provide best strategies and tools that law schools can implement to ensure access to resources and opportunities for all students.

The research team for the study is Linda Chanow, CWIL Executive Director; Dawnyelle Addison, CWIL Program Coordinator; Tammy Patterson, NALP President and CEO; and Jennifer Mandery, NALP Director of Research. The research team is working in close consultation with a 28-member advisory board that includes six lawyers, six deans, seven professors, two research fellows, one

student, one judge, and other industry thought leaders.

The research is multilayered. During Phase One, CWIL/NALP collected quantitative data from over 4,000 students enrolled at 46 law schools across the country. The survey questions gathered information on students' experiences, including interactions with professors and administrators, class participation, job searches, interviews and hiring. In Phase Two, CWIL/NALP will collect qualitative data from at least 10 participating law schools through student focus groups and interviews of administrators. The focus groups will expand on the quantitative data and identify possible solutions. Once all of the data is collected, CWIL/NALP will publish a report that outlines common themes in experiences and provides strategies for closing gaps identified by the research.

CWIL's goal is not to create a study for replication, but rather to raise awareness of the challenges faced by women of color in law school and work with the schools to ensure that women of color have access to the resources they need to be successful. They hope that deans and administrators will implement the solutions proposed in our report on the study and thereby decrease the disparities between the experiences of women of color and their white and male counterparts in law school. The research is ongoing but there is an expectation that the strategies will range from minor tweaks to existing programs that will cost very little to implement to larger programs requiring more resources such as scholarships for women of color pursuing clerkships to offset the cost of student loans.

For more information on this study, contact Dawnyelle Addison, CWIL Program Coordinator at daddison@law.utexas.edu or (512) 232-2642.

National Women's Law Students Organization Leadership Academy

Ms. JD's National Women's Law Students Organization ("NWLSO") Leadership Academy is Ms. JD's initiative created to further its mission of supporting and improving the experiences of women law students.

The Leadership Academy is building a national network of women's law association leaders empowered to lead their law student organizations, leveraging ideas and inspiration from their new connections with other law student leaders. Additionally, the leadership academy class is providing participants with tools to develop the professional skills to help them succeed and serve in leadership positions beyond law school. The one-day intensive workshop featured attorneys, thought leaders, and professional development professionals speaking on their personal experiences as women in leadership positions and their advice on developing the professional skills required to become and support women in leadership. Participation in the Leadership Academy greatly enhanced the participants' national law school network, equipping them with tools necessary for professional development, and generally providing opportunities for connection that would not have existed otherwise.

The Leadership Academy had 60-70 participants. It required the work of three staff members, one who worked full-time and two others who each averaged between 10 and 20 hours per week. Costs centered around those typically associated with any conference-type program, such as catering, printing, AV, staff travel, office supplies, etc. These costs were covered through law firm sponsors and local women's bar associations. Ms. JD is interested in partnering with others to maintain and expand this program.

Feedback from participants has been overwhelmingly and enthusiastically positive. Clearly Ms. JD has touched upon an area that women law students are keenly interested in exploring and not finding many other avenues providing this sort of practical information.

To learn more about the Leadership Academy or partnership opportunities, contact Danielle Allison, Executive Director, Ms. JD, at director@ms-jd.org or (617) 460-5311.

1L Diversity Scholar Program

The 1L Diversity Scholar Program is an intensive training, coaching, and recruiting program intended to help diverse law students become successful lawyers and leaders. The primary objective of the program is to increase diverse leadership in every sector of the legal profession, with a focus on large law firms and corporate legal departments.

The program is run by PracticePro, a San Francisco-based legal education start-up with expertise in skills training and coaching for diverse and first-generation law students and law firm associates. It is the brainchild of PracticePro founder and Berkeley Law lecturer Niki Khoshzamid. Created in 2014 and initially launched in Texas and California, the program now operates nationwide and has experienced 820% in application growth.

PracticePro accepts applications from first-year law students on November 1 and selects the Diversity Scholar class in late January. First-year law students who are admitted into the program participate in a number of training and coaching activities starting in the Spring semester of their first year and ending one year after law school graduation. The various components focus on teaching proactive career management, professional branding, communication skills, leadership, cultural code switching, networking and business development, project management, relationship and conflict management, and litigation skills for junior attorneys. Examples can be found on their website at <http://www.practicepro.cc/1l-diversity-scholars-program>.

The 1L Diversity Scholar Program prepares ready and confident associates. The feedback from the scholars who have graduated or just finished their summer associate positions is that this training and coaching have substantially helped them be more prepared for the rigors of law practice and working at law firms. By continually interacting with the students from their first year of law school until they are actually engaged in the practice of law, this program provides support continuity enhanced through peer mentors who support each other through job searches, law school transfers, and other facets of preparation for the legal profession.

The program uses detailed student input and feedback to continually refine and improve. As a result, participants report that they learn more in one day of this training than in other longer programs. The program does not rely solely on anecdotal reviews but also measures and scores non-academic success drivers that can help employers make better hiring decision with a greater likelihood of retention.

Currently the 1L Diversity Scholar Program has 146 law students in the different stages of the program. Each year, approximately 45 new students are admitted to the program. The cost for each student to participate in the Program is \$5,000. That does not include the initial development cost of the various training and coaching components and materials of the program. Currently, 50% of the new admittees to the Program are sponsored by our law firm and corporate sponsors and the remaining are funded by PracticePro.

The Program is run by one full-time and two part-time staff. Collectively, they spend 20-80 hours a week administering the Program, teaching the career conferences, and coaching the Scholars. In addition to our staff, about 60 lawyers are involved each year who help co-teach the training events. They are typically senior-level attorneys selected from all different sectors, including large law firms, corporate legal departments, government, solo practice, and public interest.

The biggest challenges to this program are the administrative bandwidth for selection and continuous support of scholars in different phases of the program coupled with understanding law student preferences and needs so as to optimize programming timelines and content and the need to develop or outsource the training and coaching components of the program.

For more information, contact Niki Khoshzamid, Founder & CEO, at niki@practicepro.cc or (415) 237-3703.

Diverse 1L Summer Internship Program

Traditionally, law firms have focused most of their interactions with law students on their summer associate programs. Most try to include a diversity and inclusion aspect, seeking diverse classes of summer associates. The Diverse 1L Summer Internship Program presented by Drinker Biddle & Reath LLP, however, caught our attention because of its stated intent to shift from assessing candidates' suitability for employment, to make the priority one of giving "diverse, relatively inexperienced first-year law students an opportunity to become fully immersed in the large law firm environment (including exposure to multiple practice areas) and thereby help them to become better equipped to pursue their legal career and make informed decisions about it. Whether or not Drinker Biddle is the first stop in that legal career is of secondary importance: The Firm's view is that the legal and broader communities will benefit when law students of diverse backgrounds are better prepared for the practice of law." We were intrigued, to say the least.

Drinker Biddle's Chicago Office recruited candidates for the program from three local law schools: DePaul University College of Law, Chicago-Kent College of Law, and Loyola University Chicago College of Law. Some 60 students from these schools attended a firm-sponsored introductory reception in early March 2018, and approximately 40 subsequently applied. An *ad hoc* committee of eight Drinker Biddle associates of diverse backgrounds vetted applications, assembled teams of associates and partners to conduct interviews, and selected four students to participate in the inaugural program. The same *ad hoc* committee also had primary responsibility for leading the development of the curriculum, which they based on their own experiences of what skills/information would have been valuable for them to develop/learn earlier in their careers. The curriculum included (among other things) a pre-arrival assignment, weekly practice group assignments, weekly practical skills seminars, shadowing opportunities, and two long term assignments. Everything was carefully calendared in advance to ensure that the interns had full schedules.

For the pre-arrival assignment, the students received a packet of materials discussing oral presentation skills and were asked to prepare for and participate in a hypothetical client meeting. After attending an oral presentation skills seminar upon their arrival, the interns played the role of an attorney in a mock strategy discussion with a client, received feedback from a team of observers, reviewed a video of their performance, and then implemented what they learned in a second mock discussion.

For the remainder of the six-week program, the interns rotated through two different practice groups each week and completed one assignment from each. Meetings, lunches, and trips off site during each rotation provided the interns the opportunity to meet with and learn from Firm attorneys, clients, and alumni about the substantive practice of law in each area. Interns also learned softer, but no less important, professional skills each week during Friday Practical Skills seminars that addressed skills like legal writing, oral advocacy, emotional intelligence, and interviewing. When not in their scheduled meetings, attending workshops, or working on their weekly assignments, the interns shadowed attorneys in order to gain a more realistic sense of how practicing lawyers fill their days and handle their responsibilities.

Two long-term assignments (an oral negotiation involving a transaction and the preparation of a brief for a motion to dismiss) provided an eye-opening dose of the law and a good barometer for one's interest in either a transactional- or litigation-focused practice. These long-term assignments also provided the interns with the opportunity to hone their time management skills as they juggled all of their other meetings, activities, and assignments.

The program was punctuated with check-in meetings, during which interns sought and received guidance and feedback from their associate mentors (two per intern). In addition, the interns participated in a number of social events in order to get to know Firm attorneys as their peers and friends.

By any measure, the program was a success. The participating interns learned skills and gained insights that will help them to be more effective and successful law students, summer associates,

and lawyers (wherever their careers may take them). In fact, its value to the interns was assessed empirically via mid- and end-program reviews and an end-of-program survey: the inaugural class all rated their experience as “excellent,” and recommended that other diverse 1Ls at their schools apply to the program.

The Firm benefited as well. The interns provided youth, enthusiasm, and diverse perspectives, and the members of the *ad hoc* committee of diverse associates were able to take ownership over a hiring and mentoring program that reaffirms and tangibly demonstrates Drinker Biddle’s commitment to promoting diversity and inclusion in the legal community.

Drinker Biddle’s Chicago Office intends to repeat the Diverse 1L Summer Internship Program in 2019 and will seek to replicate the program in other offices. New iterations will be refined based on feedback from the interns and committee members. While a significant amount of time was devoted to the inaugural program (over six hundred attorney hours), much of that time was spent designing and implementing the curriculum. Future iterations will still require strong commitment from attorneys—it is, after all, the time the Firm’s attorneys dedicated to providing formal and informal feedback, coaching, and constructive criticism to the interns that made the program such a success.

To obtain more information, contact Justin O. Kay, Chair, Firmwide National Hiring Committee, Drinker Biddle & Reath LLP at Justin.Kay@dbr.com or (312) 569-1381.

PROGRAMS FOR LAW FIRMS and LAW FIRM LAWYERS

New York City Bar Associate Leadership Institute

The Associate Leadership Institute (“ALI”) was established by the New York City Bar Association Office for Diversity & Inclusion in 2017 to help bridge the skill gap for mid- and senior-level attorneys at law firms so as to assist associates on the track to partnership.

ALI was established as a direct response to the New York City Bar’s quantitative and qualitative research, outlined in its 2016 Diversity Benchmarking Report. Statistically, minority attorneys leave law firms in their junior and mid-level years at a higher rate than their white male counterparts. Through qualitative research conducted with 50 hours of interviews with law firm partners, diversity and professional development staff and associates, the City Bar identified several skills as imperative to an associate’s advancement within a law firm. The City Bar then asked minority attorneys what the skills they considered essential to their career progression and created the ALI curriculum based on the areas where there was overlap. The curriculum focuses on the following core skills: executive presence and communication skills, mentor and sponsor relationships, branding and leadership/management skills and business development.

ALI classes are split into smaller “Clusters,” assigned by class year and practice area. In 2018, Fellows from the 2017 class served as Cluster Mentors to help the 2018 Fellows tie learnings from ALI back to their respective firms and to facilitate convenings outside of the sessions. Each curriculum topic includes a fireside chat with senior attorneys who describe the topic in the context of their careers, followed by an intensive workshop with a subject-matter expert who provides actionable strategies for improvement, and then a third component, Cluster Breakout Sessions, where a volunteer attorney/coach facilitates a dialogue within small groups. Business development, the last topic on the curriculum, ties learnings from all previous topics and includes a mock pitch, where clusters present a mock pitch in response to an RFP to a volunteer in-house counsel attorney and receive on-site feedback.

A crucial part of the development is ensuring that the majority of the facilitators and speakers are women and minority attorneys. It is imperative for the Fellows to see themselves reflected in the faculty, which then makes them feel more comfortable asking candid questions in a safe space where the faculty can directly address their specific concerns on navigating the workplace as a minority attorney.

The program includes thorough pre- and post-session surveys, which asks the Fellows to rate their knowledge and confidence in each area on a scale of 1 to 5 (1 being the lowest, 5 being the highest). For all sessions, the ALI Fellows rated their skill level at or below a 3. After completing the curriculum, Fellows increased their self-ratings to 4 or higher. Based on these numbers, anecdotes and promotions (one 2017 and one 2018 Fellow made partner within 6 months of completing the Institute and several have been promoted to Counsel), the Institute has had a positive impact on the professional development and career advancement of Fellows.

In 2018, a total of 112 people participated in the planning and implementation of ALI, consisting of:

- 35 Faculty members/speakers
- 31 Small group discussion leaders
- 25 ALI Planning Committee members
- 10 Cluster Mentors
- 8 Volunteers (undergraduate or law students who helped with administrative functions)
- 3 New York City Bar Association staff members

ALI requires paid staff to liaise with the ALI Planning Committee to confirm speakers, program materials, review nominations and administer each program. Of the three staff members in the City Bar's Office for Diversity & Inclusion, one has been the point of contact for the committee, speakers, program materials and Fellows. The two other staff members assist with some administrative tasks and on-site support during programs.

The budget for ALI is \$110,000, representing approximately \$100,000 in ALI tuition at \$2,000/fellow for 50 fellows plus an additional \$10,000 for expenses. The funding came from law firm sponsorships and ALI tuition payments.

The two most critical elements of the program's success are that 1) the program addresses the need for a safe space for associates to speak candidly and honestly about their experiences and the challenges that they face in their professional lives; and 2) participants commit to the long-term success of the Fellows by meeting regularly over several months to ensure continual, longer-term improvement. As a bar association, the City Bar felt well-equipped to tackle these issues and the City Bar was intentional about hosting a majority of the sessions in its building, whereas associates may feel less comfortable asking candid questions in their respective law firms or client locations.

The Institute was created as a model that the City Bar hopes that bar associations, law firms, and other organizations will replicate and expand upon. The curriculum and faculty materials are publicly available on the City Bar's website at www.nycbar.org, and the City Bar is open to providing additional materials, including the session timed agendas, talking points and relevant handouts/worksheets, on request.

Several of the Fellows in the program have used the program handouts and takeaways to provide turnkey presentations back to their respective law firms. This provides a few important outcomes: associates solidify their learnings from the program, gain visibility within their firms and in turn help their firms consider ways to enhance their current professional development offerings for associates.

To learn more about ALI, contact Bijal Shah, Manager, Office for Diversity & Inclusion, New York City Bar Association at 42 West 44th Street, New York, NY 10036 or (212) 382-6773 or bshah@nycbar.org.

LaddHer Up

The LaddHer Up retreat is Ms. JD's initiative to help women in the earlier stages of their career learn about becoming and networking with general counsel.

This retreat creates a unique opportunity for women law firm associates in the earlier stages of their careers to personally engage with women general counsel for transparent 2:1 career strategy discussions, as well as professional development on expanding personal networks, effectively pitching to potential clients, and building skills for a general counsel role in the future.

LaddHer Up is structured to include two general counsel plenary panels, including topics like "How to Pitch to a General Counsel". Both days will provide great general counsel networking opportunities and interesting expert workshops. The first day's programming includes inspiring keynote authors and small group recreational activities to foster informal general counsel-associate social interaction. On the second day, there is a career meet up where each general counsel will informally provide career advice to a few associates.

The program is designed to accommodate 80-100 women attorneys and 40-50 general counsel. It is being funded through individual registrations and law firm sponsors.

To learn more, contact Danielle Allison, Executive Director, Ms. JD, at director@ms-jd.org or (617) 460-5311.

Remote Working Program

Retention of diverse attorneys is an ongoing challenge for law firms. No firm wants to see talented associates in whom the firm has invested time to train depart. Therefore, Morgan Lewis & Bockius LLP instituted its Remote Working Program for its associates. Associates participating in the Remote Working Program are able to work remotely up to two days a week with a complete office set-up. It allows for them to serve clients in the most responsible and seamless ways possible while also allowing the firm to attract and retain top associate talent.

Given the ever-changing technology and workplace environment, the firm organized a pilot program to assess the strategic potential of a firmwide initiative. After receiving incredibly positive feedback from associates, partners and the task force and determining excellent client service was delivered seamlessly, the firm then formally implemented an associate remote working program in May 2017.

Associates in U.S. and London offices who have been with the firm for a least two years (for one year if they joined as laterals) can request to participate in the program. Upon approval from practice group leaders to join the program, associates can purchase office equipment at a cost-share with the firm to ensure they have a complete remote office set up. Associates work with their office and practice group to identify up to two remote working days each week. Currently, about 200 associates are participating in the program.

In addition to serving as a retention and recruiting tool, the firm has received incredibly positive results from the program. Participants report increased productivity and a seamless transition to working without losing efficiency due to the excellent quality technology platform.

The firm has discovered that it has been important to properly socialize the program across the firm including leadership, practice groups, associate committees, and key administrative departments prior to rolling out the program. Additionally, identifying a clear process with responsible parties and partnering with IT to leverage internal technology tools has proven critical.

For more information, contact Amanda Smith, Associate Talent & Pro Bono Partner, Morgan Lewis & Bockius LLP at amanda.smith@morganlewis.com or (212) 309-7130.

Ramp Up Program

Like many firms, Morgan Lewis & Bockius LLP has various extended leave programs to allow attorneys the latitude they need to meet family or other personal or professional demands. The firm's Ramp Up Program supports associates who are returning from an extended leave, including but not limited to Primary Caregiver Leave, so that they do not feel disadvantaged or penalized or unduly burdened as they make the transition back to work.

The central element of the Program is Morgan Lewis's Return to Work Policy which formally reduces the hours expectations of eligible traditional track associates by 25% for the first six months upon their return to work, with no reduction in base pay or bonus eligibility.

The Ramp Up Program provides:

- 1) Individualized counseling before, during and following return;
- 2) Guidance on best practices for returning to work, managing assignments and partner expectations after an extended leave; and,
- 3) A partner mentor, matched by the firm's Return to Work Affinity Group, to serve as a confidential resource and assist with any client or practice group re-entry issues.

To date, 71 associates took advantage of the program during 2017, while 32 associates did so in 2018.

For more information, contact Amanda Smith, Associate Talent & Pro Bono Partner, Morgan Lewis & Bockius LLP at amanda.smith@morganlewis.com or (212) 309-7130.

Leaders Investing for Tomorrow ("LIFT") Sponsorship Program

While women have been entering the legal profession in increasing numbers, their entry into and retention within the ranks of law firm partners has not. Recognizing this and acknowledging that within its own ranks women have been joining the firm at a higher rate than men but not progressing to Principal and leadership roles at the same pace, Baker & McKenzie LLP proactively developed a range of actions to help address this, with its Leaders Investing for Tomorrow ("LIFT") Sponsorship Program forming one of a series of initiatives.

LIFT aims to provide a development experience to enhance the leadership impact and career trajectory of women partners in the Firm. The program provides knowledge, skills and support to continue to build their careers and progress to positions of leadership with the Firm. LIFT seeks to connect these women with more senior partners, through a one-to-one sponsorship over a period of 12 months.

LIFT is a personalized, highly-focused 12-month leadership development program, involving sponsees and sponsors (both men and women) working closely with leaders to accelerate opportunities for career and leadership development.

As part of the LIFT program sponsees receive, through a blended learning approach, a mix of in-person meetings, including a two-day workshop, webinars and social learning. Content includes: an individualized assessment, feedback, career development, skill building, monthly check-ins and coaching.

During its first year, LIFT involved 35 sponsees and 35 sponsors, together with a project team, and representatives from the firm's People teams. This year the program has increased to 50 sponsees and 50 sponsors across two cohorts. Sponsees have benefitted from an expanding internal and external network, sponsorship and new learning and development opportunities throughout the program. The program effectively supports women developing into more senior and leadership positions within the Firm, including progress toward the firm's gender aspirational targets.

Key program costs resulted from programing and content design, in-person meetings and coaching which was provided throughout the 12-month program. LIFT is run by a project team of 4 who are responsible of all aspects of the program's planning and delivery. The firm funds the program through various internal budgets, with the majority of the funding coming through its People team, while a small contribution comes from the sponsees' own office.

LIFT represents a promising step forward from traditional mentorship programs but there are real challenges around the coordination and personalized matching of the sponsor and sponsee. This can be addressed through planned and sequenced consultation with all key stakeholders (global practice groups, office leadership, global diversity and inclusion committee and LIFT project team).

For more information about LIFT, contact Anna Brown, Director, Global Diversity & Inclusion at Anna.Brown@bakermckenzie.com.

Art of the Pitch

Studies show that women and minorities have fewer chances to pitch their skills and their firms to existing and potential clients. This means they have fewer chances to secure new business, and therefore fewer chances to develop their careers. Art of the Pitch, a Ballard Spahr program, was designed to remedy this problem by giving mid-level associates and junior partners the opportunity to learn new pitching techniques. It enables Ballard to partner with affinity bar associations and other law firms to provide key skills and tools for making an effective pitch. Participants have the opportunity to give a "practice pitch" to in-house counsel and receive direct and immediate feedback.

Art of the Pitch operates in three phases:

1. During a luncheon and panel discussion for senior associates and junior partners, in-house counsel and diverse rainmakers from law firms discuss their methodology for securing new work and share their views as to what makes a good pitch.
2. Pitch teams are assembled and matched with volunteer in-house counsel, who then provide an opportunity to pitch and receive feedback.
3. As a follow-up program, in-house counsel who participated in earlier Art of the Pitch programs share best practices and learning opportunities.

Approximately 70 diverse mid-level to senior associates or junior partners have participated in the program. The benefits to the mid-level to senior associates and junior partners who have participated have been that they were able to learn tried-and-tested pitch techniques from experienced partners and in-house counsel. In some cases, this has led to an ongoing mentoring relationship beyond the scope of the program.

Art of the Pitch has been an extremely cost-effective program for Ballard Spahr. The program does not require any dedicated staff resources. The chief responsibilities entail collaboration with the local affinity bar associations, coordinating the lunch, facilitating the match process and following up with all of the participants. By leveraging existing relationships across the legal industry, the firm has been able to arrange for participation by well-regarded presenters at no significant out-of-pocket cost. The only notable expense has been for the luncheon portion of the program.

This is a program that can easily be replicated by others. The most significant hurdle would be the time and effort need to identify, contact and secure participation from in-house counsel.

For more information, contact Virginia G. Essandoh, Chief Diversity Officer, Ballard Spahr LLP at essandohv@ballardspahr.com or (215) 864-8192.

High Potentials Program

The High Potentials Program is a targeted business development program for female attorneys aspiring to become equity partners. Equity partners represent a select group of business developers and leaders within a private law firm. In most large firms, while women make up nearly 50 percent of all associates, the percentage of female attorneys who rise to the ranks of equity partner drops off to less than half that number. At Nelson Mullins Riley & Scarborough LLP, the firm's experience showed that traditional firm mentoring programs were not changing this paradigm. They developed this program with an aim to expand the business development and leadership capabilities of women lawyers through focused, internal coaching and sponsorship.

The Nelson Mullins' High Potentials Program is a two-year program involving a select group of women non-equity partners who have been identified by firm leadership based on their stellar legal skills and their genuine high potential for business development. The program was launched in 2016. The high potential attorney participants work closely with senior-level, male "rainmaker" sponsors, an internal marketing coach and an external executive coach to affirm their personal brands and interaction styles, raise their profiles internally and externally, develop client opportunities, and expand their leadership capabilities. The program involves a rigorous one-on-one coaching regimen, weekly discussions with sponsors and quarterly participant/sponsor education in-person sessions led by an outside executive coach.

The interaction of the sponsors and participants is designed to expose the female attorneys to various successful business development male "rainmakers" and their different styles and approaches they employ to cultivate business. During the program's one-to-one interactions, the partner sponsor takes a personal interest in involving their participant with direct client opportunities and developing a business growth plan. Throughout the program, sponsors, participants and coaches provide ongoing feedback and suggest improvements.

The firm evaluates the success of this program by measuring the increase in business development activities of the participants, the growth in the number of female equity partners and the increase in the number of female partners in firm leadership roles. The firm reports that the program has already had an immediate impact. One participant commented, being defined by firm leadership as an attorney with great business development and leadership potential gave me real confidence to push the bounds of my comfort zone and seek out highly visible speaking opportunities. These opportunities, in turn, led to more client pitch opportunities and assignments, as well as invitations to serve in leadership roles on firm committees."

Nelson Mullins had 10 attorneys (5 women and 5 men) participate in the two-year program. Program costs included an outside coach and travel expenses for attorneys who attend four in-person program sessions. Two paid staff people assist with administrative and organizational functions. The majority of the time spent by paid staff is greater during the selection process and in planning and implementing the in-person sessions. The firm estimates that these individuals spent a combined total of 120+ hours working on the program over a two-year period.

To learn more about the High Potentials Program, contact Brendi Kaplan at brendi.kaplan@nelsonmullins.com or (615) 664-5318.

Integrated Professional Development and Diversity initiatives

Siloes remain a persistent challenge within the legal profession's diversity and inclusion efforts. In part it's because the focus on different types of diversity started at different times, were motivated by different needs, and had different levels and types of resources that they could access. The challenge has been compounded over time because diverse lawyers often lacked sufficient knowledge about, sensitivity to, or even interest in other types of diversity beyond their own. It has left the profession with multiple diversity and inclusion efforts that operate in isolation and miss opportunities for synergies.

The Integrated Professional Development and Diversity Initiatives strategy of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. tackles this challenge head on and in a way that is designed structurally to recognize, address, and then move beyond the limitations imposed by the traditional silo approach. By integrating professional development and diversity, Ogletree Deakins has ensured that diversity and inclusion initiatives and programs are an integral part of competencies. This structure imbues inclusion as a leadership skill to be valued and developed and is treated as an ability vital to individual attorney development, firm-wide quality assurance, and overall success for attorneys and clients. By integrating diversity and inclusion into professional development, the firm dissolves the siloes where diversity is too frequently pigeon-holed while ensuring cultural competency as an integral part of attorney engagement and advancement. This approach provides attorneys with opportunities to grow professionally while developing commercially viable skills that lead to success and directly benefit clients. As a result, it positions the firm to offer a rich environment that supports authenticity while simultaneously offering premier service to a diverse client base.

The Integrated Professional Development and Diversity Initiatives strategy has its roots in the 2011 hiring of a full-time Professional Development and Inclusion (PDI) team led by a Director and former practicing attorney, whose primary focus was to establish programming and initiatives to sustain a productive and inclusive work environment in every office location. One of the first major initiatives that the team carried out was in-person interviews of attorneys at every level and in every demographic as a springboard to develop a PDI Needs Assessment/Climate Survey. The interviews contributed to devising an appropriate survey instrument and creating a baseline of accurate information needed to build an effective and sustainable PDI plan. In early 2012, the survey was rolled out and there was an impressive 86% response rate which provided a thorough picture of strengths, challenges and needs and allowed PDI to tailor its strategic plan to Ogletree and the vision of firm leadership.

The Professional Development & Inclusion (“PDI”) department designed a behavioral competency framework and substantive legal labor and employment benchmarks. These Labor & Employment benchmarks, together with practice-area specific benchmarks such as Immigration, Employee Benefits, and Class Action were developed by the PDI department working collaboratively with a Professional Development Steering Committee comprised of twelve senior shareholders.

In 2015, the firm launched a project to identify the traits and behaviors of successful Ogletree Deakins attorneys and career derailing patterns through extensive interviews with shareholders. The result: “The Success the ODWay Learning Guide” (“SODW”), a comprehensive and clearly articulated description of the behavioral competencies that lead to success at Ogletree Deakins. It is a written ‘playbook’ which empowers attorneys, especially associates, to take greater ownership of their careers by better understanding the firm’s cultural norms and expectations. The Learning Guide was presented to all shareholders in January 2016, to Directors at their Annual Directors Meeting in August, and it was rolled out to associates and of counsel at the 2016 Attorney Retreat. In 2017, the firm made SODW available as an on-demand webinar for all.

In late 2016, through a collaborative effort among the Human Resources, Learning and Employee Development, Recruiting and Retention, and Professional Development and Inclusion departments, and with support from the General Counsel’s office, the firm launched its first firm-wide diversity and inclusion training program for all employees: Foundations of Inclusion and Cultural Competence.

This four-part e-byte program is designed to provide foundational training on diversity and inclusion principles and explore key concepts, including the business importance of inclusion in the workplace; the difference between diversity and inclusion; how to develop cultural competence; and key strategies to help the firm become more inclusive.

Additionally, PDI has a catalogue of training opportunities on business development, communication, professional and organizational skills, all of which encourage respectful and inclusive attitudes at work. For example, in 2018 they released “Fostering a Respectful Workplace”, an e-learning module that offers practical tips on how to become more aware of the value and contributions of others.

To further supplement all of this, the firm also provides resources for attorneys to enhance their mentor-mentee relationships. For instance, it offers two on-demand e-Learning modules, “Mentor Playbook” and “Mentee Playbook” that our attorneys participate in individually, as mentor/mentee, or in groups that then discuss how to best implement the tips they learned in the module. This blended approach—combining e-Learning with more traditional, in-person interaction—increases engagement and motivation, and makes learning more effective overall. Mentorship relationships are being formed not only by associates and supervising attorneys but also within and across our various firm business resource groups, such as ODBAR (African-American group) and ODWIN (Women’s Initiative).

Not surprisingly, the implementation of a firmwide strategy aimed at creating cultural change has not been without its challenges.

The biggest challenge in the past has been integrating national PDI efforts with those of 53 local offices. From 2012 to 2013, a Diversity and Inclusion Steering Committee (“DISC”) and a Professional Development Steering Committee (“PDSC”) were created consisting of firm shareholders and headed by the chair of the firm. The PDI Department in collaboration with the DISC and PDSC developed a three-year Strategic Action Plan, which continues to be adjusted and aligned with the Firm’s Strategic Plan. It incorporates best practices as benchmarks that ensure the highest-standard point of reference for evaluation of performance and quality. To integrate more efficiently with offices, PDI now has a fully action-oriented ambassador network in each office which helps in that regard. PD Ambassadors are most often shareholders who help to train locally. D&I Ambassadors represent attorneys at all levels to help promote our national efforts while aligning local office efforts with our firm-wide initiatives. The firm has both a PD and D&I Ambassador in each of its local offices. Quarterly reports are provided to all ambassadors that include PD and D&I opportunities that they, in turn, use to communicate within their respective offices. Wherever feasible, joint training of both groups is offered to ensure collaboration and cross-pollination of efforts.

The Integrated Professional Development and Diversity Initiatives approach has taken time and required careful, broad-based planning and consensus-building. But, as an internally-designed and driven initiative, it has achieved a level of buy-in and support that externally-driven efforts do not always achieve.

For more information about the Integrated Professional Development and Diversity Initiatives contact Rebecca Baumgartner, D&I Manager at rebecca.baumgartner@ogletree.com or (816) 410-1803; or Laura Rogora, PD Manager at laura.rogora@ogletree.com or (816) 410-1805.

Lunchtime Inclusion Workshops

Over the past 4-1/2 years, Frost Brown Todd LLC has been hosting lunchtime Inclusion Workshops across its 12 offices. While each employee undergoes diversity and inclusion training when they join the firm, these workshops are designed to help the firm’s attorneys and business professionals fill gaps in their lenses. In 2018, the firm began live-streaming the workshops to the entire firm and had between 220 and 285 attendees at each of its 2018 programs.

What makes these lunchtime workshops so successful is due, in large part, to their purpose: exposing the attendees to new and different ways of looking at, thinking about, and experiencing life so that they can apply these new dimensions to their worldviews to their work and interaction with colleagues and clients. For example, the firm welcomed Dr. Brigitte Vittrup, who spoke about the false-merits of “Colorblindness,”; Rick Najera, who shared the experience of Latinx writers and actors in the TV and film industry; and Darius Nabors, who discussed the values of vulnerability, constants, and storytelling while visiting 59 national parks in 59 weeks. These are not the typical kinds of topics most firms would think of in terms of their diversity and inclusion programming but each program has sparked days of further conversation and reflection across the firm. The various offices have been extremely receptive to the programs since live streaming was added. Clients who are hearing about

the programs are asking to be invited, and the firm now routinely has wait lists in its larger offices when a new program is announced.

Frost Brown & Todd funds the program out of its Diversity & Inclusion budget. Typical costs include the speaker's fee or an honorarium donation in the speaker's name, lodging and transportation for the speaker, as well as lunch for the office participating in the event. The program is run by the firm's Director of Diversity, Kim Amrine, with the assistance of first year associates Simon Svirnovsky, Sunrita Sen, and Janine Tate. The firm also engages the help of its video conference staff, local office heads, and its technology team, most of whom have been volunteering their time and services beyond their regular day-job duties and responsibilities, making it a truly firm effort. Indeed, the most challenging aspects to the program have been the coordination of dates and times that work for the speakers and all of the firm's offices for any workshop. At Frost Brown & Todd, the lunchtime Inclusion Workshop brand has quickly become strong enough that each time a new session is announced, there is tremendous excitement and anticipation throughout the firm.

For more information, contact Simon Svirnovskiy at ssvirnovskiy@fbtlaw.com or (513) 651-6754.

OnRamp Fellowship

The purpose of the OnRamp Fellowship is to address the lack of diverse talent in the mid- to senior-level lawyer pipeline that has contributed to the dearth of women and minorities in positions of power. For instance, in large law firms there is typically a 50/50 gender split at the entry level, but many women leave the profession early in their careers, often for family reasons, and face significant obstacles when they attempt to return. The Fellowship helps law firms and legal departments tap into this untapped pool of experienced high performers who have a strong desire to return to and advance in the legal profession. It also serves as an experiential learning program that provides lawyers returning to the profession an opportunity to demonstrate their value in the marketplace while broadening their experience, skills, and contacts.

The Fellowship is a re-entry platform that matches experienced lawyers returning to the profession with top law firms and legal departments for one-year paid positions. Fellows are paid a stipend and receive benefits with the expectation that they will be engaging with complex client projects while updating their skill set and taking advantage of training opportunities.

A unique aspect of the Fellowship program is the use of custom assessment tools to both evaluate applicants and analyze organizational values, cultural profiles, and success traits. The Fellowship directors combine this objective data with information from interviews to match candidates and workplaces with the greatest potential for a successful outcome.

Lawyers who have at least three years of post-licensure legal experience and have been on a hiatus from full-time practice for two or more years are eligible to apply for Fellowship positions at participating law firms and legal departments.

All applicants are rigorously screened by the Fellowship to assess their current experience, skill set, and desire to return to and advance in their profession. As part of the screening process, each applicant is expected to:

- 1) Complete a battery of online skills, personality, and values assessments, which are similar to the hiring and development tools used in corporate environments;
- 2) Take a writing assessment developed by leading writing authority Ross Guberman; and
- 3) Participate in a behavioral interview conducted by a hiring expert.

Once the initial interview process is complete, the Fellowship directors create a "Screening Scorecard" that is sent to the participating organizations with the outcomes of the assessments and other

application details. The Scorecard also compares each candidate to the organization's culture and success traits, which are ascertained through the two supporting talent analyses detailed below. After reviewing the applications, the organizations are encouraged to personally interview their top applicants to determine who will receive a Fellowship offer.

Talent Analyses Conducted at Organizations

- (1) An assessment of the organization's culture is conducted through a brief scientific survey – only 10-15 minutes per participant. The organization's assessment results are analyzed by office, group, and other demographics to better understand the cultural similarities and differences that exist within the organization. These results, along with the organizational success traits, are used to guide the interview and matching process.
- (2) High-performing women and men at the organization are interviewed to gather information on their success. Typically called a Bright Spot Study in social science, this analysis allows the organization to better understand why women and men in particular offices or groups are successful. The goal is to learn what contributes to their success so that those behaviors, skills, and approaches can be replicated in the Fellowship program and beyond at the organization.

To support the Fellows' re-entry and career advancement, they receive external support from professional development experts and career counselors. The additional benefits offered through the Fellowship include:

- Training by specialists in negotiations, leadership, oral advocacy, and project management;
- Monthly Cohort Calls with other returners to share experiences and exchange ideas for effectively re-entering the profession; and
- Counseling from experienced career coaches who work one-on-one with the Fellows throughout the Fellowship to assist with their skill development and to navigate work/life integration.

Organizations are asked to provide each Fellow with an internal "mentor" and high-level sponsor who can assist with navigating organizational nuances and offer support as the Fellow eases back into the profession.

A Fellow who does excellent work will conclude the Fellowship with a current professional reference that can be leveraged as she pursues her next endeavor. If a relevant position is available, the hope is that the Fellow will be offered a longer-term role in the organization.

Of the women who have completed the OnRamp Fellowship, 87% have transitioned into longer-term positions with prestigious law firms and other organizations. Those who have not received longer-term opportunities in law have leveraged their experience for jobs in academia and other career choices.

As of August, 2018, 71 Fellows have been hired in 14 cities throughout the United States. Of these, 35% are women of color. And 86% of the Fellows who completed the Fellowship received offers for longer term roles in the legal profession.

The Fellowship launched its pilot in January, 2014, with four law firms in the U.S. Since then, it has grown to include 40 organizations that have posted more than 200 positions in the U.S., Australia, Canada, and the U.K., including 31 law firms, eight legal departments, and a bank.

Costs include an annual subscription to an online application management system; travel expenses associated with meeting with participating organizations and current Fellows, as well as for marketing and education events; fees for the assessments that are part of the screening process; and pay/salary to staff and contractors. Participating organizations pay an annual fee to participate in

the program, which covers the costs of the organizational studies, candidate screening, and the staff required to manage the program. Fellowship applicants pay \$175 to defray the costs of the skills, personality, and writing assessments.

Eight full-time Diversity Lab employees devote 10-95% of their time to managing the Fellowship. Additionally, the Fellowship contracts with a number of professionals who provide key services, including career coaches and professional development experts, who provide coaching and training to Fellows and data scientists, who provide technical assistance and statistical analysis for the organizational studies.

As a result of the OnRamp Fellowship, law firms and legal departments are now making strides on gender diversity in an entirely new way—by sourcing from non-traditional pools of diverse talent and “activating” the experience of lawyers who paused their practices for life reasons. Would-be returners who previously searched unsupported are now able to take advantage of a supported pathway with a built-in peer network to the next chapter of their legal careers. We have opened a new point in the diversity pipeline and in four years, increased the number of experienced women lawyers in the profession. And, most importantly, 86% of the Fellows who completed the Fellowship are now gainfully employed, once again, in the legal profession.

Interested applicants or organizations wishing to explore participating can visit onrampfellowship.com to learn more about the program or contact Jennifer Winslow, Managing Director of the OnRamp Fellowship at jennifer@diversitylab.com (720) 799-7588.

Reed Smith’s Disability Inclusion in Law Firms

Disability has, to date, been one of the less prominent diversity strands within the legal profession and within the professions more generally. There are likely a number of reasons for this. One is the misconception that because some (but by no means all) individuals who have disabilities need support, either temporarily or on a more consistent basis, they may not be “able” to work in a law firm or in a busy legal department. Another is undoubtedly that because there have historically been so few people with disabilities working in law, there are few role models and law firms may feel that they do not have the know-how or the expertise to support people with disabilities. A third is the fact that people with disabilities often do not feel able to disclose their disability to law firms for fear that they will not be employed if they do. But the barriers which may have historically prevented people with disabilities from achieving their potential in law firms have either come down or are coming down and perceptions of “disability” and indeed what “ability” means in our profession are changing.

Reed Smith started its business inclusion group (LEADRS) for people with disabilities in 2012 with the aim of consciously recruiting, retaining and advancing the careers of people with disabilities. The firm saw how few people with disabilities there were working in the legal profession generally and, indeed, how few people within their own firm were disclosing that they had disabilities. They felt that as a business, the firm wanted to effect change.

The London Paralympics acted as the catalyst for this work. Here were athletes with disabilities (some of whom had severe physical disabilities) running the 100 metres in times which most people could only dream. There could be no question of the talent and the determination of those individuals and Reed Smith wanted to tap into what they thought was a largely untapped talent pool. The firm hypothesised that like the paralympians, those who have managed to make their way through traditional education systems (which are generally not designed with students with disabilities in mind) and achieve the grades required to go to university or college or to law school to study law have generally overcome very significant obstacles—sometimes physical and often also mental in order to achieve those grades. The firm’s working theory was that individuals with a disability were likely to be exactly the sort of people that they wanted to hire—much of what lawyers do is to try to resolve or find ways around difficult problems for clients. The ability to do that for yourself,

they thought, was likely to be an extremely good indicator of the ability to do the same for clients. That proved to be the case. It would be no exaggeration to say that some of Reed Smith's very best hires have disclosed that they have a disability and indeed have told the firm that they decided to work for the firm because of the conscious efforts that they saw being made to hire people with disabilities.

There is also a working theory that given the current digital transformation that is taking place within the professions in general, individuals who think differently, creatively and laterally (as many people with disabilities do either as a result of their disability or because they have had to learn those skills to succeed) will be hugely in demand in the professions in the future. That certainly resonates with Reed Smith and with its experiences of working with people with disabilities.

There are sometimes fears that the additional support that some people with disabilities need will be costly or that people with disabilities will not be as productive. However, Reed Smith reports that its experience is that those fears are rarely well-founded. There is often government support available for businesses to help with any additional costs and technology has now advanced to the degree that there are very few obstacles that cannot be overcome—to borrow from Microsoft's terminology, the technology available now empowers people with disabilities to work effectively in ways that may not have been possible in the past. People with disabilities can work remotely from home when it is too difficult to travel, people with dyslexia can use spelling and grammar checks, and speech recognition tools can support those who have difficulties with vision. Many of the actual or perceived barriers which prevented people with disabilities from achieving their full potential are simply no longer there.

Reed Smith tells us that they did not think there were any good reasons why they should not try to hire more people with disabilities but they could think of many reasons why they should try to do so. As with all projects, LEADRS has taken time to develop and grow but Reed Smith's LEADRS group now has more than 65 members across our network of offices and during 2018 more than 12% of the trainee lawyers hired in their London office disclosed that they had a disability. The firm acknowledges that there is more to be done but they are justifiably proud of what they have achieved so far.

In our experience, there are some key things that need to be done in order to begin increasing disability diversity in the workplace. The first is to let people know that you are looking to hire more people with disabilities. This might involve partnering with third parties—in the UK Reed Smith has partnered with the Law Society's Lawyers with Disability Division, Aspiring Solicitors, Employability and My Plus Consulting among others. The second is to look at whether your recruitment process is disability friendly—small changes can make a big difference. For example, people with disability notice and appreciate when a job advertisement clearly expresses that reasonable accommodations are available in the application and interview process. The third is to earn the trust of prospective employees with disabilities. If people do not feel able to disclose their disability, it may impact their performance at interview, and if they are hired, it can impact their ability to do their job if they do not get the support they need. People with disabilities need to be confident that disclosure will not impact their prospects of being hired and it is up to the prospective employer to make it clear however they can and in as many ways as they can that there is no risk associated with disclosure. Trust needs to be earned.

Reed Smith notes, however, that in its experience, the most important thing to do is to look beyond any disability a person might have and instead focus on their ability and what they can bring to the organisation. There is perhaps a natural synergy between an organisation which is willing to think creatively, laterally and differently about recruitment and which looks to find solutions and not problems and its ability to attract candidates whether with or without disabilities with the same attributes.

Diversity & Inclusion Key Performance Indicators

While it's not uncommon for law firms to have strategic plans or even strategic plans specific to their diversity and inclusion goals and objectives, Fish & Richardson P.C.'s Diversity & Inclusion Key Performance Indicators ("KPIs") caught our attention for the way it marshals a comprehensive approach to assessing and evaluating its diversity and inclusion efforts. We have long advocated for critical analysis of whether diversity and inclusion programming and policies were truly having the desired impact and this program seems a positive step in the right direction.

Taking stock of a robust history of diversity and inclusion efforts and programs that ranges from Space Camp Scholarships to send minority and economically-disadvantaged middle school students to the U.S. Space and Rocket Center Space Camp in Huntsville, AL to funded fellowships and active affinity groups as well as internal training programs, Fish & Richardson's leadership engaged in a candid discussion about the firm's need to do more to ensure that inclusivity and diverse perspectives would thrive within the firm. With that in mind, they revamped their strategic plan in incorporate KPIs.

The firm adopted six goals and six key performance indicators in May 2017. Each goal has corresponding programs and initiatives. The KPIs are tracked on a quarterly basis.

Goals

- We will educate and engage everyone in our Firm on diversity & inclusion.
- We will embed diversity & inclusion into all career development processes and procedures for the Firm.
- We will increase the representation of individuals from diverse backgrounds in our Firm.
- We will increase the percentage of individuals from diverse backgrounds in positions of leadership.
- We will increase the percentage of individuals from diverse backgrounds in positions of responsibility with Firm clients.
- We will be recognized as an industry leader in diversity & inclusion.

Key Performance Indicators/Measurements

- Increased recruitment of individuals from diverse backgrounds, including women, racial/ethnic minorities, LGBT, veterans, and individuals with disabilities.
- Retention of diverse legal staff occurs at similar rates as other legal staff, with no appreciable gap in the retention metrics.
- Diverse representation at all levels in the composition of the firm's client service teams.
- Increased representation of diverse attorneys in the principalship, including in the equity ranks.
- Meaningful attendance of individuals from all backgrounds at diversity events.
- Public and client recognition of the Firm for diversity & inclusion efforts and outcomes.

The way KPIs is designed, the entire firm is involved in these efforts at some level, and approximately 60 individuals are directly involved in the many initiatives. This includes members of the Management Committee, practice group leaders, affinity group leaders, and senior administrative staff.

In the first year, the firm set aside \$250,000 in additional funds to launch the strategic plan. Subsequent years have and will include budgets to further the goals of the program. The funding is part of a special budget allocation by the Firm's Management Committee.

The firm has a full time D&I Manager who has significant responsibility for the program. The Legal Talent Department also has a Data Analyst who provides significant support.

Measurable goals have allowed the firm to track what is working and what may not be working. As a direct result of this initiative, the firm feels it has improved a number of policies and is seeing results. For example, Fish & Richardson is attracting more candidates from underrepresented backgrounds for open positions. The firm has increased the number of women in leadership roles. And, the firm has raised its profile in the diverse legal community.

This is the type of program that can be readily replicated but Fish & Richardson cautions that given the systemic change it pursues, there needs to be sustained commitment of resources and buy-in from senior leadership, both in terms of people and finances.

For additional information, contact Kristine McKinney, Chief Talent & Inclusion Officer, Fish & Richardson P.C. at mckinney@fr.com or (612) 278-4556.

LEGAL PROFESSION IN GENERAL

Access Success

Access Success was designed to move beyond the cursory discussion of the importance of diversity towards more interactive discussions about the unique challenges facing disabled lawyers and how to achieve tangible solutions in diversifying the profession.

The program had three components: a CLE seminar with an interactive panel discussion, an in-person networking reception and an online networking event powered by LexVita.com. The target audience was attorneys and law students with disabilities, as well as law firms and law departments interested in expanding their own networks of able counsel.

Access Success features a live event which includes an educational component and a networking reception. The educational component focuses on providing employers with an overview of the protections afforded to disabled workers, ways employers can make sure they maintain compliance with the law and reflections from attorneys with disabilities on challenges they have faced and suggestions for improving work environments. The live program serves as the kick-off for an ensuing two-week online networking fair. Attorneys and law students with disabilities, as well as law firms and law departments interested in expanding their networks of able counsel, are encouraged to create a profile through www.lexschola.com (law students) and/or www.lexvita.com (attorneys) to participate.

44 individuals participated in last year's event.

The program costs were limited to ~\$1,500 for the cost of a translator and the food/drink for the reception. The development of the online networking tool was donated. During the first year of this program, the food/drink were donated by the host law firm and The Chicago Bar Association covered the costs of the translator. During the second year, the costs were covered by a grant from the American Bar Association.

A staff member devoted approximately 15 hours to this project during its inaugural year and approximately 8 hours during the second year.

Access Success has been a unique opportunity for attorneys with disabilities to connect with potential employers. More than that, though, it has served as platform for employers, potential employers and attorneys with disabilities within the Chicago community to discuss ways that networking events, the hiring process and the work place can be more inclusive for all.

The main obstacle in replicating this program is securing participation by potential employers. Participation by law firms and law departments is essential to having a successful two-way conversation about making hiring process and work environments more inclusive, as well as in making the online networking portion of the event a valuable experience for participating attorneys.

This program can certainly be replicated, but other individuals or organizations can get involved in THIS program by publicizing it to networks interested in connecting attorneys with disabilities with networking and career opportunities. Law firms and corporations from anywhere in the country can participate in the online networking portion of the event.

For more information, contact Jennifer Byrne at jbyrne@chicagobar.org or (312) 554-2031.

Women in Leadership in the Law

Women in Leadership the Law is a program of the Law Society of England and Wales that encompasses a number of initiatives both nationally in the UK and internationally. Spearheaded by Law Society President Christina Blacklaws, it is aimed at 1) positioning the Law Society as a thought leader on matters related to women and the law; 2) addressing matters relevant to women's rights and gender equality; 3) promoting and supporting gender equality in the legal sector; and 4) leveling the playing field for all women working in all parts of the law and legal profession.

The program has five key components:

1. A global quantitative survey that received 7,786 responses;
2. A literature review of articles and research on women in the law;
3. A series of 100 focused roundtable discussions collecting qualitative information on women in the law;
4. Publication of a toolkit offering structural guidance to promote dialogue and action; and,
5. An actions and impact assessment.

A final report with recommendations is being released on March 8, 2019 in conjunction with International Women's Day.

As a program, Women in Leadership in Law accomplishes a multitude of objectives. These include:

- Highlighting the lack of representation of women in positions of leadership in the legal profession;
- Championing the necessity of true diversity and inclusion of people, backgrounds, ages, experiences, and genders;
- Providing organizations, communities, professions, and international jurisdictions with the means to tackle gender inequalities that exist for them through use of a dedicated toolkit;
- Cross-jurisdiction and profession applicability;
- Gathering qualitative and quantitative data from men and women on the barriers which are preventing women from achieving leadership roles and the solutions to overcome this;
- Galvanizing public commitments at both grassroots and leadership levels to achieve proactive and tangible change in the profession;
- Creating movement on key areas of focus such as the gender pay gap;
- Sharing knowledge and free resources;
- Facilitating networking for women to share knowledge and skills and to support one another across national and international jurisdictions;
- Collating a history of women in the profession to evidence role models of different backgrounds and experiences, and their various routes to leadership in law;

- Celebrating the achievements of women in the profession;
- Role modelling correct behaviors;
- Sharing solutions and better practices;
- Celebrating the success of the profession, both throughout the UK and internationally

For additional information, contact Lauren Thornton, Project Coordinator – Women in Leadership in Law at the Law Society of England and Wales at Lauren.Thornton@lawsociety.org.uk or 0207 316 5631 or Alex Storer, Diversity & Inclusion Adviser – Gender Equality Lead at the Law Society of England and Wales at Alex.Storer@lawsociety.org.uk or 02073205749.

Microsoft’s Diversity Tag

Sometimes, in the D&I echo chamber, it can be easy to forget that truly advancing diversity and inclusion requires courage: courage to step out of one’s comfort zone and letting go of the familiar, and thoroughly participating in a dialogue that isn’t always comfortable. Microsoft’s Corporate External & Legal Affairs department (“CELA”), itself a diverse team that is spread across the globe, diverse in terms of gender, age, race, culture, experience, and perspectives, recognized this need for courage. Rather than allowing the diversity of the team to impose siloes and barriers, they decided to use these diverse attributes to foster the important discussions that are required to model truly inclusive behavior. Diversity Tag not only illustrates the company’s D&I culture, but it also aligns with its goal to make the program and dialogue a best practice that can be replicated throughout any organization.

Here’s how Diversity Tag works: A group of people—Microsoft calls theirs the Diversity Council—creates a list of tasks or challenges intended to encourage dialogue and test boundaries related to diversity and inclusion. Next, a team of three to five (Tag Team A) chooses a series of tasks or challenges from the list. Tag Team A is given a reasonable timeframe in which to complete the selected tasks and challenges. Tag Team A and the Diversity Council hold at least one checkpoint meeting to evaluate how the process is going. Once Tag Team A completes its selected challenges, they present their experience(s) and learnings to the entire organization. Upon completion of the presentation, a new group of volunteers (Tag Team B) are selected to participate in the next round of challenges. Tag Team A steps into the role of the Diversity Council for the next round and will draft a list of new challenges for Tag Team B to consider. The cycle continues from there.

To date, the Tag Teams have taken on several different challenges including those related to immigration, cultural biases, movies and entertainment, religious worship, and food. The Tag Team presentations have achieved the anticipated level of discussion and outcomes. Members from various teams and across other CELA departments have engaged in deep substantive conversations and activities such as attending cross denominational church services, discussions pertaining to immigration policies, as well as personal stories about gender, race, and age discrimination.

There are a few key takeaways that Microsoft has noticed thus far.

- Each Tag Team should begin their engagement by meeting to discuss their respective backgrounds and history around diversity. The discussion should be candid, transparent, and without a “cone of silence.” This discussion will set the tone for how the team will embrace each other’s differences. Participants have noted that this threshold challenge is difficult, and more emotional than they thought.
- Challenges that can be done face to face appear to garner the most meaningful results. To the extent that in-person discussions/meetings can be facilitated, these challenges should take priority.

- There should be a pre-established cadence for conducting the Tag Team presentations. Momentum for this initiative can be easily slowed if there is too much of a time lag between when the challenges are completed and when the actual report out occurs.

Participant Recognition

Two times per year, senior leadership should recognize Tag Team participants with the “Medal of Courage” acknowledging individual behavior that aligns with Diversity Tag’s goals.

For more information about Diversity Tags, contact Alonzo Barber at alonzob@microsoft.com or Daphne Forbes dforbes@microsoft.com.



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MASTERING THE GAME: STRATEGIES FOR CAREER SUCCESS

By Sharon E. Jones with Sudheer R. Poluru

Available through [Amazon](#), [Barnes & Noble](#), and independent book sellers

Feedback on the Book

“Mastering the Game is like a treatise for career development. Jam-packed with honest advice that too often women and minorities do not get to hear, Jones teaches you skills you may not have known you needed and gives you actionable steps to start practicing them.”

“I would highly recommend this book for someone who is just entering the workforce or is currently in the workplace but feels frustrated with how their career is advancing. Parts of the book are focused specifically toward women and racial or ethnic minorities but much of the advice is universal.”



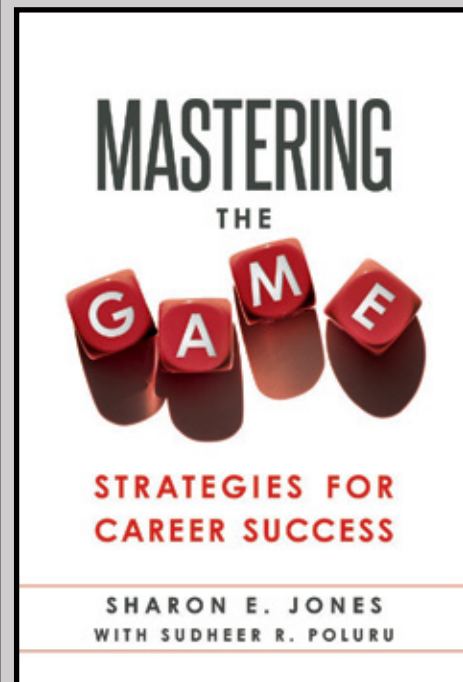
Before you can master the game, you have to know all the rules! Sharon E. Jones shares insider strategies to help women, people of color, and other diverse professionals succeed in any workplace.

Author Bio: Sharon E. Jones

Sharon E. Jones, graduate of Harvard Law School and Harvard College, is a trailblazer for diversity and inclusion in the workplace. In her decades of professional experience, Jones has learned how to excel in organizations and industries still dominated by White male leadership. Jones acknowledges that it wasn't easy, but she hopes that her new guide to career advancement as a diverse professional will help you overcome some of these challenges.

Jones has practiced law and been a community leader over a twenty-five-year career, practicing as an Assistant U.S. Attorney, as a Senior Counsel for Fortune 500 Corporations, and as a partner with major law firms. Additionally, Jones has served as a board member for the Institute for Inclusion in the Legal Profession and president of the Black Women Lawyers Association of Chicago, which she co-founded. She has won numerous awards as a lawyer, industry leader, and advocate.

Jones is the founder and CEO of Jones Diversity, Inc., which offers services to organizations looking to improve their workplace culture and create more diverse and inclusive teams.



Book Summary

There's nothing more frustrating than playing a game without knowing all the rules. Lawyer and diversity consultant, Sharon E. Jones can attest to this in her professional life. As a woman of color, she has spent her entire career navigating the conscious and unconscious biases of her supervisors and peers. In *Mastering the Game*, Jones demystifies ten unwritten "rules of the game" and provides over 100 strategies to help women and other diverse professionals succeed.

Jones delves deeper into:

- The current trends in diversity in the legal, corporate, tech, and medical sectors
- The importance of visualizing your goals before you even begin
- The value emotional tenacity will have as you encounter challenging situations
- The need to identify the metrics for success
- The difference good sponsorship can make for your career
- The importance of self-promoting and advertising your strengths
- More rules and techniques to help you build your vision of personal and professional success



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