

We Can Work It Out: Creatively Using Mediation Techniques To Advance Diversity and Inclusion

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Handouts

1. PowerPoint Presentation

Resources available on Dorsey.com

Dorsey & Whitney eUpdate: *Five FAQs on California's New Ban on Mandatory Arbitration Agreements* (October 16, 2019)

Link: <https://www.dorsey.com/newsresources/publications/client-alerts/2019/10/ca-new-ban-on-arbitration-agreements>

Labor & Employment Guides available at <https://www.dorsey.com/services/labor-employment-guides>

Dorsey Blog

Quirky Questions Blog at <https://quirkyemploymentquestions.com/>. Covers real life employment law questions.

Materials are Available on www.dorsey.com at <https://www.dorsey.com/newsresources/events/event/2019/11/corporate-counsel-symposium-2019-materials>

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Discussion Topics

- **Implicit/Unconscious Bias**
- **Diversity, Equity & Inclusion vs. Discrimination**
- **Eliminating/Interrupting Implicit Bias**
- **Mediation Techniques and other successful resolution techniques**

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Overview

- **Recent Statistics**
 - 2019 Women in the Workplace Report
 - 2018 NAWL Survey on Retention and Promotion of Women in Law Firms
 - Law360 Diversity Snapshot
- **Elimination of Bias**
- **Discussion of Implicit Bias**
- **Intra-Company Workplace Mediation Techniques**
 - Discussion on the Use of ADR Techniques to Advance Diversity & Inclusion Through Effective Resolution of Micro-Aggressions and Other Bias Disputes

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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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Gender Diversity

- Statistics compiled by McKinsey & Company and Leanin.org
- For further details, see **Women in the Workplace 2019** report available at <https://www.mckinsey.com/featured-insights/gender-equality/women-in-the-workplace-2019>

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Women in the Workplace 2019

- **Since 2015, the number of women in senior leadership has grown.**
- **However, parity remains out of reach. Women—and particularly women of color—are underrepresented at every level.**

Representation of women in senior....Omitted

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Women in the Workplace 2019

The biggest obstacle women face.... *Omitted*

Women in the Workplace 2019

Commitment to gender diversity has.... *Omitted*

Women in the Workplace 2019

Companies need to empower managers to drive....*Omitted*

Complete Report available at: <https://www.mckinsey.com/featured-insights/gender-equality/women-in-the-workplace-2019>

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Gender Diversity in the Legal Profession

Likelihood of women becoming equity partner

- 15% in 2006
- 20% in 2018

Percent of women compared to men declines up the ranks

- 47% of associates
- 30% of non-equity
- 20% of equity

Source: 2018 NAWL Survey on Retention and Promotion of Women in Law Firms

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Racial Diversity

- Statistics compiled by Law360
- For further details, see Law 360's fifth annual Diversity Snapshot available at <https://www.law360.com/articles/1171482?scroll=1&related=1>

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Law360's Diversity Snapshot By The Numbers

- For the fifth year in a row, at every level of a typical law firm, the representation of minority attorneys increased by less than a percentage point.
- However, minorities have recently topped 30% of U.S. law school graduates.
- Some top-tier law schools are reporting incoming classes with more than 40% of students identifying as a person of color.

Diversity Stagnates....*Omitted*

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Law360's Diversity Snapshot By The Numbers

Diversity Shrinks.... *Omitted*

Available at: <https://www.law360.com/articles/1171482?scroll=1&related=1>

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Law360's Diversity Snapshot By The Numbers

- **Of the 300+ law firms that shared data with Law360, more than 90% of those firms had leaders who identified as white.**
- **For 6.5% of firms, a person of color was listed at the helm, while 2.5% declined to specify a race or ethnicity.**

The Least Diverse.... *Omitted*

Available at: <https://www.law360.com/articles/1171482?scroll=1&related=1>

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Law360's Diversity Snapshot By The Numbers

- **Of the firms that provided data to Law360, 2.9% of all attorneys and 2% of equity partners reported identifying as LGBT. However, EEOC does not require firms to disclose LGBT data.**
- **Consequently, a significant number of the firms reported they do not compile data on LGBT attorneys.**
- **Nearly 40% of the firms reported not compiling similar data on attorneys with disabilities.**

Counting the LGBT....Omitted

Available at: <https://www.law360.com/articles/1171482?scroll=1&related=1>

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Law Firms' Bias Reduction Efforts

More likely to engage in mitigation efforts at earlier stages of career

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

Less likely to have anti-bias initiatives in place

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

Source: 2018 NAWL Survey on Retention and Promotion of Women in Law Firms

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Elimination of Bias – CLE requirement

- **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

- **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

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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

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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

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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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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**
 - See MRPC 8.4
- **Federal and state laws prohibiting discrimination**

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Model Rule of Professional Conduct 8.4

- **The Model Rules were adopted by the ABA in August 1983 as a guide for states in promulgating their own rules.**
- **The comments to each rule provide “guides to interpretation” of the rules.**
- **MRPC 8.4 proscribes prohibited conduct of a lawyer**
- **In August 2016, the ABA amended Model Rule 8.4, adding paragraph (g), which specifically prohibits harassment and discrimination in a lawyer’s conduct “related to the practice of law.”**

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MRPC 8.4(g)

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.

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MRPC 8.4(g)

Model Rule 8.4(g) makes three key changes:

- Adds a knowledge component by prohibiting conduct that a lawyer “knows or reasonably should know” is harassment or discrimination.
- Expands the list of protected classes to include ethnicity, gender identity, and marital status.
- Applies broadly to lawyers’ “conduct related to practice of law,” rather than the original Rule’s focus on conduct related to the “administration of justice.”

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States' adoptions of similar rules

- **Over half the states in the U.S. have adopted a similar rule and/or a comment related to the prohibition of discriminatory and harassing conduct by lawyers.**
- **Prior to the formal adoption of MRPC 8.4(g), 20 states already had used some or all of the ideas expressed in the Model Rule:**
 - California, Colorado, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Washington, and Wisconsin.
- **4 states/territories have adopted MRPC R. 8.4(g) in its entirety:**
 - Vermont, American Samoa, the Northern Mariana Islands, and the US Virgin Islands
- **6 states have declined to adopt the amended Rule outright, citing constitutional implications.**

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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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Strategies for Eliminating Bias

- **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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Strategies for Eliminating 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
- **Conduct regular training on implicit bias**
 - Knowing one's implicit bias helps minimize its role in business decisions
- **Demonstrate commitment from leadership**

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Strategies for Eliminating Bias

- Using ADR techniques as a proactive means of eliminating micro-aggressions
 - Micro-aggressions are defined as “brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual orientation, and religious slights and insults to the target person or group.”

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Additional reading

Diversity in the workplace:

- <https://diversityinpractice.org/how-implicit-bias-can-affect-workplace-diversity/>
- <https://www.forbes.com/sites/pragyaagarwaleurope/2019/03/29/how-microaggressions-can-affect-wellbeing-in-the-workplace/#2a16095573cb>
- https://academicaffairs.ucsc.edu/events/documents/Microaggressions_Examples_Arial_2014_11_12.pdf
- <https://www.forbes.com/sites/amyschoenberger/2019/10/23/workplace-diversity/?ss=diversity#2429223cad54>
- https://hbr.org/2017/02/diversity-doesnt-stick-without-inclusion?referral=03759&cm_vc=rr_item_page.bottom
- <https://www.law360.com/articles/1176119>
- https://www.law360.com/appellate/articles/1211575/ginsburg-says-there-s-work-to-do-to-fight-gender-biases?nl_pk=8e2a9247-b861-49da-8152-a3d1e6e4da8b&utm_source=newsletter&utm_medium=email&utm_campaign=appellate
- https://www.law360.com/appellate/articles/1211575/ginsburg-says-there-s-work-to-do-to-fight-gender-biases?nl_pk=8e2a9247-b861-49da-8152-a3d1e6e4da8b&utm_source=newsletter&utm_medium=email&utm_campaign=appellate
- <https://leanin.org/women-in-the-workplace-report-2018/men-still-outnumber-women-at-every-level>

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