



Elimination of Bias in the Legal Profession Issues to Consider

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What is Bias?

- Bias: a prejudice or preconception that prevents someone from objectively considering or evaluating a situation.
- Bias can take many forms, some familiar, and some which may not be as well known.
- Bias can arise against employees by co-workers or employers, by one opposing counsel against another, by clients, or even from the judiciary.
- Biased behavior can be roughly divided into two groups: discrimination and harassment.



Discrimination

- Usually thought of in the employment context
- Disparate treatment refers to intentionally treating an employee differently/worse than others because he or she is in a protected class, such as gender, race, or ethnicity.
- Disparate impact occurs when neutral employment policies have an adverse impact on a particular protected group.
- Discrimination can arise outside of the employment context, for example, a judge could show bias against female attorneys, or a client could refuse to hire an African-American attorney because of his race.
- Other protected classes include individuals over the age of 40 and those with disabilities.
- In California, additional protected classes include sexual orientation, gender and marital status.
- “Micro-inequities” involve subtly treating someone different because they are in a protected class, such as assuming that an African-American at a law firm works in the mail room



Harassment

- Unwelcome conduct related to an individual's protected class that is offensive to both the recipient and to a reasonable person. It also must be pervasive and severe.
- Promise of a benefit or threat of a sanction tied to an individual's protected class, *i.e. quid pro quo*.
- Harassing behavior that may not be actionable under the law can still constitute unwanted bias. Watch out for thoughtless company policies or practices that are demeaning, obnoxious, or rude. For example, consider the company that punished underperforming salespeople by subjecting them to public spankings at sales meetings. *Orlando v. Alarm One Inc.*, 2008 Cal. App. Unpub. LEXIS 280 (Cal. App. 5th Dist. January 14, 2008)



Barriers to Advancement

- Bias in the legal profession often manifests itself in the form of lower rates of advancement or promotion for members of protected classes. Even where women or minorities are well represented, bias may appear in the form of less desirable assignments, fewer perks, or exclusion from important meetings, committees, or decision making.
 - Statistics
 - Women
 - Women make up approximately 47% of all students enrolled in law school, and 30.1% of all practicing lawyers.
 - 44.3% of all associates are female, compared with 17.9% of partners. See ABA Commission on Women in the Profession, *A Current Glance at Women in the Law 2007*. www.abanet.org/women/ataglance.pdf.



Barriers to Advancement

– Minorities

- Between 1975 and 2002, the number of African-Americans obtaining law degrees rose from 4.2% to 7.2%
- Hispanic graduates of law school increased from 0.7% to 2.9% See, *Diversity in Law Firms*, www.eeoc.gov/stats/reports/diversitylaw/index.html.
- Based on statistics from the 2000 census, 3.9% of all practicing lawyers were African-American and 3.3% were Hispanic.

– Other

- In California, the percentage of attorneys over the age of 54 years old has continued to rise, and now accounts for 35% of all bar members in the state. See, *Older, whiter bar, working a little less*, California Bar Journal, March 2006.
- Also in California, slightly more than 5 % of all lawyers identify themselves as lesbian, gay, bisexual or transgender, compared with 2.1% in 2001.



Barriers on Advancement

- Glass ceilings

Do glass ceilings still exist to prevent women from achieving the uppermost echelons of legal practice at the same rate as for men?

- Women are moving up to management positions in law firms, but it is a slow process.
 - Local bar associations' work to advance women in the legal field is proving successful in some locations. For example, the Bar Association of San Francisco worked with 76 signatory law firms on its "No Glass Ceiling Initiative", which asked participating firms and companies to strive for the goal of at least 25% women partners and at least 25% women in management positions by January 1, 2005. Out of 76 original signatories, 49 responded with their results at the end of the two year initiative, and of those responding, 69% of firms and 54% of legal departments had increased the number of women in management positions to at least 25%. At the start of the initiative, on average only 22% of the management positions were held by women.



Barriers on Advancement

- The ABA’s Commission on Women in the Profession –The Unfinished Agenda
- In 2001, the ABA conducted an in-depth examination of the status of women in the legal profession and concluded that despite a positive trend, the status of women in the law is still not equal to that of men.
- Much of the lag is not due to overt discrimination, but unconscious bias such as stereotypes, lack of support networks, inflexible workplace policies, exclusion from networking opportunities, and bias in the justice system. See, www.abanet.org/women/reports.
- In a 2003 update, the ABA came to the same conclusion, that women are making incremental progress, but there is still a ways to go.



Barriers on Advancement

- Minority bias

Similar issues as with women, but progress is more slow.

- Current matriculation of minorities into law schools is low.
- To some extent, the elimination of affirmative action programs in California means that fewer minority students are even getting admitted to college, let alone law school.
- There is a lack of mentors for new lawyers of color.
- According to a study by the American Bar Association, progress for minority women lawyers is particularly slow. Although women accounted for 44% of all minority lawyers in 2000, they are almost completely excluded from top private sector jobs and have a higher law firm attrition rate than any other group. See, *Miles to Go: Progress of Minorities in the Legal Profession*, 2004 update to ABA report, www.abanet.org/minorities. Also, as of 2004, only 4% of all law firm partners were attorneys of color. See, *Visible Invisibility: Women of Color in Law Firms, Executive Summary by ABA Commission on Women in the Profession*.



Barriers on Advancement

- Other protected groups
 - It is more difficult to pin down statistics and information on groups such as gay or disabled lawyers because they self report their status in lower numbers than other protected groups. Many firms do not collect this information at all.
 - The EEOC recently issued a guidance regarding reasonable accommodations for attorneys with disabilities, recognizing that disabled attorneys have not traditionally been included in discussions about diversifying the profession.



Biased Behaviors

- In addition to lack of advancement, bias often takes the form of harassment or other disrespect towards a particular person or group. Like the forms of bias discussed above, it can be either blatant or subtle.
 - Supervisors, co-workers, management
 - Bias at this level diminishes morale, leads to attrition, and can result in legal liability.
 - In California, all employers of over 50 employees are required to provide sexual harassment training for their supervisors. Currently pending in the California legislature is a measure that would require such training if an employer had even a single California employee; regardless of the location of the supervisors.



Biased Behaviors

– Opposing counsel

- So-called “gender based trial tactics” or “Rambo litigation” waste time and money, and demean the profession generally. See, Hon. Marvin E. Aspen, *Overcoming Barriers to Civility in Litigation*, 69 Miss. L.J. 1049.
- There is a difference between zealously advocating for your client and engaging in obnoxious, boorish, or other unsavory behavior that benefits no one.
- Do not jump to conclusions about opposing counsel based on his or her race, gender, age, disability, clothing, or accent.



Biased Behaviors

- Judges, clients, and others
 - Judges can be held accountable for biased behavior. While blatant discrimination may not occur often, bias can be shown in such actions as a judge who calls a male attorney “Mr.____” and a female attorney by her first name.
 - It is not a defense to a discrimination case to argue that the company was simply adhering to a client or customer’s personal preferences.



Laws and Regulations

- Although many state bar associations require general ethics training as part of their CLE requirements, only a few mandate training in the elimination of bias. These states include California, Illinois, Minnesota, Oregon and Washington. See www.abanet.org/cle/mclevew.html.



Strategies for Eliminating or Avoiding Bias

- Elimination of bias makes good business sense
 - Having a diverse workforce means that your firm or company can tap a wide range of experiences and a broader knowledge base
 - If bias exists, the best candidate for a job may be overlooked or ignored.
 - Creating pathways for all to advance means more employee satisfaction and morale
 - More and more companies are looking to a firm's commitment to diversity and advancement when hiring outside counsel. See, Maria Kantzavelos, *Adding diversity to the bottom line: Corporate clients eye firms' progress*, Chicago Lawyer, July 2006, pg. 8.
 - Lawsuits and bad publicity from bias in the workforce are bad for the bottom line
 - Incivility, gender based trial tactics, and other biased behavior costs time and money for the firm and/or the client
 - Conversely, a company or firm with a recognized commitment to fairness and equality is attractive to both the public, customers, and potential recruits.



Strategies for Eliminating or Avoiding Bias

- Assess your organization
 - Collect information, both anecdotally, and statistically, regarding the experiences of women, minorities and other protected groups
 - Review formal and informal policies and procedures, such as leave policies, promotion policies, and salary guidelines. Do they reflect a commitment to diversity and inclusion?
 - What does the leadership of your organization look like? Are there ways to make the path to advancement fair for all employees?
 - Does your organization have formal or informal mentoring programs? Networking plan?



Strategies for Eliminating or Avoiding Bias

- Make a true commitment to overcoming bias and embracing diversity
 - Go beyond simply trying to boost numbers in your organization. Implement policies and programs designed to involve all employees in decision making, advancement, and the exchange of ideas.
 - Be aware of “micro-inequities”, and take steps to eliminate them.



Strategies for Eliminating or Avoiding Bias

- Training/ombudsman
 - Anti-harassment training
 - Train all employees, including lawyers, on civility, equality, and proper trial practice.
 - Establish an internal ombudsman to whom individuals may present concerns or complaints about treatment by partners, co-workers, judges, opposing counsel, etc.
 - Encourage the formation of networks for women, minorities, or other groups that provide career assistance and mentoring. Remember: if you allow such networks to form in your organization, don't discriminate against some groups, for example, by allowing a women's network but not one for gays.
 - Make speaking opportunities, pro bono projects, bar association activities and other networking and marketing options available to all attorneys and encourage participation.
- Mentoring – both formal and informal



Strategies for Eliminating or Avoiding Bias

- Workplace policies – salaries, leave, part time, etc.
 - Make sure that salary and promotion decisions are based on objective criteria
 - Watch for trends regarding assignments; is there a tendency to give the “best” work to male associates instead of females?
 - Make sure leave policies recognize and support all employees’ right and need to care for children without regard to the stereotypical belief that women are primary caregivers.
 - Reward diversity of ideas, encourage all individuals’ to make their ideas heard.
- Encourage participation in bar associations and other organizations



Strategies for Eliminating or Avoiding Bias

- Use the Courts
 - Do not sink to the level of opposing counsel that insists on engaging in uncivil behavior
 - Make respectful objections to biased or otherwise inappropriate comments or behavior you witness in court, whether by opposing counsel, courtroom personnel, or the judge.
 - Make a record of biased behavior by opposing counsel and involve the court in any solution



Hypotheticals

- **Scenarios – Family Obligations.**

Bob and Molly are both in-house attorneys for a large corporation. Advancement to higher job levels (and higher salaries), as well as yearly bonuses, are based in part on the number and type of major “deals” an attorney has worked in each calendar year. Although Molly always has excellent reviews, she notices that Bob is continually picked to work on the biggest deals, while she is given smaller projects. When she mentions this to the senior attorney in her department, he explains that Bob has a family to support so it is important that he gets the projects that offer the most advancement.

How should Molly respond? Should she complain to someone at the company?

–Ben and Sally are both highly regarded senior litigation associates at a large law firm. For the second time in a year, Ben is picked over Sally to work on a major piece of high profile litigation that will greatly improve his chances to making partner next year. Sally did not say anything the first time she was passed over for such a project, but this time she goes to the managing partner and expresses her interest in the case. The partner seems surprised to hear that Sally is interested in the case, noting that it will require a lot of travel over the next six to nine months. He explains that it was assumed that Sally would not want to be away from her two small children that much.

–What can Sally do?



Scenario – Family Obligations

- The head of the legal department at a large corporation is a married male with four young children who tries to leave work by 6 pm every night. He sometimes asks different attorneys to handle late-day emergencies or finish up projects that go past 6 pm. One night, Amy, who is single, tells her boss that she cannot work late that night after he asks her to, because she has plans to go out for a friend's birthday. He tells her that she needs to cancel her plans. Two days later, Amy finds out that her boss had first approached Susan to work late that night, but had allowed Susan to go home at her usual time so that she could watch her son's soccer game. After asking around, Amy discovers that the single attorneys end up doing the majority of the late nights in the department, while all the attorneys with families – both male and female - tend to leave early.
- If Amy decides to complain, what is the basis of her argument?



Hypotheticals

- **Scenarios – Sexual Orientation Issues**

Joe is a new corporate attorney. He has a somewhat “effeminate” nature and many of his co-workers assume he is gay. He is not asked to join a weekly basketball league sponsored by the company that includes many of the attorneys in the legal department; members of the league tend to get the best projects. Joe overhears two other attorneys discussing last week’s game, and one of them mentions that “maybe they should ask Joe to be a cheerleader, because that seems like his kind of thing”.

Should Joe tell someone what he heard? Does it matter whether Joe is gay or not?

–Paul is a summer associate at a large, Midwestern law firm. Almost all of the events the firm has planned for its summer associates include “spouses or significant others” in their invitations. After attending the first two events alone, Paul brings his long-term partner, Michael, to a dinner at a partner’s house. The next day, the hiring partner tells Paul that, while no one at the firm has a “problem” with Paul’s “choices”, it would probably be a good idea for him to attend the remaining summer associate events solo.

–How should Paul respond? What should he do if he is not offered a permanent job at the end of the summer?



Hypotheticals

- **Scenarios – Biases and Stereotypes**

Alpha Corporation has decided to spin off a division to become a new company which will bring in at least a half a million dollars per year to the corporation (as a stake holder in the new company). In a routine call to the new company to discuss upcoming work for the spin off, the new lead in-house counsel casually mentions that the CEO, Mr. B, strongly prefers that only white attorneys work on projects during the spin off process. He then makes a comment indicating that Mr. B believes (and the in-house attorney agrees), that minority lawyers' work is just not as good as that of white lawyers.

How should the Alpha Corporation attorney respond? Would it matter if Alpha Corporation has very few minority lawyers and was not planning on using any of them to assist in the spin off? What if Alpha Corporation had a highly regarded Hispanic attorney who would be perfect to take on the contract portion of the spin off?



- **Scenario – Family Obligations**

Ellen is a corporate partner at a large firm who has been working with Beta Corp., for a number of years, handling all their mergers and acquisitions work. The company’s business brings in close to \$400 K in fees for the law firm every year. After a new CEO takes over the company, he informs the managing partner that he would like a different attorney to be assigned to the company’s work because Ellen is “just not sweet enough” for a female lawyer. At the same time, the CEO expresses that he is happy with the work of a senior male associate who has been working under Ellen for the corporation because he is a “tiger” during negotiations. How should the managing partner respond?



Hypotheticals

- **Scenario – Other issues**

A corporation has a foundation that makes charitable donations throughout the year. Employees at the corporation can request the funds be given to a particular charity by filing out a form and providing other information justifying the request.

For the past three years, the foundation has turned down the request of a Jewish attorney for a contribution to Jewish Federation-sponsored charity that works with the homeless of all backgrounds. At the same time, the foundation continually donates to a faith-based substance abuse program run by the church to which a departmental head (and several other senior managers) belongs. The Jewish employee discovers through conversations with other employees that the foundation has also refused to make contributions to causes devoted to AIDS education, immigrant's rights, and a program providing school tutors for inner-city youths. Is there anything wrong with this practice?



Hypotheticals

- **Scenario – Diversity**

A company that has never had a significant minority presence in its upper management ranks creates a new in-house counsel position and hires a highly regarded female African-American attorney to fill the spot. The company subsequently profiles the new attorney in its annual report and other marketing materials and takes her to meetings where her presence will be (in the words of the company's CEO), "significant". However, the attorney does not get particularly interesting or important work to do on a day-to-day basis, and she eventually complains to the senior counsel at the company. He tells her that she shouldn't complain, she is getting paid a lot of money without having to do a lot of work.

What recourse does the attorney have?



Hypotheticals

- **Scenario – Gender Issues**

A senior management attorney regularly takes his reports to his all-male luncheon club where they discuss legal issues and projects being handled. Although women may be brought to the dining room as guests on certain days, the senior management attorney has generally only invited his male reports. One of the female reports asks if she can go on one of the lunches, and although he takes her, she feels very uncomfortable the entire time. She is the only female in the entire room, and while the male reports meet various “captains of industry” and others who are at the club, the female report is basically ignored.

The next time the senior management attorney asks the female report if she would like to go to the club for lunch, she asks if they can go to a different location instead. The senior management attorney refuses, explaining that not only is it a good opportunity to informally discuss legal issues, it is also a good networking opportunity for the reports who go along.

What can the female report do? She wants to have the same opportunities as her male counterparts, but the lunches at the club not only make her uncomfortable, they seem like a waste of her time.



Hypotheticals

- **Scenario – Ageism**

The corporate legal department is scheduled to provide new laptops and legal software for all individual contributor attorneys. Management attorneys will not be upgraded to the new system unless they request it. During a break from the training on the new systems, a management attorney who did request an upgrade overhears two of the IT trainers discussing the fact that the department did not want to invest money in upgrading all of the management attorneys to the new system because “you can’t teach an old dog new tricks”, and one of the trainers had been told that many of the most senior management attorneys would not be around in five years anyway.

Should the management attorney complain? To whom? Are the comments by the trainers evidence of bias? Are they reliable?



QUESTIONS?