

Labor and Employment 2019 Symposium

Fostering Diversity, Inclusion and Equity Within the Workplace and the Larger Community

Speakers

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Materials

1. Dorsey Outline: **Fostering Diversity, Inclusion and Equity Within the Workplace and the Larger Community** (April 5, 2019)
2. Dorsey eUpdate: **How to Handle a #MeToo Moment: Legal, Language and Cultural Tips** (October 12, 2018)
Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2018/10/how-to-handle-a-metoo-moment>
3. Dorsey eUpdate: **California Governor Signs Spate of #MeToo Era Bills Into Law** (October 2, 2018)
Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2018/10/metoo-era-bills>
4. Minnesota Lawyer: **Why should Diversity and Inclusion Leaders Listen to #BlackLivesMatter and #MeToo?** (2018)
Available at: https://minnlawyer.com/sponsored_content/why-should-diversity-and-inclusion-leaders-listen-to-blacklivesmatter-and-metoo/

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Fostering Diversity, Inclusion and Equity within the Workplace and the Larger Community

Rebecca Bernhard and Raegan Henderson

I. Introduction

The responsibility for implementing diversity and inclusion initiatives often fall to legal and human resources professionals within a workplace. As legal professionals, we have a duty to avoid discriminatory conduct. See Minnesota Rule of Professional Conduct 8.4, which provides in part:

It is professional misconduct for a lawyer to:

...

(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer's professional activities;

(h) commit a discriminatory act, prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including:

- (1) the seriousness of the act;
- (2) whether the lawyer knew that the act was prohibited by statute or ordinance;
- (3) whether the act was part of a pattern of prohibited conduct; and
- (4) whether the act was committed in connection with the lawyer's professional activities

Similarly, the ABA Model Rules of Professional Conduct 8.4 provides:

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.

But how do diversity and inclusion efforts fit in to this picture? Is it enough to prohibit discrimination in today's work environment? What can be done to improve overall diversity and inclusion?

II. Overview of Statistical Progress

A. According to a number of statistical reports, the legal profession remains behind many other professions in terms of achieving diverse representation in higher ranks. For example, the likelihood of women becoming equity partner has not meaningfully changed in over 10 years: 15% in 2006; 20% in 2018. These numbers are even more dramatic for other diverse attorneys, such as people of color, LGBTQ people, and persons with disabilities:

- 8% of equity partners are people of color
- 2% of equity partners are women of color
- 2% of equity partners are LGBTQ
- 1% of equity partners are persons with disabilities

However, this low percent is not reflective of the participation of diversity at earlier stages of their career. For example, the percent of women attorneys in law firms as compared to men declines as the attorneys move up the ranks:

- 47% of associates are women
- 30% of non-equity partners are women
- 20% of equity partners are women

B. The National Association of Women Lawyers released a study in October 2018 that examined human resources practices at law firms and the impact on achieving diversity.

Firms engaging in anti-bias mitigation efforts at various stages of an attorney's career:

- Recruitment 89%
- Hiring 86%
- Performance evaluations 70%

The number of firms with anti-bias initiatives in place at latter-career stages declines:

- Promotion 58%
- Non-Equity partnership decisions 44%
- Equity partnership decisions 54%

Practices that were designed to mitigate against biases are more prevalent at earlier stages of an attorney's career at a law firm than at the latter stages, leading to an obvious question: do such efforts work?

III. The Role of Interrupting Implicit Bias in Fostering Diversity and Inclusion

A. Professional Rules Regarding Eliminating Bias:

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

B. What is Implicit Bias?

1. "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." (Kirwan Institute for the Study of Race and Ethnicity, The Ohio State University)

- Implicit bias is automatic

- Implicit bias may be positive or negative
- Such biases may not necessarily align with our declared beliefs
- Such biases may not necessarily reflect stances we would explicitly endorse

2. How does implicit bias affect us? According to the Kirwan Institute, implicit bias causes us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance; such 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.

3. How is implicit bias identified? Implicit Association Tests (IATs): 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>

These IATs aim to identify thoughts and feelings outside of a person's conscious awareness and control. The tests assess the presence of automatic preference and a correlation of positive and negative feelings.

The Collaboration launched Project Implicit, and consistent results since it was launched show:

- 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

4. How can we interrupt implicit bias? “Elimination of Bias” is a misnomer when it comes to implicit bias, which can be understood and addressed – but not eliminated. The goal should be to become aware of our otherwise unconscious biases and avoid automatic responses based on them. This is often called “Interrupting implicit bias.”

- Start with awareness of your own biases; to understand what your own implicit biases may be consider taking 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?

5. There are many forms of bias beside the types that the IAT explores. Generally, in a workplace, a bias manifests when employees are pre-judged and not offered opportunities and challenges that are offered to the dominant culture.

- 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
- Immigration/National Origin Issues: “Where are you from?”
 - Assumption that someone did not “grow up” in your city/state/country

6. Potential Areas Where Bias Affects Workplaces. Verna Myers offers the following areas to examine within a workplace:

- 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.

7. Potential business consequences of Bias within a workplace:

- 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

IV. Moving Beyond Diversity to Inclusion

A. Diversity is often looked at in quantitative terms. How many “diverse” employees does one have? Is this statistically representative of the larger community? Leading diversity experts such as Ritu Bhasin and Verna Myers consistently advocate that we do not play that numbers game. “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.”

B. Inclusion reflects the qualitative experience – truly maintaining an environment where all are welcome. “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.”

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

C. Buy In From the Top is Essential. Evelina Silveira, President Diversity at Work in London Inc., suggests that buy-in from the top involves the following:

- 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?

D. Fostering Inclusion. Senior leaders can help lead the way for everyone to acknowledge bias. Too often we hide from bias, but this is not effective. See Victoria Plaut, *3 Myths Plus a Few Best Practices for Achieving Diversity* (Oct. 1, 2014). Ms. Plaut notes that the effect of ignoring racial and ethnic differences resulted in lower sense of engagement and more bias perceived by nonwhite workers, whereas the effect of leadership positively acknowledging racial and ethnic differences was higher employee engagement and less bias perceived by nonwhite workers. Diverse groups may suffer from disproportionately higher turnover when stereotypes and favoritism divide people into in-groups and out-groups.

According to some experts in this area:

- Inclusive leaders form high-quality relationships based on shared power, mutual trust, respect, and obligation
- Inclusive leaders both value their employees' unique diversity and also find a common ground to foster a sense of belongingness

Lisa H. Nishii and David M. Mayer, *Paving the Path to Performance: Inclusive Leadership Reduces Turnover in Diverse Work Groups*, Cornell Center for Advanced Human Resource Studies Research Link, no. 3 (February 2010)

Ms. Plaut recommends that senior level employees can lead the way by sharing their early experiences with newer employees to help encourage open dialogue. See Victoria Plaut, *3 Myths Plus a Few Best Practices for Achieving Diversity* (Oct. 1, 2014). This can help foster an openness by all employees.

Diversity and Inclusion Resource List

Books

Waking Up White, By Debby Irving

White Fragility: Why It's So Hard for White People to Talk about Racism, By Robin DiAngelo

Moving Diversity Forward: How to Go From Well-Meaning to Well-Doing, By Verna Myers

A Good Time for the Truth: Race in Minnesota, Edited by Sun Yung Shin

Decolonizing the mind, By Ngugi wa Thiong'o

The New Jim Crow: Mass Incarceration in the Age of Colorblindness, By Michelle Alexander

Articles

Pronouns in the Workplace

Available at: <https://www.hrc.org/resources/talking-about-pronouns-in-the-workplace>

Why Reverse Racism Doesn't Actually Exist

Available at: <https://www.businessinsider.com/heres-why-reverse-racism-doesnt-actually-exist-in-the-us-2016-4>

White Supremacy Culture Characteristics

Available at: <http://www.showingupforracialjustice.org/white-supremacy-culture-characteristics.html>

Bystander Basics

Available at: <https://www.ihollaback.org/resources/bystander-resources/>

Microaggression Tools

Available at: https://academicaffairs.ucsc.edu/events/documents/Microaggressions_Examples_Arial_2014_11_12.pdf

Videos

The Danger of a Single Story: Chimamanda Ngozi Adichie

Available at: <https://youtu.be/D9lhs241zeg>

I'm Not Your Inspiration, Thank You Very Much: Stella Young

Available at: <https://youtu.be/8K9Gg164Bsw>

The Muslim on the Airplane: Amal Kassir

Available at: https://www.youtube.com/watch?v=UIAm1g_Vgn0

I Am Not Your Asian Stereotype: Canwen Xu

Available at: https://www.youtube.com/watch?v=_pUtz75INaw

OutNorth: MN LGBTQ History

Available at: <https://www.tpt.org/out-north/>