

Labor and Employment 2018 Symposium

Cultural Bias: How is the Legal Profession Responding to Immigration, LGBTQ, and Sexual Harassment Issues?

Dorsey Speakers

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1. Outline prepared by Dorsey & Whitney LLP

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Cultural Bias:

How is the Legal Profession Responding to Immigration, LGBTQ, and Sexual Harassment Issues?



Agenda

- I. Overview
- II. Discussion of Implicit Bias
- III. Recruiting and Hiring
- IV. Diversity and Inclusion
- V. Retention and Strategies for Eliminating Bias
- VI. Q & A



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Meet the Panel:

Jim Altman, Xcel Energy
Rebecca Bernhard, Dorsey & Whitney
Barbara Jordan, Mayo Clinic
Melissa Raphan, Dorsey & Whitney



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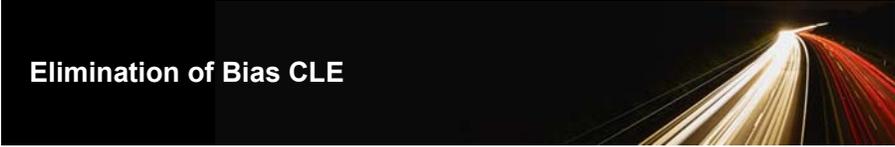
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Overview



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Elimination of Bias CLE

- Minnesota passed a resolution requiring elimination of bias CLE in 1995
- American Bar Association resolution passed in 2016 encourages all states to follow the lead



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Discussion of Implicit Bias





Discussion of Implicit Bias

- **What is implicit bias?**

- “Also known as implicit social cognition, implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.”
- Automatic
- May be positive or negative
- Do not necessarily align with our declared beliefs
- Do not necessarily reflect stances we would explicitly endorse

(Kirwan Institute for the Study of Race and Ethnicity, The Ohio State University
Available at: <http://kirwaninstitute.osu.edu/>)



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Discussion of Implicit Bias

- **How does implicit bias affect us?**

- causes us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance
- associations begin to develop at early ages in response to direct and indirect messages
- media and news programming are often-cited origins of implicit associations

(Kirwan Institute for the Study of Race and Ethnicity, The Ohio State University
Available at: <http://kirwaninstitute.osu.edu/>)



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Discussion of Implicit Bias

- **How is implicit bias identified?**
 - **Implicit Association Tests (IATs)**
 - **Aim to identify thoughts and feelings outside conscious awareness and control**
 - **Assess presence of automatic preference and correlation of positive and negative feelings**



Discussion of Implicit Bias

- **How is implicit bias identified?**
 - **Project Implicit**
 - **Collaboration among Harvard University, University of Virginia, and University of Washington researchers**
 - **Provides web-based IATs on broad range of characteristics, including:**
 - Race (European vs. African faces)
 - Age (young vs. old faces)
 - Weight (heavy vs. thin silhouettes)
 - Disability (symbols representing abled and disabled individuals)
 - Skin tone (light vs. dark)
 - Arab/Muslim (likely names)
 - Sexuality (terms and symbols associated with gay and straight people)
 - **See <https://implicit.harvard.edu/implicit/selectatest.html>**





Discussion of Implicit Bias

- IAT assessments reveal automatic associations
- IAT assessments reveal differences between self-perception and automatic associations
 - Race and skin tone often cited:
 - More than 50% of participants in the IAT on skin tone self-report no preference
 - But only 19% actually show no automatic preference
 - 68% show an automatic preference for light skin over dark skin to at least some degree



How to Minimize the Impact of Implicit Bias

- Understand it exists
- Understand what your own implicit biases may be (take an IAT)
- Be aware that we all tend to feel affinity for people to whom we are similar – and so may associate with (or hire, or promote) people who are similar to us
- Question your initial assumptions about others – is an implicit bias at play?

Other Types of Bias

- **Explicit Bias**
 - Aware of and act upon negative stereotypes and attitudes
- **Prove-it Again Bias**
 - Women, racial/ethnic minorities must prove competence repeatedly
- **Maternal Wall Bias**
 - Assumption that mothers who work are less dedicated
 - Opportunities and challenges pre-judged and not offered
- **“Mansplaining” or “He-Peating”**
- **Immigration Issues: “Where are you from?”**



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“He-Peating,” Illustrated



“That’s an excellent suggestion, Miss Triggs. Perhaps one of the men here would like to make it.”

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Potential Areas Where Bias Affects Workplaces

- Recruiting
- Hiring
- Making assignments
- Evaluating, coaching, disciplining, promoting
- Work-life balance
- Leaves of absence
- Succession planning
- “Mistaken identity” in the workplace

Verna Myers, *Moving Diversity Forward: How to Go From Well-Meaning to Well-Doing*, Chapter 1.



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Business Consequences of Bias

- Environment does not reflect organizational values
- Low morale among those subject to unfair treatment
- Low morale among those who see others subjected to unfair treatment
- Higher attrition and turnover – operational inefficiencies and costs
- Impact on brand – reputation among industry peers, vendors, and clients
- Litigation poses reputational and actual costs

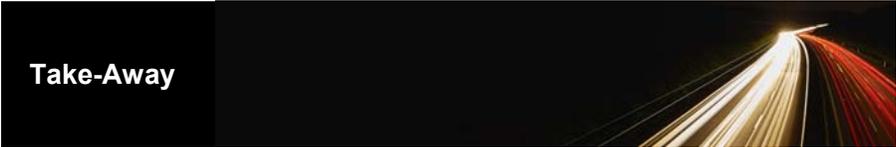


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Implications of Bias for Lawyers

- Rules of Professional Conduct
- Federal and state laws prohibiting discrimination



Take-Away

- “Elimination of Bias” is a misnomer when it comes to implicit bias, which can be understood and addressed – but not eliminated
- Goal is to become aware of our otherwise unconscious biases and avoid automatic responses based on them
- Interrupt implicit bias

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Recruiting and Hiring

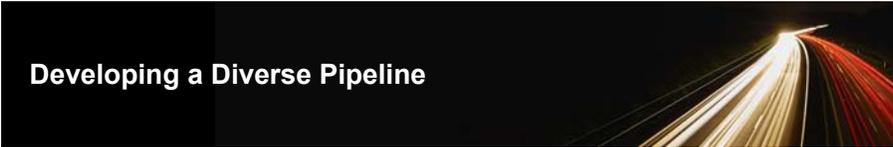


Developing a Diverse Pipeline



- **Play the long game**
- **High school and undergraduate student initiatives**
 - Minnesota Urban Debate League
 - Achieve MPLS Graduation Coach Program
 - Just the Beginning
- **HCBA 1L Minority Clerkship Program**
- **TCDIP**
 - Ambassador Program
 - Professional Development (Elimination of Bias CLE!)
 - 1L Summer Rotation Clerkship
 - Sponsorship Program



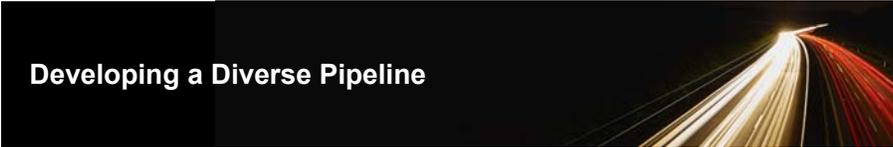


Developing a Diverse Pipeline

- **Employ diverse talent recruitment agencies**
 - Corporate Counsel Women of Color
 - Veteran recruitment agencies
- **Attend diverse career fairs and events**
 - Lavender Law Career Fair & Law Conference
- **Promote your organization as a supporter of diversity in the legal profession**
 - Get involved with diversity organizations
 - **Minority Corporate Counsel Association (MCCA)**
 - Host diversity/affinity organization events
 - **CLEs, seminars, law school student groups and minority bar associations**



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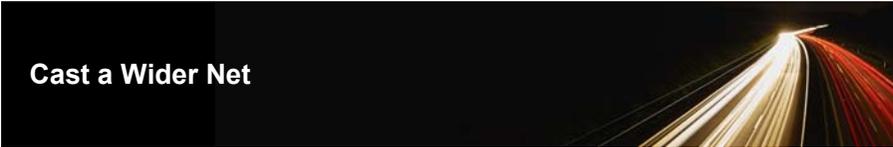


Developing a Diverse Pipeline

- **Get the word out about what it means to work in-house**
 - Explain the benefits
 - **Volunteer**
 - **Speak on panels**
 - Targeted recruitment
 - **Historically black law school alumni associations**
 - **Diverse bar associations**
 - **DAPP: supports women of color law students**
- **Take a “recruiting journey”**
 - Attend MCCA and minority bar meetings
 - Take a list of open positions and recruit on the spot
- **Implement a new attorney training program**



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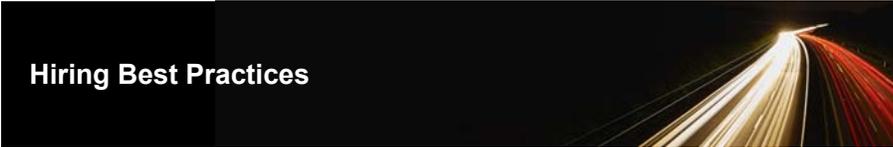


Cast a Wider Net

- **Don't just hire people who "walk and talk like you"**
 - Counteract the tendency toward similarity bias
 - Self-reflection
 - Ask tough questions
- **Perceived v. actual diversity**
 - Ethnicity, race, gender, religion, disability, LGBTQ
 - Ideology, socioeconomic community, education
 - Different ways of thinking



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Hiring Best Practices

- **Emphasize the importance of a diverse workforce that reflects your customers**
- **Form a diverse hiring team**
 - Gender, ethnicity, LGBTQ and differing levels of experience
- **Create opportunities to meet with a diverse array of attorneys during the interviewing process**
- **Do not conduct "social media background checks"**
- **Leverage your Affirmative Action Plan**



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Consider Diversity When Hiring Outside Counsel

- 2004 A Call to Action
- 2014 Engage Excellence Program
 - DuPont, General Mills, Verizon and Walmart
- 2016 ABA Resolution 113
- 2016 Mansfield Rule (“Next Generation Rooney Rule”)



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Diversity and Inclusion



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Diversity v. Inclusion

- **Diversity = quantity**
 - “When you don’t hold people to standards of excellence, deep down you are indicating that you don’t think you can find talented black people to meet your standards.”
- **Inclusion = quality**
 - “Unless the environment, the friendship, the neighborhood, and the workplace are inviting, fair, and respectful, diversity is not going to thrive.”
 - “What I have noticed is that trying to be *nice* often stands in the way of creating real inclusion. It prevents action or creates a situation where black people are ignored or coddled, rather than engaged and challenged.”

Verna Myers, *Moving Diversity Forward: How to Go From Well-Meaning to Well-Doing*, Chapter 1.



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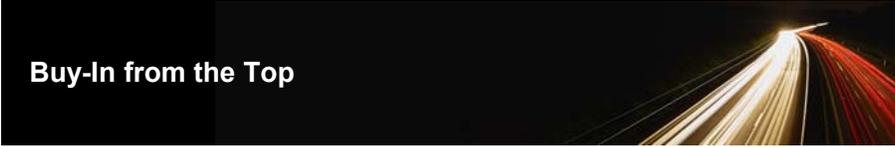
Diversity v. Inclusion

Metrics Don't Automate Inclusion!

- The employee experience begins with an offer letter.
- To nurture and promote top talent – and to foster a truly inclusive environment – it's critical to take an honest look at the end-to-end employee experience.

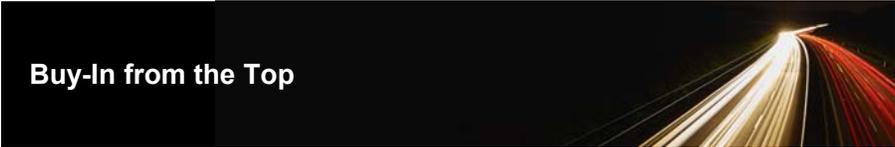


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Buy-In from the Top

- “Diversity and Inclusion” is often treated as a single, stand-alone initiative that exists in a silo.
- **Creating a culture of belonging should be viewed a business imperative.**
 - To effect meaningful change, the entire C-suite should be prepared to stand behind steps to integrate tangible inclusion expectations across all aspects of day-to-day operations.
 - Studies show there are compelling business reasons to do so!



Buy-In from the Top

Evelina Silveira, President Diversity at Work in London Inc.:

- **Buy-in from the top involves:**
 - **Who:** Do you have the **right person** spearheading diversity and inclusion efforts at your Company?
 - **What:** Are you sending the **right message** to the leadership team?
 - **When:** Are your efforts to integrate diversity and inclusion measures **in line** with other business initiatives?
 - **Why:** Does leadership understand the **business case** for diversity and inclusion?
 - **How:** Do you have a **strategic plan** to help leadership understand the long-term goals and how to achieve them?

Change Management

1. Assess any barriers or resistance to change
2. Identify leaders at every level of the organization
3. Make the formal case for change – “vision statement”
4. Create “ownership incentives”
5. Prepare integrated and ongoing communication
6. Be explicit and detailed about the desired cultural goals
7. Continue to reassess over time
8. Make it personal!



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Successful Strategies

- Judge Jack B. Weinstein, Eastern District of NY
- Hollywood, **#inclusionrider**
- Pledge to the Profession
 - <http://www.theiilp.com/Resources/Documents/PledgetotheProfessionForm.pdf>
- Xcel Energy: “Diversity Exists: Inclusion is My Responsibility”
 - Diversity and Inclusion Training
 - Business Resource Groups
 - Council for Diversity and Inclusion
- Mayo Clinic
 - Strategic recruiting and hiring: “Active Diversity Planning”
 - Office of Diversity and Inclusion



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Best Practices for Creating and Maintaining an Inclusive Culture

- Gain leadership buy-in
- A “top down” approach isn’t enough – change must be managed across the organization at all levels
- Inclusion is an ongoing and holistic goal – it cannot be obtained through a stand-alone committee or a one-off training
- Know your “blind spots” and establish tangible measures to overcome them
- Use measurements and incentives to track and promote success
- Look to other organizations and industries for practical strategies that work
- Continue to question your organization’s assumptions and biases



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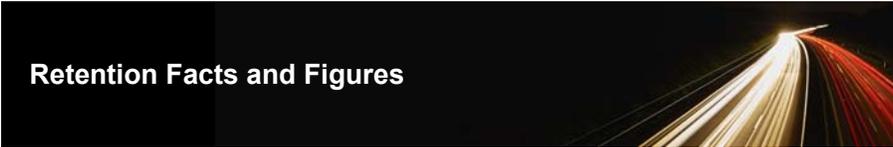
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Retention and Strategies for Eliminating Bias



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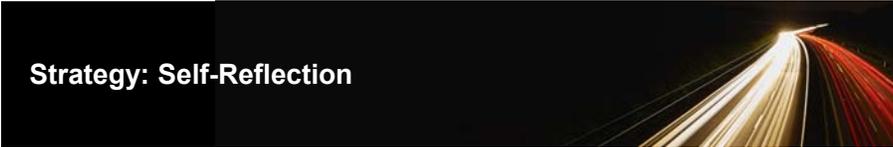


Retention Facts and Figures

- Today **27%** of general counsels at Fortune 500 companies are women
 - 22% white women and 5% women of color
- In 2016: **37%** of corporate legal departments increased their in-house staff
- In 2016, **56%** in-house attorneys surveyed [Bloomberg] said diversity and inclusion is important to their legal departments
 - 50% rated their department efforts highly
- In 2016, **61%** private practice attorneys surveyed said diversity and inclusion is important to their firm
 - 40% rated their firm's efforts highly



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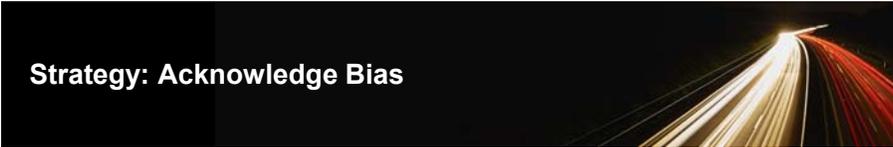


Strategy: Self-Reflection

- **Self-reflection**
 - Ask:
 - Who is getting hired? Who is getting promoted?
 - Am I building relationships with people who are different from me?
 - Be aware of the signals you give
 - Negative facial expressions
 - Dismissing an idea from one employee, but embracing the same idea from another
 - Leaving someone off a group email
 - Addressing some employees by chummy nicknames
 - Continually mispronouncing one employee's name



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Strategy: Acknowledge Bias

- **Do not hide from bias**
 - “Hidden biases” are often quite noticeable
- **Colorblind v. positive acknowledgement policies**
 - Awareness of existence of disparities in treatment helps eliminate disparities in decision making
- **Create a diversity task force**
- **Conduct regular training on implicit bias**
 - Starbucks: every employee speaks for your organization
- **Demonstrate commitment from leadership**



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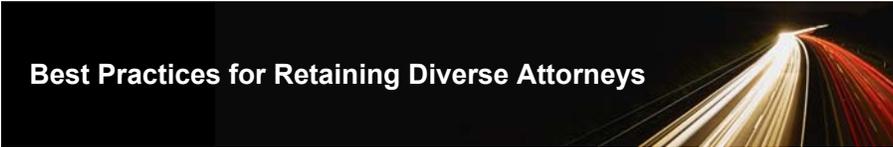


Strategy: Create a Sense of Belonging

- **Allow more-senior employees to share their early experiences with newer employees**
 - “In the beginning, it was hard...”
 - “I felt I didn’t belong...”
- **Stanford University study: students who read testimonials from more senior students regarding their social difficulties academically outperformed their peers in the control group**
- **Employee Resource Groups**
 - Mayo and Xcel examples



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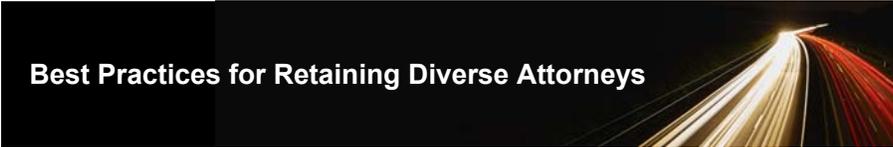


Best Practices for Retaining Diverse Attorneys

- **Transparency:** Provide information about the department's goal to be more diverse
- **Evaluation System:** Carefully consider how to solicit feedback in a manner that reflects the attorney's role (e.g. feedback from clients? Supervisors? etc.)
- **Development Opportunities:** Flat organizations find creative ways to provide development opportunities to in-house counsel
- **Training:** Take advantage of training through law firms with whom you have strong relationship
- **Sponsors:** Sponsors create opportunities for their sponsorees (e.g. stretch assignments)



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Best Practices for Retaining Diverse Attorneys

- **Provide multiple learning opportunities:**
 - Peer-to-peer coaching
 - Action learning projects
 - Mentoring
 - Collective team off-site meeting
- **Mentoring:** Establish a robust mentoring program with measurable goals
- **Metrics:** Measure department leaders' hours spent participating in diversity efforts
- **Pro Bono Activities:** Support community activities whom have an impact on diversity in the profession and the community



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