Ethics of Diversity – ABA Adopts New Anti-Discrimination Rule – How Does This Impact the Practice?
**Ethics of Diversity – ABA Adopts New Anti-Discrimination Rule – How Does This Impact the Practice?**

Lack of diversity in law firms continues to be a focus of conversation and frustration among in-house counsel. Similarly, law firms lament the difficulties of recruiting and retaining diverse talent as client demand heats up for teams reflecting inclusive hiring practices. This article will discuss the current state of diversity and inclusion initiatives in the legal industry, and concrete strategies for (finally) moving the needle. The article will also tackle the ethical dilemmas the issue can present, including the 2016 changes to the ABA Model Rules and CLE diversity requirements, the application of ethical hiring practices, and the latest research on implicit bias.

**OUTLINE:**

A. The Problem

While the ABA Anti-Discrimination rule admirably attempts to regulate a myriad of inequities in the legal profession, the panel agrees that protecting included group members from day-to-day indignities is not the “big picture” goal. Dominique Mosbergen, *Don’t Call Me Honey: U.S. Lawyers Barred from Sexist Comments; Discriminatory Behavior*, Huffington Post (August 10, 2016 8:30 AM ET), [http://huffington.com/entryamerican-bar-association-antidiscrimination-rule_us_57aaf5f5e4b0ba7ed23e3361.html](http://huffington.com/entryamerican-bar-association-antidiscrimination-rule_us_57aaf5f5e4b0ba7ed23e3361.html). We submit, there is a greater purpose.

Most recognize that diversity is not only a moral imperative – the right thing to do; but also produces a higher quality work product that will move the needle. A national study by McGinn-Repas in 2016, looking at eleven major industries, revealed that among areas such as higher education, healthcare, manufacturing, government and finance, law firms were perceived to have the lowest commitment to diversity when it comes to hiring and retention. Sadly, even the media and entertainment industries ranked significantly higher
for perceived commitment to diversity than the legal profession. Law firms came in dead last with a net-minus one score. Why?

It is clear, that representation of minorities in the law has essentially flat lined since 2000 and the 2020 data does not look any more promising. The McGinn-Repas Study showed that the public simply does not believe that law firms care much about diversity even though 62% of participants believed that law firms with a diverse group of lawyers attract more clients. Interestingly, the study linked these beliefs to the perception that corporate clients don’t care much about diversity either, and so the demand for diverse legal teams is low.

The Minority Corporate Counsel Association (MCCA) released its annual Vault/MCCA Law Firm Diversity Survey (mcca.vault.com) which is considered the legal industry’s most comprehensive tool for measuring law firm diversity, collecting data on race, ethnicity, gender, GLBT identity, and disability status. The annual survey collects data based on the previous calendar year. Approximately 250 law firms participate in the survey each year, representing virtually all of the AmLaw 100 and a majority of the NLJ 250. According to the 2016 report, despite some progress in recruitment of diverse attorneys, problems at law firms persist concerning attrition and promotion. Indeed, lawyers of color continue to leave their firms at alarming rates citing isolation, the absence of authentic mentorship, poor assignment opportunities, lack of client exposure and slower rates of promotion.

In 2010, the American Bar Association (ABA) highlighted a study that revealed 25% of law firms “are to blame” for high minority attrition numbers. In an ABA cover story, “Minority Women are Disappearing from BigLaw and Here’s Why,” Liane Jackson noted that 85% of minority female attorneys in the U.S. will quit large firms within seven years of starting their practice. Jill Schachner Chanen, Early Exits: Women of Color at Large Law Firms Tell ABA Researchers They Are Being Overlooked and Undervalued – Maybe That’s Why they Are Leaving in Droves, ABA Journal, August 2006. These studies confirm that when corporate clients don’t require diverse talent in outside counsel, the
potential for growth, promotion and success at larger law firms becomes virtually unattainable for women and people of color. As millennials and minorities gain more buying power in the marketplace, this public perception will ultimately affect a company’s bottom line.

What impact does the new ABA Rule have on these heady challenges? In order to examine the issue, a careful reading of the Amendment is useful.

B. The Rule

Maintaining The Integrity Of The Profession

Rule 8.4: Misconduct

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 the 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 relevant Comments to Rule 8.4(g) provide:

...[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or
physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

(Emphasis added).

C. The Pushback


In an opinion, Texas Attorney General, Ken Paxton, concluded “a court would likely conclude that the ABA’s Model Rules of Professional Conduct 8.4 (G), if adopted in Texas, would unconstitutionally restrict freedom of speech, free exercise of religion, and
freedom of association for members of the state bar. In addition, a court would likely conclude that it was over broad and void for vagueness.”

Robert D Koch, Attorney General for the State of South Carolina opined, “in summary, we believe, if adopted, that the likelihood of a successful challenge to the Model Rule based upon the First Amendment and due process clause is substantial and that a court could well conclude the rule is unconstitutional.“

Similarly, the 2017 Montana legislature is attempting to push through senate resolution number 15, a joint resolution of the senate and the house of representatives of the state of Montana, making the determination that it would be an unconstitutional act of legislation, in violation of the Constitution of the state of Montana, should the Supreme Court of the State of Montana enact proposed Model Rule of Professional Conduct 8.4 (g).

Generally, opposition to the Amendment has been grounded in rebuke of political correctness. “We live in an era when America’s elites are anxious to control what we say, because language both reflects and molds how we think. Hence, they are falling all over themselves to become politically correct.” Robert Rotunda, The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought The Heritage Foundation (October 6, 2016) http://heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought.html.

As a matter of policy, the intent of the Rule was to assure that the legal profession functions for all participants, including vulnerable groups, such as racial and sexual minorities and persons with disabilities. Inclusion and accountability, rather than exclusion and immunity, are the core values the Rule sought to protect.

The Rule democratizes access to all persons involved in the legal profession to play their assigned roles without fear of harassment and discrimination. “No lawyer —partner or associate, renowned or unknown — has any constitutional or statutory right in the practice
of law to harass clients, witnesses, judges, court officials, support staff at the law firm, or colleagues on the basis of race, color, religion, national origin, gender, or any other unlawful classification. Nor does a lawyer have any constitutional or statutory right to engage in unlawful discrimination in the employment of new lawyers and staff.” Liaquat Ali Khan, *Disciplining Lawyers for Harassment and Discrimination*, Huffington Post, (July 12, 2017 7:40 AM ET), http://www.huffingtonpost.com/entry/disciplining-lawyers-for-harassment-and-discrimination_us_5962c774e4b0cfc8e8d59d7.html.

C. The Reason. The Research.

"Decision making is a very private thing, individualized and personal. Yet it has a cultural dimension. The human brain does not acquire language, symbolic skills, or any form of symbolic cognition without the pedagogical guidance of culture and, as a result, most decisions made in modern society engage learned algorithms of thought that are imported from culture." Merlin Donald, *How Culture and Brain Mechanisms Interact in Decision Making*, in Christoph Engel & Wolf Singer, EDs., Better Than Conscious? Decision Making, The Human Mind, and Implications for Institutions 191 (2008). Similarly, the attitudes of one’s group influence individual attitudes. When we become aware that our attitudes differ from our groups’, our attitudes tend to shift toward the norm of our peer group; this includes influence on our biases. Nilanjana Dasgupta, *Mechanisms Underlying Malleability of Implicit Prejudice and Stereotypes: The Role of Automaticity Versus Cognitive Control* in T. Nelson, ED, Handbook of Prejudice, Stereotyping, and Discrimination (2009). The often unintended result is implicit bias.

Implicit biases do not necessarily lead to explicitly biased decisions or behaviors, but they may predict discriminatory nonverbal, subtle behaviors such as sitting further away or cutting interviews short, which behaviors are then interpreted as biased. Susan T. Fiske, Social Beings: Core Motives in Social Psychology (2nd ed. 2010). The Reverend Jesse Jackson poignantly confessed: “there is nothing more painful to me at this stage in my life and to walk down the street and hear footsteps and start thinking about robbery… Then look around and see somebody white and feel relieved.” (Bennett 149, Steele, Vedantam See No Bias...) Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POL’Y REV. 149 (2010), Claude M. Steele, Whistling Vivaldi and Other Clues to How Stereotypes Affect Us (2010) (describing source of title as a black graduate student who becomes non-threatening when he whistles Vivaldi), Shankar Vedantam, See No Bias, WASH. POST Jan. 23, 2005 (Magazine) at 12.

By definition, implicit biases are those we carry without awareness or conscious direction. Such biases, often distinct from our self-reported responses to groups other than our own, play out in many ways ranging from expectations about behavior and ability to assessment an advancement. These implicit biases are “particularly evident when measured unobtrusively…” Nilanjana Dasgupta & Luis Rivera, When Social Context Matters: The Influence of Long-term Contact and Short-term Exposure to Admired Outgroup Members on Implicit Attitudes and Behavioral Intentions, 26 SOC. COGNITION 112 (2008).

So, how do we know what our implicit biases are and whether they are impacting our decision-making or our interactions? One way developed by social scientists at Harvard University is the Implicit Association Test or IAT. (Project Implicit). The IAT is designed to measure associative knowledge, associations, and links that cause one concept to be activated by another, so-called automatic associations (e.g. math ability) with attributes (like male, female) under tight time parameters. The underlying theory is that we will

**Take The Test!**

Harvard Implicit Association Test: Project Implicit

https://implicit.harvard.edu/implicit/

At the very least, the IAT tells us to consider our possible implicit bias and be mindful of its implications. Psychology research shows how implicit bias may be relevant to the homogenous composition of the legal profession with prevailing male leadership in largest firms. U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Report 1026, Table 6* (2010), American Bar Association, ABA Commission on Women in the Profession, *A Current Glance at Women in the Law 2011*. “If people have a schema about gender differences, that schema spills over into their judgments… The implications for judgments of professional competence are clear. Employers faced with a man and a woman matched on the qualities relevant to success… May believe they are judging the candidates objectively. Yet, if their schema represents men as more capable… They are
likely to overestimate the male’s qualifications and under estimate the females.” Marianne Bertrand & Sendhil Mullainathann, Are Emily and Greg more employable than Lakisha and Jamal? 94 AM. EC. REV. 991 (2004).

The potential influence of implicit bias on the legal profession and access to and delivery of justice is wide ranging. For example, implicit bias likely underlies part of the reason why the practicing bar remains predominately white and male, particularly in the law firm setting. The employment data reflects differences in educational qualifications, entry, retention, and success between genders and among races and ethnic cities and demonstrates how decisions are made that maintain the in group status quo. Frances Trix & Carolyn Psenka, Exploring the Color of Glass: Letters of Recommendation for Female and Male Medical Faculty, 14 DISCOURSE & SOCIETY 191 (2003); John T. Jost, Laurie A. Rudman, Irene V. Blair, Dana R. Carney, Nilanjana Dasgupta, Jack Glaser & Curtis D. Hardin, The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore, 29 RES. IN ORGANIZATIONAL BEHAV. 39 (2009).

Do not feel forlorn - implicit bias is are malleable and can be changed! While the data are not uniform, some research does conclude that a desire to be fair can change implicit bias through development of “chronic egalitarian values.“ Danel T. Fiske, Handbook of Social Psychology 406-8, 1090 (5th ed. 2010), Justin A. Wellman, Alexander M. Czopp & Andrew L. Geers, The Egalitarian Optimist and the Confrontation of Prejudice (2009) available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2844083/.

In fact, the desire to be fair may be more effective at impacting bias than legal coercion. Conditions that support this motivation include strong, unambiguous norms around bias, and leadership with positive examples. Katherine Bartlett, Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination, 95 VA. L. REV. 1893 (2009).
One approach to debiasing is utilizing procedural changes to disrupt the link between implicit bias and discriminatory behavior through change procedures. Similarly, adding a level of accountability to the process impacts decisional outcomes. If we think we are being monitored or may have to explain our decisions, we are more motivated to act in an unbiased way. Adam Benforado & John Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 Emory L.J. 311, 325-26 (2007-2008); Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. Applied Psychol. 553, 556 (2005). What is important is that the accountability be to a superior who him/herself offers a clear, unequivocal and unbiased approach.

**E. The Takeaway.**

What does all this mean? Certainly, under the new ABA Rule, harassment and discrimination constitute sanctionable, professional misconduct. But more important is the clear understanding that under the Rule, firms may undertake efforts to promote diversity and inclusion without violating the Rule, including tackling implicit biases affecting decision-making in law firms and corporations shopping for outside counsel.

With respect to debiasing, in 2012, the ABA Section of Litigation, Implicit Bias Task Force set forth the following objectives:

- Understand what implicit bias means and how it may influence our decisions;
- Understand that being implicitly biased does not necessarily mean we act in explicitly biased ways;
- Learn to recognize some behaviors that may suggest bias or differential treatment;
- Learn some techniques that help debias perceptions and improve interactions.
In its 2017 report, *Creating Pathways to Diversity*, the Minority Corporate Counsel Association (MCCA) developed a set of recommended practices for law firms.

1. **Develop and communicate the business case.** The most important driver to an active commitment to diversity is a strong business case. Most participants agreed that their key driver was client demand, but there may be other existing or potential business reasons as well. It is imperative that these are examined and the strongest business case possible is presented to senior partners along with the rest of the firm.

2. **Have senior partners take the lead.** Designating a sincere and vocal senior partner to lead this effort removes several obstacles, such as the lack of senior partner involvement and ownership, or weak, decentralized efforts with few results, or diversity committees staffed primarily by women and minorities.

3. **Mandate top-down diversity training.** Training in diversity and inclusion is essential to build awareness and create a common language and understanding within the firm.

4. **Establish accountability.** Firms serious about diversity have to reward and hold staff accountable for the success or failure of the recruitment and retention initiatives. Incentives include creating a time bank to reward attorneys for their work on the firm’s diversity programs or tying the results to incentive pay for senior partners.

5. **Develop mechanisms to have an effective mentoring program.** In most law firms, mentoring occurs all the time, through informal relations at work and social networks outside the office, for example, on the golf course. The challenge is to make effective mentoring accessible to all attorneys. Group mentoring sessions and reciprocal mentoring should be explored.

6. **Emphasize lateral hires.** The more senior minority attorneys, the greater a firm’s chances of recruiting and retaining new attorneys of color. With more senior attorneys, a firm will be more desirable to entry-level attorneys and better positioned to minimize
attrition. This practice is much more likely to succeed as an integral part of a firm-wide diversity strategy.

7. **Promote work-life balance.** Firms must find creative ways to retain women who are both mothers and attorneys and committed to succeeding at both. Firms also must ease the dissatisfaction that all attorneys report with their work environment. Options include an on-site day care center, establishing flexible hours and other options, like telecommuting. Firms should make the quality of life of all attorneys a valid, urgent work issue. Part-time partners are important role models who provide a positive incentive for women who worry that the price for a successful career in a law firm is sacrificing family commitments.

8. **Expand recruitment.** Recruitment tactics may include: advertising in minority professional publications; offering scholarships to first-year minority law students; increasing recruitment at historically black law schools; revising outdated hiring criteria; and; participating in pipeline programs; and becoming more involved in community activities to enhance name recognition. Campus recruiters should have diversity training to help them interact more effectively with diverse students. Involve minority attorneys in the firm’s decision-making process, for example, reviewing minority resumes. Also, the firm could take advantage of professional and personal networks by offering a bonus for referrals of talented minorities and women who can be recruited to the firm.

9. **Make diversity-related activities billable.** Law firms that understand the business case for diversity will make these initiatives worthwhile for the attorneys who drive the firm’s diversity program. By making a portion of the hours spent on diversity activities billable, management acknowledges that diversity contributes to the firm’s bottom line and to the advancement of its attorneys.
10. **Equal treatment programs.** Focus on creating a plan to ensure each minority attorney gets significant and meaningful client visibility and gets to develop relationships with senior law firm management.

Our hope is that though these efforts, and a little self-critical analysis, our firms and our clients will gain a strategic advantage when they leverage differences to tap emerging markets and solve complex business and legal problems.