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THE CASE FOR CULTURAL COMPETENCY

How to Meet our Ethical Obligations as Lawyers and Create More Diverse and Inclusive Companies

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CULTURAL COMPETENCY AND CREATING MORE DIVERSE AND INCLUSIVE COMPANIES

The Model Rules of Professional Responsibility require lawyers to provide competent representation of their clients. Competency is maximized when it includes cultural awareness and an understanding of both our own biases and those existing in the communities where we practice. How can we create a diverse team to help identify cultural blind spots and provide the best representation for our clients? How can companies create ESG plans which include the robust diversity initiatives that will satisfy their investors and provide an inclusive environment for their employees? How can companies enhance diversity and inclusion to help yield the best results?

1. Cultural Competency

“Culture is like the air we breathe— it is largely invisible and yet we are dependent on it for our very being. Culture is the logic by which we give order to the world.”

—Raymond Carroll, *Cultural Misunderstandings: The French-American Experience 2* (1988)

a. Model Rules of Professional Responsibility 1.1 and 1.3

Model Rule of Professional Responsibility 1.1 requires a lawyer to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation. Model Rule 1.3 states that “a lawyer shall act with reasonable diligence and promptness in representing a client.” This Model Rule is further explained in comments, which state that “a lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” Model Rule 1.3. As the world becomes more diverse, cultural competency is becoming imperative to the practice of law. It is important in order to create the best quality teams as well as understanding the communities where we practice, including clients, courts and juries.

b. Cultural Competency and Diversity

While common in other fields, cultural competency is a fairly new term for many in the legal profession. While there is no commonly accepted definition of cultural competency, “definitions typically involve the ability to interact with people from different cultures, taking into account diversity in cultural norms and world views.”

<https://blog.lawhelpny.org/the-case-for-cultural-competency-training/>

The United States is continually becoming more diverse. The United States is home to over 350 languages, U.S. Census Bureau, *Census Bureau Rel. No. CB 15-185*, Nov. 3, 2015, with over 13.3% of the population born outside of the United States. Sandra Colby & Jennifer Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2016* (Mar. 2015). However, demographics in the legal profession are changing very slowly. In 2000, only 28% of lawyers were women, and in 20 years, that percentage has increased only to a mere 37%, but it does continue to increase. In 2000, 89% of all attorneys self-identified as “White, Not Hispanic,” and less than 11% of attorneys self-identified as minorities. This percentage has not increased by much, and in 2020, 14% of attorneys self-identified as minorities. American Bar Association, *Profile of the Legal Profession 2020*.

<https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>

But as clients demand that firms employ lawyers that are more representative of our community, the

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demographics of the legal profession will more closely model society. In time, the number of attorneys of color, attorneys with disabilities, LGBT attorneys, and women attorneys will continue to increase. In interacting with colleagues in the profession, all attorneys will need to learn how to interact with cross-cultural colleagues to build a reputation as a respectful and culturally aware professional.

c. Diversity Goals of the American Bar Association

In 2008, the ABA adopted Goal III, which aims to eliminate bias and enhance diversity. Goal III aims to “promote full and equal participation in the association, our legal profession, and the justice system by all persons and to eliminate bias in the legal profession and justice system.” American Bar Association, ABA Mission and Goals, www.americanbar.org/about_the_aba/aba-mission-goals.html.

Members of the Section, and the ABA broadly, had a heightened awareness of diversity after the ABA implemented the Diversity and Inclusion CLE Policy (the D&I CLE Policy), effective as of March 1, 2017.⁶ The D&I CLE Policy provides that any ABA CLE program with three or more panelists (including the moderator) must have at least one member from a diverse group; a CLE program with five to eight panelists (including the moderator) must have at least two members from a diverse group; and a CLE program with nine or more panelists (including the moderator) must have at least three members from a diverse group.⁷ Failure to adhere to the D&I CLE Policy results in the ABA not sponsoring, co-sponsoring or seeking CLE accreditation for any group.

The ABA has made it clear through the Model Rules, adoption of Goal III, and other initiatives that cultural competency, by any name, is its mandate within the profession and outside of it. In addition, one of the most important reasons for attorneys to become culturally competent is because cultural competency will play an important role in the future of the profession and society.

In June of 2021, the ABA's Council of the Section of Legal Education and Admissions to the Bar approved for Notice and Comment proposed revisions to Standards 205, 206, 303, 507, and 508 of the ABA Standards and Rules of Procedure for Approval of Law Schools. The revisions to Rule 206 seeks to achieve "diverse" and "equitable" environments.

The proposed Rule 206(b) provides that "a law school shall effective actions that, in their totality, demonstrate progress in diversifying the student body, faculty, and staff...."

In addition, many argue that cultural competency should be a topic that law students receive specific training. <https://blog.lawhelpny.org/the-case-for-cultural-competency-training/>

The ABA further has created a Model Diversity survey in 2018 which is used by many companies to assess progress on diversity for law firms. www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/aba/aba-model-diversity-survey.pdf

d. Implicit Bias

Any discussion of cultural competency requires some discussion of implicit bias. Implicit bias is the unintentional or unaware act of grouping persons or things into categories that can lead to discriminatory behaviors. It is important to understand our biases that might inhibit our ability to fully serve our clients.

The ABA has analyzed the concept of implicit bias at great length describing how we naturally assign people to various social categories based on salient and chronically accessible traits, such as age, gender, race, and role.

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People have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from experience with other people, some of them direct (that is, real-world encounters), but most of them vicarious (that is, relayed to us through stories, books, movies, media, and culture). ABA Section of Litigation Implicit Bias Initiative, *What Is Implicit or Unconscious Bias*, www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/what-is-implicit-bias.html, quoting Jerry Kang, *Implicit Bias: A Primer for Courts*, prepared for the National Campaign to Ensure Racial and Ethnic Fairness of America's State Courts (Aug. 2009), www.americanbar.org/content/dam/aba/migrated/sections/criminal_justice/PublicDocuments/unit_3_kang.authcheckdam.pdf.

The danger of implicit bias lies in the lack of self-awareness because it can present itself and allow discrimination not only in situations of conflict, such as in litigation, but also in situations without conflict, such as in interactions with clients from certain backgrounds. *Id.*

e. Practical Tips in Achieving Cultural Competency and Meeting ABA Diversity Goals

Enhancing one's cultural competency can be accomplished by acquisition of awareness, knowledge, and skills needed to function effectively in a diverse society and on an organizational/societal level, working to develop new theories, practices, policies, and organizational structures that are more responsive to all groups. Annette Demers, *Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011*, 39 *Int'l J. Legal Info.* 22, 24 (citing D.W. Sue & G.C. Torino, *Racial-Cultural Competence: Awareness, Knowledge, and Skills*, in 2 *Handbook of Racial-Cultural Psychology and Counseling: Training and Practice* 3, 8 (R.T. Carter ed., Wiley 2005)).

Demers posits that the concept of cultural competency is a broad one in its scope. The best way to understand and apply it practically is to understand the legal needs of each client as an individual. The practice of cultural competency is driven in service delivery systems by *client preferred choices*, not by culturally blind or culturally free interventions. *Id.* This means that understanding the needs and wishes of each client and understanding how those needs and wishes are informed by the client's culture, can help the attorney be effective. *Id.*

In defining cultural competency and the broad scope that it covers, the foremost thing to keep in mind is to treat each client as an individual without applying cultural stereotypes.

2. Diversity and ESG

a. What is ESG?

Environmental, social, and governance (ESG) criteria are a set of standards for a company's operations that socially conscious investors use to screen potential investments. Environmental criteria consider how a company performs as a steward of nature. Social criteria examine how it manages relationships with employees, suppliers, customers, and the communities where it operates. Governance deals with a company's leadership, executive pay, audits, internal controls and shareholder rights. <https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp>

Since the 2008 financial crisis, public awareness of corporate financial behavior has increased significantly. The integration of ESG in the corporate landscape has led to a culture of sustainable investing and products that are designed to meet sustainability goals, such as a reduction in carbon emissions and pollution, or the promotion of biodiversity. <https://www.cube.global/resource/compliance-corner-what-is-environmental-social-and-corporate-governance-esg/?gclid>

b. How does Diversity Play a Role in ESG?

The upheaval of 2020 has been defined in part by highly visible social movements. Companies have found themselves in the crosshairs, pressed to declare their commitments to causes and articulate the steps they are taking to support social justice. <https://www.pwc.com/us/en/services/audit-assurance/library/diversity-equity-inclusion-reporting.html>

The public's heightened expectations for companies have dovetailed with the growing interest of investors in environmental, social and governance (ESG) factors, which include diversity and inclusion (D&I). The pursuit of diversity isn't just about doing the right thing. A diverse workforce can drive better outcomes that can actually enhance business growth and brand reputation. However, this renewed emphasis has also highlighted the fact that many organizations do not have consistent, standard metrics in place to track progress and report results. *Id.*

On July 26, 2021, Law360 addressed this exact issue with an interview of Gayle Littleton, Executive Vice President and General Counsel at Exelon Corp. Littleton advises that the murder of George Floyd, hate crimes against Asian Americans, and pandemic related racial and gender disparities have created a tipping point where expectations of corporate leaders has moved beyond just talking about DEI initiatives but requiring them to "stand up, speak out and drive social change." <https://www.law360.com/articles/1401132> As a result, Littleton says companies are re-evaluating ESG policies and ensuring they include a strong commitment to DEI programming, both within and outside the company. *Id.*

Littleton encourages companies to (1) model DEI values by driving such initiatives within all company departments, (2) supporting the profession and its pipeline, and (3) give back to the community. *Id.* Littleton believes that not only does a strong ESG drive growth, but it is the right thing to do. *Id.*

c. Stating DEI Values and Implementing a Diversity Plan

Every organization must determine its own path for improving diversity and inclusion, however, any initiative evolving organizational change requires support and commitment from leadership and reaching diversity goals is no different. Once company management understands the benefits of recognizing, valuing and promoting diversity, committing the organization to a proactive diversity plan will become part of the business plan. There are a number of ways to educate company leaders on the need for more diversity including providing the demands of clients and customers, citing statistics and providing education, and/or hiring a consultant to survey the current environment and provide employee training.

Once company management is on board, a Diversity Equity and Inclusion Committee can plan, implement and oversee the diversity initiatives. The committee should be diverse and must include senior leadership to be effective. Some organizations even hire or appoint a full-time Director of Diversity or Chief Diversity Officer. Once committed, leadership must be held accountable through continuous monitoring in order to achieve success.

Determining DEI goals generally requires a company to assess the current diversity of the organization including a measurement of diverse employees and a comparison to industry and community statistics to determine measurable goals. Companies should also evaluate its recruitment, retention and promotion history. Firms should also assess how leaders communicate the company's culture and work to identify blind spots.

Following this review, the DEI committee should develop a strategic plan to reach the companies stated goals. These plans should address recruiting, training, mentoring, sponsoring, company education and community outreach. As company leaders identify and work together to reach DEI goals, the diversity and inclusivity of the company will certainly improve, providing and promoting better outcomes that can actually enhance business

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growth and brand reputation.

3. Conclusion

Competency as lawyers goes beyond substantive expertise. In an increasingly diverse society, attorneys need to expand their cultural competency as well. As outside counsel, we need to understand the culture of our clients, communities and jurors to maximize results. As companies, we need to respond to investors demands for increase ESG goals by including diversity objectives. And as employers, we all need to create inclusive communities in order to enhance the recruitment and retention of diverse employees. Together, consistent with our companies values, we can foster a diverse and inclusive environment to position our team for success.