Are you kidding me? Some of my best friends are…

ETHICS: DIVERSITY & IMPLICITY BIAS:
A Discussion of Implicit Bias, Its Effects on the Practice of Law, Including Costs and Practical Solutions for Taking Control

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ETHICS: Diversity & Implicit Bias: A Discussion of Implicit Bias, Its Effects on the Practice of Law, Including Costs and Practical Solutions for Taking Control: From the early years of our nation, America has been heralded as the great "Melting Pot" of many cultures. Moreover, *"e pluribus unum"* ("out of many…one") is one of our most treasured national mottos. Despite that, and notwithstanding our cultural diversity, bias has always been a troubling aspect of American culture. In fact, implicit or unconscious bias is particularly unsettling because many Americans have biases that they are not even aware of. It has been studied and proven that we all have biases that unintentionally affect every aspect of our dealings with others. Is bias an unfortunate and inevitable part of our history and "DNA" as Americans?

In its fourth year, this panel will give practitioners invaluable insight into implicit bias, as well as a forum to explore this timely and sensitive issue. The session will illuminate such biases, discuss the hidden financial disincentives of such biases, and, through "transformative learning," provide strategies for how to take control, to the benefit of your practice, of your professional relationships and your organization. The ABA Model Rule 8.4(g) regarding anti-discrimination will be reviewed, as well as the National Association of Bond Lawyers' Diversity Initiative.

It is highly recommended that participants take <u>any one</u> (or more) of the Implicit Association Tests at (https://implicit.harvard.edu/implicit/takeatest.html) **as a companion to this panel and the associated materials.**

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UNINTENTIONAL DISCRIMINATION & IMPLICIT BIAS:
TO KNOW IT IS TO ABATE IT

I. INTRODUCTION

From the early years of our nation, America has been heralded as the great "Melting Pot" of different races, languages, beliefs, and cultures, which have blended into one "American" persona. In fact, this ethos is part of the standard curriculum taught in American elementary schools. Moreover, *"e pluribus unum"* ("out of many…one"), with the ideal of unity arising out of diversity, is a longstanding national motto. Over the years, however, there has been a growing awareness of diversity in American culture, and as a result, the "Melting Pot" paradigm has gradually shifted to a "Salad Bowl" model, which recognizes diversity and sees America is one big amalgamation of unique, distinct cultures.

Notwithstanding our dynamic and mutifaceted diversity, bias has always been a problematic aspect of American culture and society. Derived from the French word "biais" which means angle or slant, bias has been firmly entrenched in our history and it has filtered through to every aspect of American life.

In recent years, it has been argued consistently and convincingly that the practice of law is one of the least diverse professions in the United States, and moreover, that lack of diversity is most profound in law firms. Part of this lack of diversity has its roots in the scarred history of the United States and many lingering issues that are beyond the scope of this outline. However, another aspect of this lack of diversity stems from well-intentioned professionals who have implicit biases of which they are unaware and who unwittingly allow those implicit biases to affect personnel decisions and professional relationships.

The National Association of Bond Lawyers ("NABL"), the American Bar Association (the "ABA"), various governmental entities, and various private entities have all adopted rules and have created policies and procedures in an attempt to combat discrimination and unintentional bias, and to promote all types of diversity and inclusion within the practice of law. The main purpose of this outline is to demonstrate that we all have implicit biases and how certain biases can lead to unintentional discrimination. In addition, through "transformative learning" and other methods, this outline will seek to provide lessons on how to abate unintentional discrimination and implicit bias to the benefit of your practice, your professional relationships and your organization. This outline will also review ABA Model Rule 8.4(g), regarding anti-discrimination and NABL's Diversity Initiative.

II. THE ABA MODEL RULES, PARTICULARLY ABA MODEL RULE 8.4(g)[1]

What are the ABA Model Rules and Why Does the ABA Adopt Model Rules?

The Model Rules of Professional Conduct (the "Model Rules") were first promulgated in 1983 by the ABA to address, among other things, criticism concerning the Model Code of Professional Responsibility's focus on litigation.[2]

According to the introduction to the Model Rules, they are:

> . . . rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. . . . The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. . . . Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.[3]

The Model Rules are invoked as governing standards in the context of disciplinary or disqualification proceedings, and not as the basis for a separate cause of action. Comment [20] to the Scope of the Model Rules states that "[n]evertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."[4] Violations of the Model Rules are considered by courts as evidence of standards of care in civil actions based on allegations of malpractice, misrepresentation, and other common law or statutory concepts.[5]

Pre-Model Rule 8.4(g)

Prior to the adoption of the ABA's Model Rule 8.4(g) ("Model Rule 8.4(g)"), anti-harassment and anti-discrimination provisions existed only as Comment [3] to ABA Model Rule 8.4, which read in pertinent part:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice . . . [6]

Proponents of an amendment to Model Rule 8.4 advanced two primary critiques of Comment [3]: that the comment (1) had too narrow a scope; and (2) existed only as guidance regarding enforcement of Model Rule 8.4(d),[7] which only covered "conduct prejudicial to the administration of justice."[8] After years of drafting and negotiations, constituents of the ABA succeeded in amending Model Rule 8.4 to adopt a revised version of Comment [3], which moved the anti-discrimination provision to the black letter of the rule as Model Rule 8.4(g).[9]

History of Adoption of Model Rule 8.4(g)

Based on a widespread concern about the effects of bias, discrimination, and harassment in the practice of law and the justice system, ABA efforts to adopt Model Rule 8.4(g) extend as far back as 1994.[10] The ABA Young Lawyers Division first recommended an amendment that included an anti-bias and antidiscrimination provision, but withdrew it due to opposition from other groups within the ABA.[11] Opponents of the amendment thought the drafts were too broad and too vague to have any legitimate enforceability.[12] That same year, the ABA Standing Committee submitted a similar proposed amendment but withdrew it for similar reasons.[13]

In 1998, the ABA Criminal Justice Section attempted to correct problems in the previous proposed amendments to Model Rule 8.4 by narrowing the scope of the rule and including comments clarifying the terms to which lawyers were to adhere.[14] Again, the proposal was withdrawn before it reached the ABA House of Delegates.[15]

In the same year, the ABA Standing Committee sought to add only a comment (rather than a black letter rule as previous groups had attempted to do) to Model Rule 8.4.[16] The ABA Standing Committee noted the need to consider race, gender, and other factors in the legal process.[17] The ABA Standing Committee also noted the prior controversial and divisive attempts at amendments.[18] Again, this proposal was withdrawn before consideration, but importantly, acted as the precursor to Comment [3] (*supra*).[19]

At the 1998 ABA Annual Meeting, the House of Delegates adopted Comment [3] after debate and a voice vote.[20] Until the adoption of Model Rule 8.4(g), this Comment was the only anti-bias provision in the Model Rules.[21]

After 16 years of existing as a comment to Model Rule 8.4, sponsors within, as well as outside of, the ABA began advocating for the elevation of the comment to a rule.[22] Proposed in 2015, the first version of the amendment expanded the conduct of lawyers to be covered by the rule, added the bases of characteristics on which discrimination was barred, adopted Comment [3]'s "knowingly" qualifier, and eliminated the connection to Model Rule 8.4(d) so that the new rule would stand on its own.[23] This version also modified the previous Comment [3] to Model Rule 8.4 (*supra*) and would eventually become the adopted model rule, but not without subjection to several revisions.[24]

A change in the second version, to cover "conduct related to the practice of law," would eventually be included in the final version.[25] However, at the public hearing, the second version drew criticism for lack of definitions of key terms within the proposal, lack of an applicable knowledge qualifier, and vagueness.[26] The ABA Standing Committee on Professional Discipline also questioned whether there was a need for the change at all.[27]

A third version was drafted in response to the criticisms that the second version received.[28] This version expanded conduct covered to virtually anything a lawyer may encounter while practicing law.[29] Also, it did not attempt to define key terms, but expounded upon the principles of discrimination and harassment and what they included.[30] Significantly, this version added a diversity exception: "Paragraph (g) does not prohibit conduct undertaken to promote diversity," and an advocacy exception: "Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation."[31] Finally, this version added at the end of the rule an exception: "This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16."[32]

A fourth version of the proposal re-introduced the "reasonably should know" standard that exists in the provision today.[33] The addition of this knowledge qualifier proved to be a major factor in finalizing the adoption of Model Rule 8.4(g). This version also expanded the "diversity exception" and "advocacy exceptions" that existed in the third version.[34]

Bargaining over the fourth version yielded yet another version that left much of the previous version intact, but elevated the "legitimate advice or advocacy" exception from a comment to a rule.[35] Further negotiations and bargaining to smooth over any differences among constituencies within the ABA resulted in the new rule being passed on August 8, 2016.[36] The ABA Standing Committee on Ethics and Professional Responsibility noted that many jurisdictions across the United States had already adopted similar language to the Rule 8.4 revision.[37] Moreover, the great majority of the 598 member ABA House of Delegates approved the amendment, with only a few opposing via voice vote; none spoke in opposition from the floor.[38]

ABA Model Rule 8.4(g)

Important groups within the ABA that led the charge for the adoption of Model Rule 8.4(g) include the ABA Commission on Racial and Ethnic Diversity, the ABA Commission on Sexual Orientation and Gender Identity, the ABA Commission on Disability Rights, and the ABA Commission on Women in the Profession. Until the ABA's recent amendment to the Model Rules, there were no anti-bias, anti-prejudice, or anti-harassment black-letter rules. These groups achieved a substantial victory for the legal profession with Model Rule 8.4(g), which provides that it is professional misconduct for a lawyer to:

> . . . 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, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.[39]

Importantly, the new rule reaches conduct that a lawyer knows or "reasonably should know" is discrimination.[40] The ABA states that this knowledge requirement acts as a safeguard protecting lawyers from prosecution for conduct they could not have known was discrimination or harassment.[41] This requirement doubly acts as a safeguard against lawyers attempting to evade prosecution for conduct that any reasonable lawyer would and should know was discrimination or harassment.[42] Further, Model Rule 8.4(g) extends to cover any "conduct related to the practice of law" instead of the narrower conduct covered under 8.4(d).[43]

The ABA also included three new comments relating to Model Rule 8.4(g).[44] Comment [3] provides an explanation and examples of what discrimination and harassment include.[45] Comment [4] provides an explanation and examples of what conduct the rule is intended to cover, including representation of clients, managing a law firm, and participating in bar association or social activities "in connection with the practice of law."[46] Finally, Comment [5] provides exceptions that do not constitute a violation of Model Rule 8.4(g), including those for peremptory challenges on a discriminatory basis and limiting one's practice to members of underserved populations.[47]

Adoption of Model Rule 8.4(g) by States

Since its inception, Model Rule 8.4(g) has been met with some controversy regarding adoption by the states.[48] Fourteen states still have neither a rule nor a comment,[49] and thirteen states have adopted only a comment.[50] However, in the four years since the ABA's formal adoption of Model Rule 8.4(g), 24 states and Washington, D.C. have adopted Model Rule 8.4(g) in some capacity.[51] Specifically, in addition to Washington, D.C., the states of California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Texas, Vermont, Washington and Wisconsin have all adopted Model Rule 8.4(g).[52] However, in each of these jurisdictions, Model Rule 8.4(g) exists in varying forms, none of which is as all-encompassing as the pure ABA iteration of Model Rule 8.4(g).[53] For example, no state has adopted Model Rule 8.4(g)'s "legitimate advocacy exception," only a few states include all 11 protected classes and characteristics listed in Model Rule 8.4(g), several states limit rules to "conduct in the course of representing a client," and some require the conduct be "prejudicial to the administration of justice," as explained in Rule 8.4(d).[54]

Challenges to Model Rule 8.4(g)

Six states have declined to adopt the amended Model Rule outright, citing constitutional implications.[55] For example:

- In 2017, the Montana State Legislature passed a joint resolution vehemently condemning the amended Model Rule, stating that it violates the First Amendment and "seeks to destroy the bedrock foundations and traditions of American independent thought, speech, and action."[56]
- In the same vein, the Texas Attorney General opined in 2016 that Model Rule 8.4(g) "would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues," including subjecting participants in candid dialogue on topics such as illegal immigration, same-sex marriage, or restrictions on bathroom usage to discipline while suppressing their "thoughtful and complete exchanges about these complex issues."[57]

- In 2017, Louisiana's Attorney General also weighed in and rejected the amended Model Rule, stating — among other reasons — that the expansive phrase "conduct related to the practice of law" is "unconstitutionally broad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct."[58] Subsequent to that pronouncement, the Louisiana State Bar Association Rules of Professional Conduct Committee voted not to proceed with Rule 8.4(g).[59]

Moreover, augmenting the unconstitutionality claims after the ABA's adoption of Rule 8.4(g), the United States Supreme Court rendered two decisions regarding free speech, wherein the Court held that certain government restrictions on free speech were unconstitutional. In *Matal v. Tam*[60] the Supreme Court held a federal statute unconstitutional *prima facie*, because it allowed the punishment of "disparaging" speech."[61] Specifically, the *Matal* Court unanimously agreed that a provision of a longstanding federal law allowing government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons was unconstitutional, because "[i]t offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[62] Additionally, writing for a plurality of the *Matal* Court, Justice Alito noted that "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[63]

National Institute of Family and Life Advocates v. Becerra[64] ("NILFA") dealt specifically with restrictions on legal speech. In *NIFLA*, the Supreme Court held that government restrictions on lawyers' professional speech are subject to strict scrutiny, because they are content-based restrictions, and "such laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[65] Further, the *NILFA* Court observed that "[t]his stringent standard reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[66] Moreover, the Court added "[T]his Court has not recognized 'professional speech' as a separate category of speech subject to different rules. Speech is not unprotected merely because it is uttered by 'professionals.'"[67]

Notwithstanding these constitutional challenges, the ABA Commission on Racial and Ethnic Diversity, the ABA Commission on Sexual Orientation and Gender Identity, the ABA Commission on Disability Rights, and the ABA Commission on Women in the Profession, among others, argue that no First Amendment rights are being infringed upon, and that Model Rule 8.4(g) is intended to give underserved groups a weapon with which to combat unprofessional and unethical conduct that would cast lawyering in a negative light.

Another frequent argument against the adoption of Model Rule 8.4(g) is that gray areas exist in considering what conduct is covered and not covered by Model Rule 8.4(g). For example, South Texas College of Law professor Josh Blackman has argued that the text of Rule 8.4(g) is not specific enough to exclude the harassment or discrimination it seeks to preclude, and instead could make "[a] single 'harassing' comment . . . result in discipline."[68] UCLA School of Law Professor Eugene Volokh raised similar sentiments, pointing to several hypothetical situations wherein attorneys may be at risk for disciplinary action for engaging in social activities where their "'verbal . . . conduct' [may be seen as] 'manifest[ing] bias or prejudice' and thus as 'harmful.'"[69] The crux of this argument is that lawyers may not know what form of conduct could offend another person. Notwithstanding these ambiguity-based attacks, the ABA has countered this argument by noting that Rule 8.4(g) calls for lawyers to *educate themselves* about reasonable standards of acceptable conduct; the rule prohibits conduct "the lawyer knows or reasonably should know is harassment or

discrimination."[70] If nothing else, the rule is an invitation for lawyers to consider another person's viewpoint *before* speaking or acting.[71]

Like NABL and its Diversity Committee (the "Diversity Committee") and the NABL Diversity Initiative (the "Diversity Initiative"), the ABA has chosen to confront the issue of diversity and inclusion head on. The ABA has adopted certain goals to guide its actions and desired outcomes. In 1986, the ABA adopted Goal IX as one of such goals. That goal supported "the full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities."[72] In 2008, the ABA identified and revised a series of goals to serve its mission as an organization, and Goal IX became Goal III, "to eliminate bias and enhance diversity."[73] According to the ABA, "[i]ts objectives are to promote full and equal participation in the association, our profession, and the justice system by all persons and to eliminate bias in the legal profession and justice system."[74] The ABA established commissions for each of its goals, including the following for Goal III: Commission on Racial and Ethnic Diversity, Commission on Women in the Profession, Commission on Sexual Orientation and Gender Identity, and Commission on Disability Rights.[75] The efforts of these Goal III Commissions ultimately culminated in Model Rule 8.4(g) and its related comments years later.

Similarly, the Diversity Initiative, adopted by the NABL Board of Directors (the "NABL Board") at its March 2017 NABL Board meeting, has the stated purpose, among others, "[t]o encourage and facilitate active long-term participation in NABL by diverse NABL members and to minimize implicit bias within NABL on the basis of gender, gender identity, race, ethnic background, religion, age and sexual orientation."[76] Consequently, in many ways NABL and the ABA are aligned in their goals regarding diversity and inclusion within their respective organizations and the practice of law as a whole.

III. IMPLICIT BIAS: IS IT IN OUR DNA?

What is Implicit Bias?

Baseball, Apple Pie and Bias

Racial bias, stereotyping and discrimination are as old as America itself, and are well documented throughout American history. Moreover, biases may be held by an individual, group, or institution and have been institutionalized in education, the news media and journalism, entertainment, politics, law enforcement, healthcare and other social strata. In recent years, bias has even manifested itself in artificial intelligence and website algorithms for such cyber giants as Google and Amazon. Is bias an unfortunate and inevitable part of our history and DNA as Americans?

What is implicit bias? In short, "implicit bias" is an unconscious attitude or stereotype that affects how people view and interact with other people. The Kirwin Institute for the Study of Race and Ethnicity at The Ohio State University, one of the nation's leading experts/institutions on implicit bias, has created the following comprehensive definition of "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. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social

> and/or political correctness. Rather, implicit biases are not accessible through introspection.
>
> The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages. In addition to early life experiences, the media and news programming are often-cited origins of implicit associations.[77]

Types of Unconscious Cognitive Biases

We all have unconscious biases that can, and often do, interfere with our interactions with others. Unconscious bias can manifest itself in many different ways. Here are some common types of bias that often affect decision-making and interactions at work.

Confirmation Bias

Confirmation bias is a particularly troubling type of unconscious bias that causes people to pay more attention to information that confirms their existing belief system and assumptions, while disregarding that which is contradictory. Of particular relevance to this outline, this type of bias can "skew your evaluations of others' work and potentially disrupt their careers."[78] For example, in 2014, lawyer and sociologist Dr. Arin Reeves released results of a study she conducted to probe whether practicing attorneys make workplace decisions based on confirmation bias.[79] Specifically, this incisive study tested whether attorneys unconsciously believe African Americans produce inferior written work and that Caucasians are better writers. In the study, Reeves created a research memo that contained 22 errors (spelling, grammar, technical writing, factual, and analytical). The memo was distributed to 60 partners working in nearly two dozen law firms who thought they were participating in a "writing analysis study" to help young lawyers with their writing skills. All of the participants were told the memo was written by a (fictitious) third-year associate named Thomas Meyer who graduated from New York University Law School. Half of the participants were told Thomas Meyer was Caucasian and the other half were told Thomas Meyer was African American. The law firm partners participating in the study were asked to give the memo an overall rating from 1 (poorly written) to 5 (extremely well written). They were also asked to edit the memo for any mistakes. The results are truly compelling:

> The results indicated strong confirmation bias on the part of the evaluators. African American Thomas Meyer's memo was given an average overall rating of 3.2 out of 5.0, while the exact same memo garnered an average rating of 4.1 out of 5.0 for Caucasian Thomas Meyer. Incredibly, the evaluators found twice as many spelling and grammatical errors for African American Thomas Meyer (5.8 out of 7.0) compared to Caucasian Thomas Meyer (2.9 out of 7.0). They also found more technical and factual errors and made more critical comments with respect to African American Thomas Meyer's memo. Even more significantly, Dr. Reeves found that the female and racially/ethnically diverse partners who participated in the study *were just as likely* as white male participants to be more rigorous in examining African American Thomas Meyer's memo (and finding more mistakes), while basically giving Caucasian Thomas Meyer a pass.[80]

It is a safe bet that the law firm partners who participated in this study were shocked by the results, especially those who did not view themselves as having any biases. For Katleen Nalty, a lawyer and leading consultant who specializes in diversity and inclusion, that is the insidious nature of unconscious bias — people are completely unaware of implicit biases they may harbor and how those biases leak into their decision-making and behaviors.[81]

Attribution Bias

Another type of unconscious cognitive bias — attribution bias — causes people to make more favorable assessments of behaviors and circumstances for those in their "in groups" (by giving second chances and the benefit of the doubt) and to judge people in their "out groups" by less favorable group stereotypes.[82]

Availability Bias

Availability bias interferes with good decision-making because it causes people to default to "top of mind" information.[83] So, for instance, if you automatically picture a man when asked to think of a "leader" and a woman when prompted to think of a "support person," you may be more uncomfortable when interacting with a female leader or a man in a support position, particularly at an unconscious level.[84]

Affinity Bias

The adverse effects of many of these cognitive biases can be compounded by affinity bias, which is the tendency to gravitate toward and develop relationships with people who are more like ourselves and share similar interests and backgrounds.[85] According to Attorney Nalty, this leads people to invest more energy and resources in those who are in their affinity group while unintentionally leaving others out.[86] Attorney Nalty further argues that, due to the prevalence of affinity bias, the legal profession can best be described as a "mirror-tocracy"—not a meritocracy.[87] For Nalty, a genuine meritocracy can never exist until individual lawyers and legal organizations come to terms with unconscious biases through training and focused work to interrupt biases.[88]

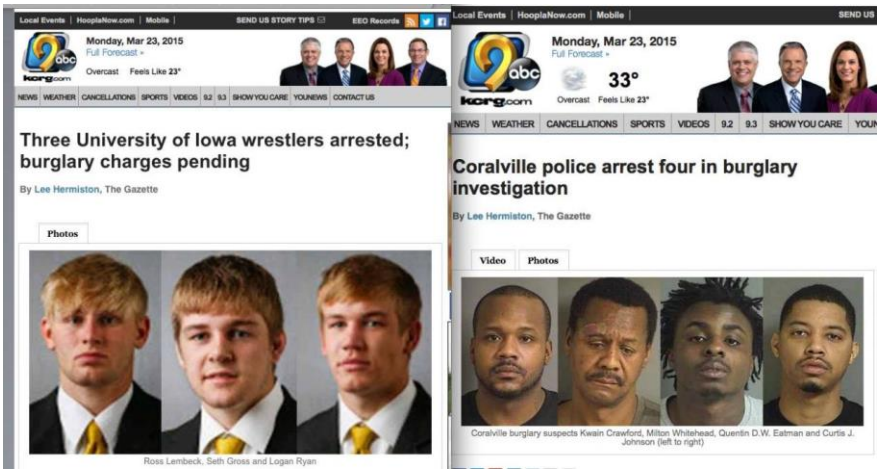
Implicit Bias in the News Media and Entertainment

Human beings certainly are not born with biases and prejudices, but rather, these negative impulses are basically learned behavior from one's environment over time. Typically, biases are picked up from family and friends, but they are also absorbed from negative images of groups and individuals that have been consistently presented to the American public by the news media and entertainment industry, often on a nightly basis.

Race and Ethnicity

The news media is a vitally important American institution that is the very backbone of a free and democratic society. It has also been integral to shaping American public perception and opinion. Nevertheless, the news media unfortunately has often spread prejudice and biases, purposefully or not. There are many examples of bias in the news media, some of which follow below. The first is an AP photograph and news report below regarding a young black male walking through flood waters after allegedly "*looting* a grocery store" in the wake of Hurricane Katrina in New Orleans. Looting has obvious negative connotations because it involves a criminal act of stealing or taking something illegally during a crisis. This is in stark contrast to a photograph and news report of a white couple, taken the same day walking through the same flood waters, whose actions were innocently characterized as "*finding* bread and soda from a local grocery store."[89]

In another striking example of unbalanced and biased news reporting along racial lines, the photograph below is a side-by-side comparison of two 2015 crime reports from the same reporter of a local newspaper (The Gazette) in Coralville, Iowa concerning the same alleged crime — burglary — that occurred on the same day.[90]



The story regarding the black suspects, who were arrested in connection with a single burglary, uses mug shots (i.e., photos taken at the time of booking), which are inherently suggestive of criminality, and have long been held by US courts to be highly prejudicial because they create an almost automatic "inference that the person involved has a criminal record, or has at least been in trouble with the police…"[91] Moreover, mug shots typically do not show suspects in their best light, as many appear disheveled and/or despondent under the stress of an arrest. By stark contrast, the story on the white suspects uses their official school yearbook photographs (with each in a suit and gold tie), and the reporter emphasizes that the white suspects are University of Iowa student-athletes, which taken together with the official school photographs, creates an inference that the white suspects are educated, clean cut and basically "good kids." This inference is drawn despite the fact that these "good kids" were arrested for *seven* burglaries, and one of the suspects fought

with police officers at the time of his arrest.[92] Mug shots were taken of all three white suspects, but those pictures were not used in the initial news story, and were used to swap out the original school yearbook photographs in follow up reports *only* after the unbalanced nature of the two crime reports had caused quite a firestorm on social media.[93]

Finally, the photograph below is a comparison of two official Twitter feeds; one from NBC News and one from New York City Alerts.[94]

The NBC News tweet uses smiling shots (one seemingly a yearbook photo) of the white couple and depicts them as "teen sweethearts" who are embarked on an adventurous "Bonnie-and-Clyde-style" crime spree. It should be noted that Bonnie Parker and Clyde Barrow were a criminal couple who were widely popular in the 1930's and who were later glamorized and romanticized in books, music, screen and stage. Taken together, the smiling photographs of the two teens, along with the "teen sweetheart" and "Bonnie-and-Clyde" descriptions convey the idea that they are "good kids" who are on an almost whimsical adventure despite their alleged criminal activities, and there is no statement or implication at all that they are threatening in any way. By contrast, the New York City Alerts tweet — in essence an electronic "Wanted" poster — bluntly describes the two black males as "dangerous individuals" who are "wanted" by the police, and a reward or bounty is offered for their apprehension. It is also apparent that mug shots are used in the New York City tweet. The clear message is that the two black men are dangerous and menacing, and the only thing missing from that tweet is the warning of "guard your windows and lock your doors!" Moreover, these types of images and descriptions are particularly problematic because, when viewed on a regular basis, they help to create the impression in many readers/viewers that all black men are similarly threatening or predisposed to crime.

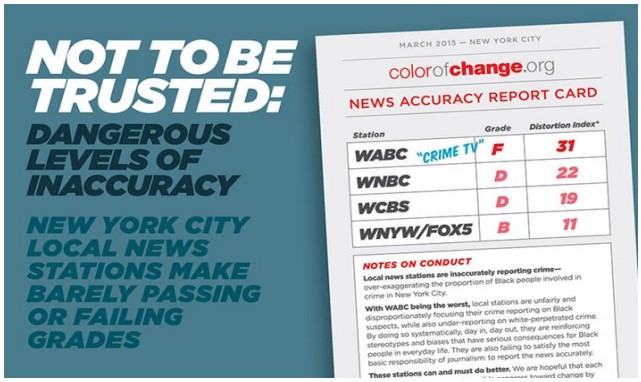
The news media's use of mug shots to depict people of color who are suspected of criminal activity has been pervasive over the years, but it has finally begun to be acknowledged and recognized as part of an over all reckoning of systemic racism following the uproar over the shocking death of George Floyd at the hands of Minneapolis police officers on May 25, 2020. For example, in July of 2020, the San Francisco Police Department ("SFPD") announced that it would no longer release mug shots for use in news reports.[95] SFPD Police Chief William Scott, who is African American, said that SFPD's new policy is based on:

> [c]ompelling research suggesting that the widespread publication of police booking photos in the news and on social media creates an illusory correlation for viewers

> that fosters racial bias and vastly overstates the propensity of black and brown men to engage in criminal behavior.[96]

SFPD joins a growing movement by newspapers and broadcasters (including GateHouse Media, Gannett, The Orlando Sentinel, The Houston Chronicle, and WRCB-TV in Chattanooga, TN) that have decided to curtail the use of mug shots as well.[97] This is definitely a very positive step, but it could be argued that the many decades of this repetitive practice has already caused damage and has generated significant racial bias that may take generations to undo.

In addition to the unbalanced depictions and descriptions of black and white criminal suspects, it has been found that news coverage has also *over-represented* African American people as perpetrators of criminal activity. As an example, a 2015 Media Matters for America and Color of Change joint study of crime coverage found that in 2014, the four major network affiliate stations in New York City (WABC/7, WNBC/4, Fox/5 and WCBS/2) reported on murder, theft, and assault cases in which black people were suspects at a rate that far outpaced their actual arrest rates for these crimes.



Specifically, the joint study found the following:

> According to [2010-2014] averages of arrest statistics from the New York City Police Department (NYPD), African-American suspects were arrested in 54 percent of murders, 55 percent of thefts, and 49 percent of assaults. However, between August 18 and December 31, 2014, the suspects in the four stations' coverage of murders were 74 percent African-American, the suspects in coverage of thefts were 84 percent African-American, and suspects in assaults were 73 percent African-American….For WABC, where the problem was at its worst, 82% of the people they present as perpetrators of crime are African American, an exaggeration of 31 percentage points.[98]

This is a significant level of distortion. As *The Color of Change News Accuracy Report Card* notes, the exaggerated amount of black faces linked to crime undoubtedly breeds suspicion and hostility toward black people, as does the practice of inaccurately under-representing white people in crime coverage.[99] This in turn substantially intensifies negative stereotypes about black people and significantly contributes to the development of implicit biases against them.

Latinos have been similarly disparaged in the news media. For example, a study found that 66 percent of the time, news coverage between 1995 and 2004 showed Latinos in the context of either crime or immigration rather than in other contexts.[100] According to the Center for American Progress, more recent analysis confirms these findings, and moreover, this treatment of Latinos as criminals and outsiders is especially concerning given that Latinos are otherwise rarely represented

in the news media.[101] For example, one of the more recent studies found that between 2008 and 2014, stories focused on Latinos and issues concerning Latino communities composed just 0.78 percent of coverage on national evening network news.[102] To put this in perspective, CBS, NBC, ABC, and CNN dedicated an average of *just 87 seconds* of coverage on Latinos per day — combined — from 2008 to 2014.[103]

In the same way that it over-represents black people in its coverage of crime, the news media's overrepresentation of Latinos as lawbreakers and outsiders is particularly troubling considering the overall lack of coverage of Latinos. In addition, the Center for American Progress argues that, similar to the coverage of black people, coverage of Latinos often "speaks in generalities when the story is unfavorable."[104] Positive coverage, meanwhile, is likely to focus on individuals, which allows positive attributes to be seen as "the exception, not the rule."[105] In comparison, the Center for American Progress notes that coverage of white suspects "rushes to emphasize the humane aspects of the offender," even in instances when the crime is far more horrendous than a crime committed by blacks or Latinos.[106]

When media outlets are so erroneous in this regard, they reinforce a culture in which we see a hostility and distrust for some, and privilege for others.[107] Media-driven biases limit the empathy people feel for African Americans, Latinos and other racial and ethnic groups, and "adversely influence the behavior of employers conducting job interviews, juries and judges evaluating guilt and sentencing, and countless other discriminatory encounters with doctors, teachers, landlords, lawmakers, prosecutors and everyday people on the street."[108] Basically, the effect of these unbalanced portrayals is all-encompassing.

Gender

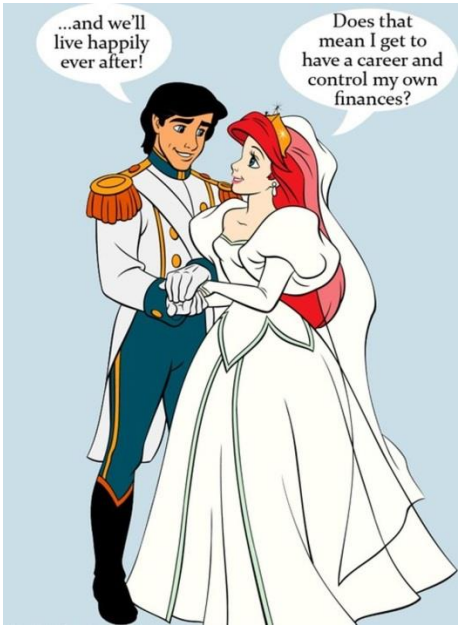
Women also have been traditional targets of implicit bias, which is present in every facet of American society. Gender bias is one of the most commonly discussed and observed forms of unconscious bias, which is often used to refer to "the preferential treatment men receive — specifically white, heterosexual males."[109] Gender bias is often labeled as "sexism" and describes the prejudice against women solely on the basis of their sex. Gender bias is most prominently visible within professional settings, where female employees must constantly battle the omnipresent "Glass Ceiling," which is a "metaphor for the evident but intangible hierarchical impediment that prevents minorities and women from achieving elevated professional success."[110]

To further illustrate the problem, Built In, a Seattle-based technology company, assembled a number of statistics related to gender bias in the workplace from such prominent sources as the U.S. Equal Employment Opportunity Commission, the Pew Research Center, the International Labour Organization and the Harvard Business Review, among others. The statistics show the following:

- 42% of women report having experienced gender discrimination at work.
- In 2017, 25,000 sex-based discrimination claims were filed and in 2018, victims of sex-based discrimination received more than $148 million in payouts from the complaints.
- Women are 25-46% more likely to be hired with blind applications or auditions.
- Half of men believe women are well-represented at their company, when 90% of senior leaders are men.
- 40% of men and women notice a double standard against female candidates.
- 34% of men and women believe male executives are better at risk assessment.
- Men are 30% more likely to obtain managerial roles.

- Women receive pay raises 5% less often when men and women ask for raises at the same time.
- 23% of CEOs are women
- 4% of C-Suite roles are held by women of color.
- 6.6% of CEOs at Fortune 500 companies are women.
- 0.2% of CEOs at Fortune 500 companies are women of color.[111]

There are many societal and historical causes of gender bias. Ironically, one of the main offenders in this category has been one of the most cherished American institutions, the iconic Walt Disney Company ("Disney"). Disney has influenced American culture in more ways than many people realize or acknowledge, and the iconic Disney princess movies (the "Disney Princess Movies") have contained subliminal gender roles and negative female stereotypes* for decades. For example, the renowned "classic" Disney Princess Movies (*Snow White and the Seven Dwarfs, Cinderella* and *Sleeping Beauty*) are three of the most watched Disney productions of all time, and all had three dominant themes based on negative gender roles for women: (1) the heroine was a weak "damsel in distress" character, (2) the worth of the heroine, and in the case of *Snow White*, the main antagonist as well, was based solely on her beauty and appearance ("...mirror, mirror on the wall, who is the fairest one of all…?) and (3) the heroine's fate was completely dependent upon her being rescued by the brave male hero. As one commentator observed, "Disney's depiction of females as young and delicate, wearing gowns, being admired for their beauty and as damsels-in-distress waiting for a heroic knight to rescue them, reinforced society's long-held views of women."[112]



The themes in the classic Disney Princess Movies, which have been watched by millions of American families for generations, have served as a catalyst to reinforce and perpetuate negative gender stereotypes that women cannot be leaders, cannot be assertive, must rely on others for their safety, and can only depend on their physical appearance (beauty and sexuality) — and invariably a man — to "live happily ever-after."

* It has been demonstrated convincingly that Disney movies have also perpetuated negative racial stereotypes for decades as well. These racial stereotypes, however, are not the focus of this outline.

Although the "Disney Renaissance" period (post 1989) has seen Disney playing "catch-up" with more positive female leads and doing away with many of the blatant gender-based stereotypes of the classic era, the important takeaway from this is that Disney actively promoted and reinforced negative gender stereotypes for almost 60 years in the production of its classic Disney Princess Movies, and those stereotypes have gone far beyond that timespan due to the frequency in which they have been viewed by new generations of young male and female viewers over the past 30 years. Moreover, because Disney has been such a significant influencer on American culture for decades through its movies, theme parks and paraphernalia, its use of gender stereotypes has undoubtedly had a significant effect on America's social landscape and by extension, the workplace environment. Notwithstanding the foregoing, Disney is merely one of many generators of implicit gender bias that exists in our society.

Although racial and gender biases are the most documented forms of inequality in American history, it is important to recognize that biases, explicit and implicit, are not limited to race, ethnicity and gender. Indeed, such biases exist toward social groups based on sexual orientation, gender identity, age, physical abilities, religion, weight, and many other characteristics.

Implicit vs. Explicit

To understand implicit bias, it is essential to distinguish it from explicit bias, which is essentially a prejudice known to the believer that generally judges one group of people to be superior to another. In many cases relevant to the practice of law, explicit bias is both against the law and contrary to professional ethics rules (see discussion of Model Rule 8.4(g) above). In the United States, many of the laws and policies forbidding explicit bias have to do with righting subjugation of minorities throughout the history of both the United States and other countries. While explicit bias is abhorrent and typically violative of laws and a host of policies and procedures, implicit bias is treated differently, and for good reason.

The National Center for State Courts articulately explains that implicit bias results from subtle cognitive processes that often operate at a level below conscious awareness and without intentional control.[113] Most researchers agree that we all have implicit biases.[114] However, as suggested in the title "implicit," unless people make a conscientious choice to explore their implicit biases, they tend to operate without actual knowledge that implicit bias is unintentionally affecting their dealings with others. The following paragraph from a May 2017 article in *The Atlantic*, backed up by scientific references, is particularly illuminating:

> In fact, studies demonstrate bias across nearly every field and for nearly every group of people. If you're Latino, you'll get less pain medication than a white patient. If you're an elderly woman, you'll receive fewer life-saving interventions than an elderly man. If you are a man being evaluated for a job as a lab manager, you will be given more mentorship, judged as more capable, and offered a higher starting salary than if you were a woman. If you are an obese child, your teacher is more likely to assume you're less intelligent than if you were slim. If you are a black student, you are more likely to be punished than a white student behaving the same way.[115]

The Implicit Association Test ("IAT")

Scientists have long known that it is difficult to identify implicit bias through reporting. There are two primary reasons for this. First, the reporting person may not be aware of the bias. Second, even if the reporting person is aware of the bias, the reporting person may be too embarrassed to disclose it. One of the latest tools used in the identification of implicit bias is the Implicit Association Test ("IAT"). The IAT is an online test housed on a Harvard University domain and run by a non-profit entity called Project Implicit.[116] According to Project Implicit, the IAT measures attitudes and beliefs that people are either unwilling or unable to report. To do so, the IAT measures strength of associations between concepts (e.g. race or sexual orientation) and evaluations (e.g. good or bad) or stereotypes (e.g. athletic or smart). In simple terms, the idea of the IAT is to get the person taking the test to move through the test as quickly as possible before that person's brain has the ability to make a politically correct response as opposed to following his or her underlying instinct. Project Implicit describes the process more specifically, as follows:

> When doing an IAT you are asked to quickly sort words into categories that are on the left and right hand side of the computer screen by pressing the "e" key if the word belongs to the category on the left and the "i" key if the word belongs to the category on the right. The IAT has five main parts.
>
> In the first part of the IAT you sort words relating to the concepts (e.g., fat people, thin people) into categories. So if the category "Fat People" was on the left, and a picture of a heavy person appeared on the screen, you would press the "e" key.
>
> In the second part of the IAT you sort words relating to the evaluation (e.g., good, bad). So if the category "good" was on the left, and a pleasant word appeared on the screen, you would press the "e" key.
>
> In the third part of the IAT, the categories are combined and you are asked to sort both concept and evaluation words. So, the categories on the left hand side would be Fat People/Good and the categories on the right hand side would be Thin People/Bad. It is important to note that the order in which the blocks are presented varies across participants. So, some people will do the Fat People/Good, Thin People/Bad part first and other people will do the Fat People/Bad, Thin People/Good part first.
>
> In the fourth part of the IAT, the placement of the concepts switches. If the category "Fat People" was previously on the left, now it would be on the right. Importantly, the number of trials in this part of the IAT is increased in order to minimize the effects of practice.
>
> In the final part of the IAT, the categories are combined in a way that is opposite what they were before. If the category on the left was previously Fat People/Good, it would now be Fat People/Bad.
>
> The IAT score is based on how long it takes a person, on average, to sort the words in the third part of the IAT versus the fifth part of the IAT. [Project Implicit] would say that one has an implicit preference for thin people relative to fat people if they are faster to categorize words when Thin People and Good share a response key and Fat People and Bad share a response key, relative to the reverse.[117]

Project Implicit reports that millions of people have taken the IAT since its inception and researchers agree that no other measure of implicit bias has been more influential in the conversation about implicit bias than the IAT. Part of this lies in the ability to pull such statistics; for example, seventy percent of people who take the race version of the IAT have a moderate preference for white faces over black faces.[118] As a result of this ability, the IAT has been cited in thousands of peer review papers regarding implicit bias and countless more presentations (like this one). In a legal context the IAT has been used, among other purposes, to provide more context to determinations by statisticians that prove judges and juries still value some lives over others. For example, judges and juries tend to incarcerate those who kill whites longer than those who kill blacks, those who kill women longer than those who kill men and those who kill old victims longer than those who kill young victims.[119]

However, despite its champions, the IAT is not without detractors. One of the most frequent and biting criticisms of the IAT is that a test taker's score on the very same test (e.g. gay versus straight) can vary significantly depending upon when the test is taken. For example, in January, 2017, the *National Review* published an article directly challenging the IAT's results and relevance.[120] Among other things, the author suggested that the IAT is "a Ouija board of the mind conjuring up the ghosts of our own bigotry . . . ."[121] Project Implicit acknowledges this problem on its website and responds that:

> Although the IAT is a well-validated measure of implicit attitudes, no test is perfectly accurate and some variation is to be expected. We encourage you to take a test more than once. If you get similar feedback more than once, you can be more certain about the accuracy of your results. If you get somewhat dissimilar feedback two times you can simply average the results. It is somewhat unusual for someone to get very different feedback but, if you do, you can think of your test results as being inconclusive.[122]

Nevertheless, Project Implicit's response, provided in many different forms over the years, has been insufficient to quiet a very vocal minority of scholars who argue that it is a poor method for judging implicit bias. Recently, this resulted in an article in *The Chronicle of Higher Education* entitled "Can We Really Measure Implicit Bias? Maybe Not."[123]

The article in *The Chronicle of Higher Education* was spurred by a paper from researchers who examined nearly five hundred case studies over twenty years involving over 80,000 people who had used the IAT and similar other tests. The researchers concluded that there is little correlation between implicit bias and discriminatory behavior, and that there is very little evidence to support the conclusion that changes in implicit bias will change one's behavior. Interestingly, based upon the data available, Project Implicit agrees with the researchers that the statistical effect linking bias to behavior is slight. They only disagree about how slight. A minority of researchers see the connection to be so trivial that it is irrelevant. However, proponents of the IAT argue that "statistically small effects" can still have "societally large effects."[124]

Irrespective of the scientific value of the IAT, in light of Model Rule 8.4(g), the NABL Diversity Initiative and the lack of diversity in the legal profession, those seeking to adhere to Model Rule 8.4(g) and to advance the goals of the NABL Diversity Initiative are encouraged to take the IAT as one of many tools toward that end. At a minimum, the IAT is still a means to begin an open and honest dialogue regarding the root causes of a lack of diversity in our society and the legal profession.

Implicit Bias and its Application to the Practice of Law

The legal profession is one of the least diverse professions in the United States.[125] In her 2015 *Washington Post* article entitled "The law is the least diverse profession in the nation. And lawyers aren't doing enough to change that," Stanford University Law Professor Deborah L. Rhode makes a very convincing argument regarding the legal profession's diversity woes.[126] In support of Professor Rhode's conclusion, according to 2019 statistics from The Bureau of Labor, 86.6% of lawyers are white, while other professions do better (i.e. 78% of architects and engineers are white, 77% of accountants are white and 72% of physicians and surgeons are white).[127] Professor Rhode goes on to point out that:

> Women constitute more than a third of the profession, but only about a fifth of law firm partners, general counsels of Fortune 500 corporations and law school deans. The situation is bleakest at the highest levels. Women account for only 17 percent of equity partners, and only seven of the nation's 100 largest firms have a woman as chairman or managing partner. Women are less likely to make partner even controlling for other factors, including law school grades and time spent out of the workforce or on part-time schedules. Studies find that men are two to five times more likely to make partner than women.
>
> Although blacks, Latinos, Asian Americans and Native Americans now constitute about a third of the population and a fifth of law school graduates, they make up fewer than 7 percent of law firm partners and 9 percent of general counsels of large corporations. In major law firms, only 3 percent of associates and less than 2 percent of partners are African Americans.[128]

As an aside, please note the use of "chairman" above in the quotation from Professor Rhode's article. Even experts on diversity and inclusion have implicit biases. Although Professor Rhode's statistics are from 2015, as further discussed below, those numbers have barely changed in the five years since the publication of her article.

Professor Rhode is not alone in her concerns regarding the lack of diversity within the legal profession. Dr. Arin N. Reeves views implicit gender bias in the legal profession in what he has coined the: "Two Leaks."[129] Dr. Reeves points out that, in 2016, women were 60% of college graduates, 45% of law school graduates and 40% of business school graduates. Initially, that resulted in women being 45% of junior law firm associates and 47% of junior attorneys in corporate legal departments. That was prior to what Dr. Reeves describes as the "1st Leak: Work Life Balance." After the first leak, there was a significant drop in the presence of women to 30% - 35% of senior lawyers. Then comes the "2nd Leak: Implicit Bias." After that, women were only 10% - 20% of partners, general counsel and senior (C-Suite) executives. Dr. Reeves and Professor Rhode appear to be in agreement on this phenomenon, including the 2nd Leak's effects on other historically underrepresented groups.

The issues identified by Professor Rhode and Dr. Reeves, among others, are significant. They also show that the practice of law tends to become less diverse at the more senior and more highly compensated levels. This is due in large part to attrition in law firms, which is evidenced by the most recent available statistics. The National Association for Law Placement ("NALP"), a national association of over 2,500 legal career professionals, has conducted extensive research on the lack of diversity and the issue of attrition in U.S. law firms.

Partnership

Law firm partners sit at the top of any firm's hierarchy as they share in the ownership and management of the firm, and make determinations on personnel, compensation and firm policies. It is at this level that the lack of diversity is most profound. NALP reported in its *2019 Report on Diversity in U.S. Law Firms* (the "2019 NALP Report") that, out of a total number of 46,830 partners at 979 reporting law firms: 20.72% were Caucasian women; 9.55% were people of color (3.45% of which were women); 2.07%* were LGBTQ; 1.81%** were military veterans; and 0.46%*** were individuals with disabilities.[130] A further breakdown of the "people of color" category shows a more detailed disparity: 1.97% Black or African-American (0.75% of which were women); 2.52% Latino (0.80% of which were women); and 3.89% Asian (1.46% of which were women).[131]

Associates

In terms of associates, the 2019 NALP Report found that, out of a total number of 45,927 associates at 979 reporting law firms: 32.32% were Caucasian women; 25.44% were people of color (14.48% of which were women); 4.14%¥ were LGBTQ; 1.27%¥¥ were military veterans; and 0.59%¥¥¥ were individuals with disabilities.[132] Moreover, a further breakdown of the "people of color" category shows: 4.76% Black or African-American (2.80% of which were women); 5.17% Latino (2.70% of which were women); and 12.17% Asian (7.17% of which were women).[133] The 2019 NALP Report also noted that diverse attorneys are best represented among summer associates: 52.66% women (21.16% women of color); 35.26% people of color (21.16% women of color); and 6.86% LGBTQ).[134]

The statistics noted above show a continuing trend where diverse attorneys - particularly women and people of color - are best represented among the lower-tier summer associates, and somewhat well-represented among associates, but then leave the lawyer ranks each year thereafter at a higher rate than white males, culminating in dramatic underrepresentation among equity partners, with just one in five equity partners being women and only 7.6% of equity partners being people of color.[135]

Moreover, the 2019 NALP Report also found that there have been only modest gains made in the area of law firm diversity over the past ten years. James G. Leipold, NALP Executive Director, stated "[T]he overall arc of the storyline for large law firm diversity remains the same — it is one of slow incremental gains for women and people of color in both the associate and partner ranks."[136] Moreover, after studying the data in the annual report for more than 15 years, Leipold is convinced that "despite steady gains, great structural and cultural hurdles remain that prevent law firms from being able to measure more rapid progress in increasing diversity, particularly among the partnership ranks."[137]

This is the current and traditional legal landscape. The numbers are stark and, in the context of law already being one of the least diverse professions in the United States, this is a serious problem. In this context, every single historically underrepresented lawyer lost is significant.

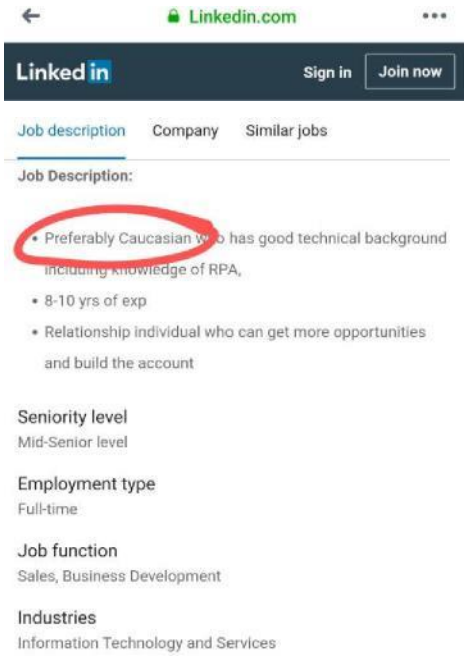
Effects in the Management of Firms

* This percentage is based on a total of 892 reporting partners.
** This percentage is based on a total of 590 reporting partners.
*** This percentage is based on a total of 147 reporting partners.
¥ This percentage is based on a total of 1,796 reporting associates.
¥¥ This percentage is based on a total of 391 reporting associates.
¥¥¥ This percentage is based on a total of 166 reporting associates.

The effect of bias on hiring decisions has been studied and accepted by most researchers for many years. The following paragraph from Kathleen Nalty's *"Strategies for Confronting Unconscious Bias"* sums up the effect certain names have on hiring decisions:

> If you are named John, you will have a significant advantage over Jennifer when applying for a position, even if you both have the exact same credentials. If your name is Jose, you will get more callbacks if you change your name to Joe. And if you're named Emily or Greg, you will receive 50% more callbacks for job interviews than equally qualified applicants named Lakeisha or Jamal.[138]

There are other sources indicating bias in the workplace. One recent example is the LinkedIn job posting below from late April 2019:



To its credit, Cynet Systems, the recruiting firm responsible for posting the job advertisement, apologized for "the anger & frustration caused by the offensive job post" and wrote that the responsible employees were terminated.[139] Whether the actions of those responsible employees were the result of implicit bias or something else is unknown, but the bias is clear nonetheless. In another 2019 example, two members of a city council reported to the city attorney that the city's mayor rejected an African-American city manager applicant because the city has a small black population and she didn't believe the city was "ready for" a black city manager.[140] These recent examples may support prior research in this area. In one study, hiring managers were three times less likely to call highly qualified Arab job candidates in for an interview compared to equally qualified candidates of the racial majority; interestingly, the IAT scores of hiring managers predicted their likelihood of offering callbacks to the Arab job applicants.[141]

Many agree that the lack of diversity in the practice of law is attributable to hidden barriers that disproportionately impact and disrupt the career paths of historically underrepresented lawyers. Sometimes these barriers are known to senior and supervising lawyers, while other times they are the result of unconscious bias. These biases typically lead to disproportionally less access to critical components for success, such as: (a) networking opportunities; (b) insider information; (c) decision-makers; (d) mentors and sponsors; (e) meaningful work assignments; (f) candid and frequent feedback; (g) social integration; (h) training and development; (i) client contact; and (j) promotions.

[142] Moreover, the double-whammy of a lack of diversity in the practice of law is that applicants and people in a position to hire them are less likely to have direct social or familial connections. This too has the effect of placing diverse candidates at a hiring disadvantage. In addition, even when hired, there is a host of data to show that diverse candidates, particularly women, tend to earn less than their counterparts for doing the same jobs and are less likely to be invited to join management. It is with that backdrop that diversity and inclusion seems to be addressed with more interest in the practice of law and in other professions.

The Costs to Law Firms of Unintentional Discrimination & Implicit Bias

It is well established that law firm attrition is costly to law firms.[143] Some estimate the costs to be as high as a collective $9.1 billion each year for the 400 largest law firms in the U.S.[144] Some of those costs include training costs and financial incentives that may never be recouped as well as the loss of profitable client relationships. In addition, there are other less obvious costs. New generations of lawyers are coming online with more exposure to diversity and a greater appreciation of its benefits. Studies have shown that these new lawyers, particularly "millennials," are focused as much, or more, on firm "culture" than anything else.[145] A lack of diversity could result in a lack of an ability to hire the best new candidates, which will ultimately adversely affect succession planning and client retention. Also, the United States Census Bureau has confirmed that the United States is becoming more ethnically diverse.[146] Consequently, clients will likely become more diverse over time as well. Law firms who hire and retain racially and ethnically diverse lawyers will be at an advantage as they will be able to draw from the cultural experiences of those lawyers as well as train and promote those lawyers; they will be ready to be the direct client contacts for clients who will no doubt demand diversity within the law firms that they hire.

Client-driven diversity initiatives are already a reality. Given the public nature of our law practice, many NABL members primarily represent governmental entities. For years, many of those governmental entities have had diversity and inclusion policies that require bond counsel and disclosure counsel to demonstrate a diverse workforce or to partner with a diverse law firm.[147] At the same time, in many cases the client decision makers have become more diverse and are increasingly aware of a lack of diversity within their public finance law firm or firms. There have been many cases where failure of a qualified law firm to identify a minority law firm with which to partner has caused the loss of a client and a profitable relationship.[148] The same holds true for qualified law firms who do not have diverse attorneys with significant responsibilities on their proposed legal team. Moreover, clients are not immune to implicit bias themselves and can be affected by an unintentional desire to have a direct relationship with a lawyer who is from the same diverse background.[149] This would fall under affinity bias and is analogous to the phenomenon explained by Dr. Beverly Tatum in her famous text *"Why Are All the Black Kids Sitting Together in the Cafeteria?"*[150] In current planning and succession planning, it behooves law firms to consider this in their hiring decisions.

Further, in addition to governmental clients, many large, private entities are stepping up their demands on their outside counsel to be more diverse and requiring training regarding the same. For example, in April, 2017, MetLife held a seminar for its outside counsel titled *"Creating a Diverse Leadership Pipeline Workshop – Ideas and Initiatives That Work."* Topics for discussion included, among others: (a) specific ways law firms can hold partners accountable for the retention and promotion of diverse talent; (b) specific ways in-house legal departments can hold senior leadership of their outside counsel accountable for retention and promotion of diverse talent; (c) financial incentives and other tools available to drive accountability; and (d) the role non-diverse men must play in successfully retaining and promoting diverse talent. Also, in 2017, through Kim Rivera, its Chief Legal Officer and General Counsel, Hewlett Packard ("HP") advised its outside counsel that

the company would be withholding invoiced fees from law firms that do not meet or exceed HP's minimum diverse staffing requirements.[151] In pertinent part, Ms. Rivera wrote about HP, "[w]e have invested in diversity at all levels, and I expect no less from our outside law firm partners. I believe we can all do better."[152] Other large companies like Microsoft Corp., Wal-Mart Stores Inc., Allstate Corp., GlaxoSmithKline, PayPal Inc., Google Inc., Viacom Inc., McDonald's, Eli Lilly and Co., MasterCard and Abercrombie & Fitch Co. are also stepping up their initiatives to require their outside counsel be more diverse.[153]

Actual Examples of Encounters with Implicit Bias Experienced by Diverse Lawyers

The following are actual examples of situations where diverse lawyers have encountered implicit bias in the practice of law. Specifics have been omitted to protect confidentiality. For purposes of this exercise and outline, put yourself in the shoes of the diverse lawyer. In addition, while doing so, try to imagine a time when you have been a minority in a meeting, dinner or setting. This is the backdrop behind which all of these incidents occurred.

1. The City Council Meeting. In this situation, an African-American bond partner appeared at a small town council meeting in lieu of his law partner who had a conflict. During the discussion of the approval of a tax-exempt forward delivery bank loan, but following the conclusion of public comment, the Mayor of the Town began to suggest modifying the terms of the loan, which had been previously agreed to pursuant to an executed and delivered forward delivery agreement. In connection with his duty to ensure the client did not modify the loan in a manner that would result in adverse consequences, the covering lawyer, in a gray business suit, approached the podium and asked to be heard. He was met by the Mayor's response, "[s]on, the time for public comment has closed." For many African-American men in particular, being referred to as "son" by a white man with whom the African-American man does not have a close personal relationship is offensive. This has to do with the use of terms such as "boy" and "son" during the U.S. slave trade, the Civil Rights Movement and elsewhere in U.S. history as a manner of belittling and subjugating African American men. Why do you think the Mayor assumed the bond partner was not approaching the podium to speak on the bond issue as bond counsel?

2. The Closing. This is an all too common situation. Multiple racially/ethnically diverse bond lawyers and female bond lawyers have experienced arriving at a closing only to be told to sit and wait. Ultimately, when the time for commencement of the closing either drew near or expired, the bond lawyer would go back to whoever originally seated him or her and request to meet with the relevant governmental signatories. The bond lawyer would then be met with the response that such signatories were busy in a bond closing. In each case, the host would appear shocked that the female or racially/ethnically diverse lawyer was in fact leading the bond closing. Why do you think the person greeting the bond lawyer automatically assumed the bond lawyer was not there for the bond closing?

3. The Partner Meeting. In a partner meeting at a local office of a large, global firm, an older white male senior partner was sitting next to a younger male partner, who is of color and identifies as LBGTQ. Following the partner meeting, the older partner said to the younger partner "you know, I didn't know they were now allowing *paralegals* to attend these partner meetings." As incredulous as this may sound, it did in fact happen…in New York City…in 2018!

4. Baby on Board. This is a story of bias and success, typically told by a bond partner who has had one or more children and has still excelled in the practice of law. Almost universally, it revolves around a female lawyer advising her managing partner that she is pregnant, but that she would like to remain at the law firm and take a brief maternity leave, work remotely until the child is ready for daycare or do some combination of both. In these cases, the female lawyer's pregnancy

and request are ultimately met with a loss of projects at the firm and other career stunting events. That results in the lawyer leaving the law firm and ultimately, but not always immediately, finding a new law firm that is supportive of the flexibility often required of new motherhood. How does this phenomenon relate to the disparity between men and women in the highest level of law firm leadership? Could it be both a cause and an effect?

5. The Drink. With the near parity of female and male law school graduates, many law firms and lawyers are admirably hiring young female lawyers as first year associates. Unfortunately, this can result in a common unintentional bias. In this situation, the older male senior partner regularly meets other older male clients for happy hour without inviting the female associate or discussing with her why she is not invited. This continues even after the female associate and the client know each other well through business interactions. Typically the younger female associate is uncomfortable asking why she has not been included in the happy hours, but her expectation is that it has to do with her age and gender. Are there better, more direct, ways to handle this problem?

6. The Club. This story is less about the practice of law and more about implicit bias in general. In this case, an African-American male attorney arrived at his business club for a client lunch prior to the rest of the party arriving. While collecting his thoughts for the lunch meeting, he was met by a request from a female member of the social club for her check. When questioned, the woman responded that she thought he was a club employee. Employees of the social club are primarily African-American men but they dress in black uniforms with name tags, not business suits like the bond lawyer was wearing. Why do you think the female club member assumed the attorney was a member of the wait staff rather than a member of the social club?

Ways to Abate the Effects of Implicit Bias, Generally

Vernã Myers, a renowned diversity and inclusion speaker, has famously summed up in one sentence what many diversity and inclusion experts have been trying to say for years: "diversity is being invited to the party; inclusion is being asked to dance." While there is an ongoing debate regarding the degree of effect, most scientists agree that bias can predict behavior.[154] However, according to Project Implicit, there is not yet enough research to say for certain whether or not implicit bias can be reduced, let alone eliminated, or whether implicit bias reduction will ultimately lead to behavioral change.[155] Project Implicit goes on to encourage people not to focus on strategies for reducing implicit preferences, but to focus instead on strategies that deny implicit biases the chance to operate. Despite a dearth of research to determine whether implicit bias can be eliminated entirely and whether or not that would ultimately change behavior, there are still many good reasons to attempt to eliminate one's implicit bias. For example, following a 2018 incident in which two black men were arrested for merely sitting in a downtown Philadelphia Starbucks, the City of Philadelphia's former Police Commissioner Richard Ross addressed implicit bias head on, explaining:

> But when they're busy doing their job, they're distracted. The biases are still going to be operative and influence them unless you change the practices and the policies.
>
> The bottom line is we don't know how to change the biases in a meaningful, lasting way, because they're...the way we think normally and they're based on years of exposure. So in the absence of being able to change them, we need to change the way people make decisions and the way that they act.[156]

For bond lawyers in particular, two good reasons to employ strategies that prevent the chance for implicit biases to operate are Model Rule 8.4(g) and NABL's Diversity Initiative.

The following are some approaches one might use to abate the effects of implicit bias and perhaps, ultimately, eliminate all or a portion of it:

1. Blind Evaluations: As discussed in this outline, even the appearance of diversity in a candidate's application can result in a negative evaluation of that application. One way to eliminate the opportunity for implicit bias or unintentional discrimination to affect the outcome of an evaluation is to scrub the hiring process of all personal details that might reveal a candidate's diverse nature.

2. Education, Awareness & Mindfulness: Even if being aware of implicit bias and unintentional discrimination only has a slight effect on ultimate behavior, education and awareness on the topic for people who have decision making authority can have a significant effect for both small and large law firms. For a large law firm, this could mean a few handfuls of diverse lawyers who are hired or retained; for a small law firm it could mean one or two. Ultimately, for both, it could also have an effect upon the ultimate survival of their law firms through recruitment and client retention.

3. Exposure: Purposefully exposing oneself to people of different backgrounds can have the effect of providing additional information about diverse people that can help to counter implicit bias, unintentional discrimination and stereotypes. Using this exposure to consider differing views can also create transformative learning opportunities.

4. Making a List of Evaluation Characteristics First: This approach might be used in tandem with blind evaluations. The creation of a list, in conjunction with other strategies, could have the effect of leveling the playing field in evaluations.

5. Focus on Results, Not Style or Processes: Law is a nuanced profession and sometimes the manner in which counsel is delivered is just as important as the substantive counsel that is being delivered. Managing lawyers should be mindful that diverse lawyers may have a different style from them, but that style is not *automatically* incorrect. In fact, the diverse lawyer's style might be more appealing to a client than the managing lawyer's style. This might also result in a better connection between the firm and the client.

6. Create an Environment that Encourages Candid Disclosure of Diversity: Even when it cannot be hidden (e.g. race), some lawyers feel uncomfortable openly disclosing or discussing their diverse nature. Creating a safe environment for disclosure of diversity may boost morale and create opportunities for others within a law firm or company to have a transformative learning experience through their interaction with openly diverse attorneys.

7. Alter Feedback/Guidance/Mentoring Delivery Methods to Adjust for Your Biases: Once you identify your biases, you can alter your own feedback, guidance and mentoring delivery methods to adjust for them. For example, if you have a moderate bias for men over women or you grew up with women being homemakers more so than working professionals, you can take that information into account in preparing for feedback and mentoring situations.

8. Promote Diversity: For decades people have been attempting to address the lack of diversity in the legal profession and there is much work still to be done. Having a passive approach to diversity is unlikely to aid in the goal of increasing diversity and inclusion. Instead, actively recruiting and hiring diverse lawyers, mentoring and promoting diverse lawyers from within and

championing diverse lawyers externally to clients, colleagues and professional publications, are all better ways to achieve the goal. [157]

IV. TRANSFORMATIVE LEARNING/PRACTICAL SOLUTIONS

In addition to the general approaches to implicit bias abatement noted above, Transformative Learning may also offer some helpful and practical solutions. The "Transformative Learning" theory was developed by American sociologist and Columbia University Emeritus Professor Jack Mesirow in 1978.[158] It is an approach designed to change a person's perspective through experience rather than more traditional approaches to learning and has been applied in academics, with increasing frequency, over the last 20 years. In his article, *"It's Time to Change Our Minds: an Introduction to Transformative Learning,"* Dean Elias explains transformative learning as follows:

> Transformative learning is the expansion of consciousness through the transformation of basic worldview and specific capacities of the self; transformative learning is facilitated through consciously directed processes such as appreciatively accessing and receiving the symbolic contents of the unconscious and critically analyzing underlying premises.[159]

Another definition of transformative learning was put forward by Edmund O'Sullivan, Director of the Transformative Learning Centre at the University of Utah:

> Transformative learning involves experiencing a deep, structural shift in the basic premises of thought, feelings, and actions. It is a shift of consciousness that dramatically and irreversibly alters our way of being in the world. Such a shift involves our understanding of ourselves and our self-locations; our relationships with other humans and with the natural world; our understanding of relations of power in interlocking structures of class, race and gender…[160]

An important part of transformative learning is for individuals to "change their frames of reference by critically reflecting on their assumptions and beliefs and consciously making and implementing plans that bring about new ways of defining their worlds."[161] This reflection of one's assumptions and redefinition of one's worldview are two goals in the battle against implicit bias, but does the Transformative Learning theory have practical applications?

A powerful example of Transformative Learning in practice is the groundbreaking "Constitutional Law and the Civil Rights Movement" course taught at Stetson University College of Law.[162] Since 2006, more than 300 Stetson students have participated in this thought-provoking transformative learning experience.[163] After receiving approximately one week of extensive classroom instruction regarding the American civil rights movement (the "Civil Rights Movement"), students embark on a six-city bus tour through the southern United States, retracing the steps of the "Freedom Riders"* and meeting some of the most prominent surviving figures of

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* The Freedom Riders were black and white civil rights activists who rode interstate buses together into the segregated southern United States to challenge the federal government's non-enforcement of United States Supreme Court decisions that ruled that segregated public buses and stations were unconstitutional. The Freedom Rides, and the violent reactions they provoked, bolstered the credibility of the Civil Rights Movement by calling national attention to the disregard for the federal law and the local violence used to enforce segregation in the southern United States. Police arrested riders for trespassing, unlawful assembly, violating state and local Jim Crow laws, and other alleged offenses, but often they first let white mobs attack them without intervention. *See, e.g.,* https://en.wikipedia.org/wiki/Freedom_Riders.

the Civil Rights Movement at some of the most famous locations, for an experience that has been described as "life-changing."[164] One such stop is a chilling, single file silent march over the Edmund Winston Pettus Bridge. This bridge, named after a Confederate general and leader of the Ku Klux Klan[165], was the site of "Bloody Sunday" on March 7, 1965. On that date, peaceful Civil Rights protesters, led by the late Representative John Lewis (D. Ga.) and other civil rights leaders, were attacked with tear gas, billy clubs and whips by Alabama state troopers and county deputies, who were led by the infamous Montgomery police chief Eugene "Bull" Connor and Selma Sheriff Jim Clark. Another stop on the tour is Kelly Ingram Park in Birmingham, where in 1963, schoolchildren were "attacked by police dogs, knocked down by water cannons and arrested (and jailed) for marching for equal treatment."[166] One particularly poignant stop is the 16th Street Baptist Church in Birmingham, where students stand at the very spot where a bomb was placed by Ku Klux Klan members that killed four young black girls who were preparing to participate in church youth activities.[167] The effect of this transformative learning experience is profound. As one May 2020 law graduate stated, "[I]t's something that, one, I never can forget….And two, it just opened my eyes up to so much more than I think just the normal population has."[168] Moreover, the impact of this historical tour reaches both Stetson students and staffers alike, as a white assistant vice president for parent and alumni engagement noted:

> [Y]ou get to the point where you feel it's safe to cry, because you do cry….when we walked up to the very spot where Martin Luther King was killed, an audible sob came out of me. I mean, it was so powerful. We just stood there together in silence.[169]

Clearly, this course teaches life lessons that are instrumental in changing perspectives, assumptions and world views. As such, this Stetson course epitomizes the word "transformative."

With regards to workplace diversity and inclusion, a critical factor in the Transformative Learning approach is the focus on the transformation of attitudes of dominant group members. Generally termed the "pedagogy of the privileged," the goal of research in this area is to determine what kinds of experiences lead socially dominant group members to recognize their dominance, choose to see inequity, and choose to act to end inequity.[170] In her seminal work on the subject, Dr. Ann Curry-Stevens, conducted extensive research with this focus on "transforming the lenses" of those who were privileged by virtue of their race, gender, or socioeconomic status to glean insights about what worked in facilitating transformation for the privileged. [171] Dr. Curry-Stevens came up with six-steps for facilitating the transformation of the privileged, which are as follows:

- Understanding that oppression exists
- Understanding oppression as structural
- Locating oneself as oppressed
- Locating oneself as privileged
- Understanding the benefits of privilege
- Understanding oneself as implicated in the oppression of others and understanding oneself as oppressor.[172]

More recently in 2017, authors Diether Gebert, Claudia Buengeler, and Kathrin Heinitz acknowledged support for the Curry-Stevens approach, and asserted that a "dogmatic" stance in diversity training is one of the reasons for its low success.[173] Instead, Gebert et al. encouraged diversity trainees to "foster a tolerance than allows for unpopular and politically incorrect statements to be shared and listened to without judgment."[174] According to these authors, "constructively" dealing with diversity is dealing with diversity "in ways that serve the mutual growth of those

involved and increase the chance that people will be able to engage in a dialogue — even in the case of opposing values that are highly salient to people's identities — as a means of preventing conflict."[175]

The goal for these Transformative Learning studies is a change in behavior arrived at through a change in one's worldview, which is triggered by a critical reflection on assumptions that had been previously unexamined or taken for granted as truth. This critical reflection on assumptions is a vital component in combatting some of the types of unconscious cognitive biases that were previously discussed in this outline, such as Confirmation Bias, which is based mainly on assumptions or pre-conceived notions about a group that are taken as truth. Therefore, it appears that Transformative Learning can be an effective tool in the arsenal to help reduce implicit bias and bring about the intended results of workplace diversity training.

V. THE NABL DIVERSITY INITIATIVE

NABL's Diversity Committee is one of its standing committees and is of great importance to the NABL Board. The Diversity Committee was created in 2006 with the stated goal to "[f]acilitate increased participation by culturally diverse individuals in NABL and its activities."[176] To further that goal, events have been held each year in connection with NABL conferences to generate awareness of the opportunities for participation in NABL activities and to provide networking opportunities for diverse individuals. A high priority of the NABL Board and the Diversity Committee over the past several years has been to identify diverse members of NABL interested in participating in the work of NABL committees, serving as panelists at NABL seminars and teleconferences, and writing for NABL publications. These efforts have resulted in increased involvement of diverse members in these activities and will continue to be a key element of the work of the Diversity Committee. In the past three years in particular, NABL has become even more proactive in its pursuit of diversity within NABL.

In an effort to gain a better understanding of the diversity and make up of its membership, NABL began actively collecting demographic information in 2015. Based upon voluntary self-identification by members, NABL is 67% male and 33% female, 87% white/Caucasian and over half of NABL's membership has been practicing law for more than 26 years.

Through its Diversity Committee in 2016, NABL used interactive voting software at its Fundamentals of Municipal Bonds seminar* and its Bond Attorneys' Workshop to query its members regarding their positions on diversity and inclusion. The result was an overwhelming response by those attendees, most of whom were NABL members, that diversity and inclusion is important and that it is lacking within the practice of public finance law. In addition, respondents overwhelmingly chose, from various definitions of diversity, the following expansive definition of "diversity" espoused by Queensborough Community College in New York City and the University of Oregon:

> The concept of diversity encompasses acceptance and respect. It means understanding that each individual is unique, and recognizing our individual differences. These can be along the dimensions of race, ethnicity, gender, sexual orientation, socio-economic status, age, physical abilities, religious beliefs, political beliefs, or other ideologies.[177]

In 2017, with this backdrop and in consultation with the Diversity Committee, the NABL Board adopted the Diversity Initiative. The Diversity Initiative is a policy passed down from the

* The Fundamentals of Municipal Bonds seminar was renamed "NABL U Presents The Essentials" in 2019.

NABL Board to the Diversity Committee and its other committees. In addition, the Diversity Initiative is a lighthouse for all of the NABL membership to see NABL's stated goals regarding diversity and inclusion, which are as follows:

> To encourage and facilitate active long-term participation in NABL by diverse NABL members and to minimize implicit bias within NABL on the basis of gender, gender identity, race, ethnic background, religion, age and sexual orientation.
>
> To create and maintain an atmosphere of inclusion around all NABL committees, projects and programs by taking steps (1) to inform leadership of NABL committees, projects and programs of diverse members who have expressed an interest in participating in committees, projects and programs, and (2) to encourage and welcome diverse member participation in those committees, projects and programs.[178]

In addition to its stated goals, the text of the Diversity Initiative includes nine steps to inclusion. The primary purpose of the steps to inclusion is to ensure coordination and collaboration among the NABL Board, the various NABL committees, the various NABL seminar chairs and the NABL membership with the Diversity Committee. The steps to inclusion also include guidance regarding continuity within the Diversity Committee from year to year and reporting requirements from the Diversity Committee to the NABL Board so that performance may be monitored and improved. The full text of the Diversity Initiative is available on NABL's website.[179]

VI. CONCLUSION

The practice of law is one of the least diverse professions in the United States. Historically, overt and intentional discrimination have played an undeniable role in that. Model Rule 8.4(g) speaks to this issue. However, another explanation for this lack of diversity is unintentional discrimination and implicit bias, which all people have. Both implicit and explicit biases are deep-rooted in American history and culture, but as American society continues to evolve into a more diverse paradigm, these biases appear more and more to be out of place and dysfunctional.

One of the keys to remedying this problem is identifying one's implicit biases and then modifying behavior to either limit the effects of implicit bias or, where possible, remove it entirely from the decision making process. The Diversity Initiative attempts to do just that with respect to NABL's business. In addition, many governmental entities, businesses and law firms have successfully adopted diversity and inclusion initiatives, which will become increasingly important as both the consumers and providers of legal counsel become more diverse.

ENDNOTES AND REFERENCE MATERIALS

1 This outline focuses on the ABA's version of the Model Rules, which has been adopted in various forms throughout the states. Each jurisdiction has its own rules, and a minority of states (such as Minnesota and Tennessee) still use the Model Code of Professional Responsibility. To the extent Bond Counsel practices in different states with differing rules, it is generally suggested that Bond Counsel comply with the stricter rules of a particular jurisdiction.

2 *See generally*, MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016).

3 MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016).

4 MODEL RULES OF PROF'L CONDUCT pmbl. cmt. 20 (2016).

5 Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 52 (1998).

6 MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (2010).

7 *See generally* Andrew Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism, and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781 (1996).

8 MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (2010).

9 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (2016).

10 *See* Taslitz, *supra* note 7.

11 ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 812 (2006) [hereinafter A LEGISLATIVE HISTORY].

12 ABA Memorandum from Standing Comm. on Ethics and Prof'l Responsibility, Draft Proposal to Amend Model Rule 8.4 (December 22, 2015).

13 ABA Memorandum from Standing Comm. on Ethics and Prof'l Responsibility, Draft Proposal to Amend Model Rule 8.4 (December 22, 2015).

14 A LEGISLATIVE HISTORY, *supra* note 11, at 813.

15 A LEGISLATIVE HISTORY, *supra* note 11, at 814.

16 A LEGISLATIVE HISTORY, *supra* note 11, at 816.

17 A LEGISLATIVE HISTORY, *supra* note 11, at 816.

18 A LEGISLATIVE HISTORY, *supra* note 11, at 817.

19 A LEGISLATIVE HISTORY, *supra* note 11, at 817.

20 A LEGISLATIVE HISTORY, *supra* note 11, at 817.

21 A LEGISLATIVE HISTORY, *supra* note 11, at 817.

22 ABA Working Discussion Draft: Amendment to Model Rules 8.4 and Comment [3] WWW.AMERICANBAR.ORG (July 8, 2015), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/draft_07082015.authcheckdam.pdf.

23 The first version added subsection (g) which made it professional misconduct for a lawyer to: "knowingly harass or discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status, while engaged [in conduct related to] [in] the practice of law"; ABA Working Discussion Draft: Amendment to Model Rules 8.4 and Comment [3] WWW.AMERICANBAR.ORG (July 8, 2015), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/draft_07082015.authcheckdam.pdf.

24 The new comment entirely eliminated the first 3 sentences of the old comment and added: "Conduct that violates paragraph (g) undermines confidence in the legal profession and our legal system and is contrary to the

fundamental principle that all people are created equal. A lawyer may not engage in such conduct through acts of another. See Rule 8.4(a). Legitimate advocacy respecting any of these factors when they are at issue in a representation does not violate paragraph (g). It is not a violation of paragraph (g) for lawyers to limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services. A trial judge's finding that preemptory challenges were exercised on discriminatory basis does not alone establish a violation of paragraph (g). Paragraph (g) incorporates by reference relevant holdings by applicable courts and administrative agencies."

25 ABA Notice of Pub. Hearing, Standing Comm. on Ethics & Prof'l Resp., at 2-3 WWW.AMERICANBAR.ORG (December 22, 2015), *available at* https://americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf.

26 ABA Notice of Pub. Hearing, Standing Comm. on Ethics & Prof'l Resp., at 2-3 WWW.AMERICANBAR.ORG (December 22, 2015), *available at* https://americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf.

27 ABA Notice of Pub. Hearing, Standing Comm. on Ethics & Prof'l Resp., at 2-3 WWW.AMERICANBAR.ORG (December 22, 2015), *available at* https://americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf.

28 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (Am. Bar Ass'n Proposed Draft, April 2016).

29 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (Am. Bar Ass'n Proposed Draft, April 2016).

30 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (Am. Bar Ass'n Proposed Draft, April 2016).

31 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (Am. Bar Ass'n Proposed Draft, April 2016).

32 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (Am. Bar Ass'n Proposed Draft, April 2016).

33 ABA, Current Working Redraft: r. 8.4 (July 25, 2016).

34 ABA, Current Working Redraft: r. 8.4 (July 25, 2016).

35 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (2016).

36 Lorelei Laird, *Discrimination and Harassment Will Be Legal Ethics Violations Under ABA Model Rule,* ABA J., (Aug. 8, 2016), *available at* http://abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass.

37 Kristine A. Kubes, Cara D. Davis, and Mary E. Schwind, *The Evolution of Model Rule 8.4 (g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, WWW.AMERICANBAR.ORG (March 12, 2019), *available at* https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/, *citing* https://www.americanbar.org/news/abanews/aba-news-archives/2016/08/aba_strengthens_prov/.

38 Id.

39 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (2016).

40 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (2016).

41 ABA Standing Comm. on Ethics and Prof'l Resp. *et al.*, Report to the House of Delegates Revised Resolution 109, at 8 (Aug. 2016) [hereinafter Revised Resolution] *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

42 *See* Revised Resolution, *supra* note 40, at 8 (Aug. 2016).

43 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (2016).

44 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (2016).

45 MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (2016) ("Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal of physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The

substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).").

46 MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 4 (2016) ("Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.").

47 MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 5 (2016) ("A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities of law.").

48 Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)* (April 1, 2017), *available at* SSRN: https://ssrn.com/abstract=2979495.

49 *See* Revised Resolution, *supra* note 40, at 6 n.13. They are Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.

50 *See* Revised Resolution, *supra* note 40, at 6 n.12. They are Arizona, Arkansas, Connecticut, Delaware, Idaho, Maine, North Carolina, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

51 *See* Revised Resolution, *supra* note 40, at 6 n.11.

52 *See* Revised Resolution, *supra* note 40, at 6 n.11.

53 *See* Gillers, *supra* note 47, at 4.

54 *See generally* Gillers, *supra* note 47.

55 *See* Kubes et. al, *supra.*

56 Id., *citing* S.J. 0015, 2017 Leg., 65th Sess. (Mont. 2017).

57 Id., *citing* Tex. Att'y Gen. KP-0123 (2016).

58 Id., *citing* La. Att'y Gen. Op. 17-0114 (2017).

59 Id.

60 137 S. Ct. 1744 (2017).

61 Id. at 1751.

62 Id.

63 Id. at 1764 (plurality op.), quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes,J., dissenting).

64 138 S. Ct. 2361 (2018).

65 Id. at 2371, quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

66 Id., quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

67 Id. at 2371-72

68 *See* Kubes et. al, *supra.*, *citing* Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(G) The First Amendment and 'Conduct Related to the Practice of Law,'* 30 Geo. J. Legal Ethics 241, 245 (2016).

69 Id., citing https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/

70 Id.

71 Id.

72 ABA, *Diversity Commission Goal 3*, (2008) *available at* http://www.americanbar.org/groups/diversity/DiversityCommission/goal3.html.

73 ABA, *Diversity Commission Goal 3*, (2008) *available at* http://www.americanbar.org/groups/diversity/DiversityCommission/goal3.html.

74 ABA, *Goal III*, (2008) *available at* https://www.americanbar.org/groups/diversity/disabilityrights/initiatives_awards/goal_3.html.

75 *See* Kubes et. al, *supra*.

76 *NABL Diversity Initiative*, NAT'L ASS'N OF BOND LAWYERS (March, 2017), *available at* https://www.nabl.org/Portals/0/Governance%20manual/Diversity%20Initiative.pdf.

77 *Understanding Implicit Bias*, THE OHIO STATE UNIV., KIRWAN INST. FOR THE STUDY OF RACE ANDETHNICITY (2015) *available at* http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/.

78 Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 THE COLORADO LAWYER 45 (May 2016).

79 Reeves, *"Yellow Paper Series: Written in Black & White—Exploring Confirmation Bias in Racialized Perceptions of Writing Skills"* (Nextions Original Research, 2014), www.nextions.com/wp-content/files_mf/1446822647201404011 4WritteninBlackandWhiteYPS.pdf.

80 Id (emphasis added).

81 *See* Nalty, *supra*.

82 Id.

83 Id.

84 Id.

85 Id.

86 Id.

87 Id.

88 Id.

89 Aaron Kinney, *"Looting" or "finding"?*, SALON.COM (September 2, 2005), *available at* http://www.salon.com/2005/09/02/photo_controversy/.

90 Kevin Eck, *Station Defends Itself Against Charges of Racial Bias* (March 25, 2015), *available at* https://www.adweek.com/tvspy/station-defends-itself-against-charges-of-racial-bias/144494/.

91 Barnes v. United States, 124 U.S.App.D.C. 318, 365 F.2d 509, 510-11 (1966).

92 KJ Pilcher, *Three University of Iowa wrestlers arrested, suspended; Burglary charges pending for several burglaries in Marion area*, The Gazette **(**March 23, 2015**)**, *available at* :*https://www.thegazette.com/subject/news/three-university-of-iowa-wrestlers-arrested-20150324* (last visited August 18, 2020).

93 Danny Biederman, Steve Straehley, *Iowa Newspaper's Choice of Photos for Burglary Suspects: Mug Shots of Blacks, Yearbook Photos of Whites*, AllGov.com (April 06, 2015), *available at* http://www.allgov.com/news/controversies/iowa-newspapers-choice-of-photos-for-burglary-suspects-mug-shots-of-blacks-yearbook-photos-of-whites-150406?news=856155 (last visited August 18, 2020).

94 JRehling, *Aww. Aren't White Criminals Adorable?,* Twitter (January 16, 2015), *available at https://twitter.com/jrehling/status/556103044383768577.*

95 Maria Cramer, *The Mug Shot, a Crime Story Staple, Is Dropped by Some Newsrooms and Police*, New York Times (July 3, 2020), *available at* https://www.nytimes.com/2020/07/03/us/mugshot-san-francisco-police.html?login=email&auth=login-email&login=smartlock&auth=login-smartlock.

96 Id.

97. Id.

98 Rashad Robinson, *Not to be Trusted: Dangerous Inaccuracy in TV Crime Reporting in NYC,* The Color of Change News Accuracy Report Card (March 2015), *available at https://colorofchange.org/newsaccuracyratings/.*

99 Id.

100 Elizabeth Sun, *The Dangerous Racialization of Crime in U.S. News Media,* Center for American Progress (August 29, 2018), available at https://www.americanprogress.org/issues/criminal-justice/news/2018/08/29/455313/dangerous-racialization-crime-u-s-news-media/ (last visited August 18, 2020).

101 Id.

102 Id.

103 Id (emphasis added).

104 Id.

105 Id.

106. Id.

107 *See* Robinson, *supra.*

108 Id.

109 Bailey Reiners, *What is Gender Bias in the Workplace?,* Builtin.com (October 9, 2019), *available at* https://builtin.com/diversity-inclusion/gender-bias-in-the-workplace (last visited August 18, 2020).

110 Id.

111 Id.

112 Jessica L. Laemle, *Trapped in the Mouse House: How Disney has Portrayed Racism and Sexism in its Princess Films,* The Cupola Scholarship at Gettysburg College (Fall 2018), *available at* https://cupola.gettysburg.edu/cgi/viewcontent.cgi?article=1769&context=student_scholarship.

113 Dawn Albert, *It's Hard To See Your Own Bias,* FORBES.COM, https://www.forbes.com/sites/womensmedia/2019/04/10/its-hard-to-see-your-own-bias/#129bf133c7ff (last visited April 16, 2019).

114 Alexandria Hien McCombs, Humana, Irving, TX, *Implicit Bias: Recognize and Interrupt It,* AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2018-2019/april19/chair/ (last visited April 16, 2019).

115 Jessica Nordell, *Is This How Discrimination Ends?,* WWW.THEATLANTIC.COM (May 7, 2017) *available at* https://www.theatlantic.com/science/archive/2017/05/unconscious-bias-training/525405/.

116 Project Implicit, *About Us*, WWW.IMPLICIT.HARVARD.EDU, *available at* https://implicit.harvard.edu/implicit/aboutus.html (last visited April 16, 2019).

117 Project Implicit, *About the IAT*, WWW.IMPLICIT.HARVARD.EDU, *available at* https://implicit.harvard.edu/implicit/iatdetails.html (last visited April 16, 2019) (emphasis added).

118 Project Implicit, *About Us*, WWW.IMPLICIT.HARVARD.EDU, *available at* https://implicit.harvard.edu/implicit/aboutus.html (last visited April 16, 2019).

119 D. Bruce Sacerdote, *How Long Would They Lock Up Your Killer?,* 1 J. LEGAL STUDIES 31 (2003).

120 David French, *Implicit Bias Gets an Explicit Debunking*, NATIONALREVIEW.COM (January 10, 2017), *available at* http://www.nationalreview.com/article/443723/implicit-bias-debunked-study-disputes-effects-unconscious-prejudice.

121 Id.

122 Project Implicit, *Frequently Asked Questions*, WWW.IMPLICIT.HARVARD.EDU, https://implicit.harvard.edu/implicit/faqs.html#faq5 (last visited April 16, 2019).

123 Tom Bartlett, *Can We Really Measure Implicit Bias? Maybe Not*, WWW.CHRONICLE.COM (January 5, 2017), *available at* http://www.chronicle.com/article/Can-We-Really-Measure-Implicit/238807.

124 Id.

125 United States Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Study*, (2016) *available at* https://www.bls.gov/cps/cpsaat11.htm.

126 Deborah L. Rhode, *Law is the least diverse profession in the nation. And lawyers aren't doing enough to change that*, THEWASHINGTONPOST.COM (May 27, 2015), *available at* https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?tid=HP_posteverything&utm_term=.61ac9ffa16b3.

127 U.S. Bureau of Labor Statistics, 2019 Labor Force Statistics from the Current Population Survey, *available at* https://www.bls.gov/cps/cpsaat11.htm.

128 *See* Rhode, *supra.* (emphasis added).

129 Dr. Arin N. Reeves, "Implicit Gender Bias: It's Not What You Think (It's How You Think)," *presentation by Nextions Consulting for GreenbergTraurig* (September 13, 2016).

130 National Association for Law Placement, Inc., *2019 Report on Diversity in Law Firms* (2019) at Pages 19 and 30, *available at* https://www.nalp.org/reportondiversity.

131 Id., at Pages 26.

132 Id., at Pages 28 and 30.

133 Id., at Page 28.

134 Id., at Pages 12 and 30.

135 Id., at Page 17.

136 Id., at Page 2.

137 Id.

138 *See* Nalty,*supra*.

139 *US firm apologises for seeking 'preferably Caucasian' candidate,* BBC News (April 29, 2019), https://www.bbc.com/news/world-us-canada-48096898 (last visited May 8, 2019).

140 Chris Joyner, *Georgia mayor under fire for alleged remarks about black job candidate*, The Atlanta Journal-Constitution (May 6, 2019), https://www.ajc.com/news/local-govt--politics/georgia-mayor-under-fire-for-alleged-remarks-about-black-job-candidate/Qr403ZLnF5VuB8CzpngLjP/ (last visited May 8, 2019).

141 *Frequently Asked Questions,* THE NAT'L CTR. FOR STATE COURTS.

142 *See* Nalty, *supra*.

143 *See*, Paola Cecchi-Dimeglio, *What It Costs When Talent Walks Out the Door*, THEAMERICANLAWYER.COM (February 1, 2017), *available at* http://www.americanlawyer.com/id=1202777519806/What-It-Costs-When-Talent-Walks-Out-the-Door?slreturn=20170512172910.

144 *See* Desiree J. Nordstrom, *Law Firms: the Cost of Hiring and Attrition*, OVERFLOWLEGALNETWORK.COM (December 15, 2014), *available at* http://overflowlegalnetwork.com/law-firms-cost-hiring-attrition/; *see also* Pamela DeNeuve, *Top 400 US Law Firms Lose $9.1 Billion Due To Turnover*, LINKEDIN.COM (February 25, 2016), *available at* https://www.linkedin.com/pulse/top-400-us-law-firms-loose-91-billion-turnover-pamela-deneuve-/.

145 Brandon Rigoni, Ph.D., *What Millennials Want from a New Job*, HARVARDBUSINESSREVIEW.COM (May 11, 2016), *available at* https://hbr.org/2016/05/what-millennials-want-from-a-new-job.

146 Noor Wazwaz, *It's Official: The U.S. is becoming a Minority-Majority Nation*, USNEWS.COM (July 6, 2015), https://www.usnews.com/news/articles/2015/07/06/its-official-the-us-is-becoming-a-minority-majority-nation.

147 *See generally*, Exec. Order No. 13583, 76 C.F.R. 52845 (2011).

148 *See* Claire Bushey, *Chicago's top law firms lack diversity—and clients are starting to notice*, Crain's Chicago Business, https://www.chicagobusiness.com/article/20161029/ISSUE01/310299994/chicago-s-top-law-firms-lack-diversity-and-clients-are-starting-to-notice (last visited May 16, 2019).

149 Id.

150 *See generally*, Beverly Tatum, *Why Are All the Black Kids Sitting Together in the Cafeteria?*, Basic Books; Revised, Anniversary, (Updated ed. 2017).

151 Kim R. Rivera, *Diversity Mandate to Partner Law Firms*, THEAMERICANLAWYER.COM (February 8, 2017), *available at* http://pdfserver.amlaw.com/nlj/HP%20Letter.pdf.

152 Kim R. Rivera, *Diversity Mandate to Partner Law Firms*, THEAMERICANLAWYER.COM (February 8, 2017), *available at* http://pdfserver.amlaw.com/nlj/HP%20Letter.pdf.

153 David Ruiz, *Legal Deprts. Ask Firms for Diversity, Make Efforts In-House*, LAW.COM (April 6, 2017), *available at* http://www.law.com/sites/almstaff/2017/04/06/legal-depts-ask-firms-for-diversity-make-efforts-in-house/.

154 *See* Project Implicit, *Frequently Asked Questions*, WWW.IMPLICIT.HARVARD.EDU, https://implicit.harvard.edu/implicit/faqs.html#faq5 (last visited April 16, 2019); *see also* Tom Bartlett, *"Can We Really Measure Implicit Bias? Maybe Not"* THE CHRONICLE OF HIGHER EDUCATION, *available at* http://www.chronicle.com/article/Can-We-Really-Measure-Implicit/238807.

155 Project Implicit, *Frequently Asked Questions*, WWW.IMPLICIT.HARVARD.EDU, https://implicit.harvard.edu/implicit/faqs.html#faq5 (last visited April 16, 2019).

156 Madison Park, *What the Starbucks incident tells us about implicit bias*, *WWW.CNN.COM (April 17, 2018)*, *available at* https://www.cnn.com/2018/04/17/health/implicit-bias-philadelphia-starbucks/index.html (emphasis added).

157 *See* Nalty, *supra*; *see also* American Bar Association, *Implicit Bias & Debiasing*, *available at* http://www.americanbar.org/content/dam/aba/administrative/litigation/implicit-bias/IB-toolbox.ppt (last visited April 16, 2019).

158 *Transformative Learning*, WIKIPEDIA, https://en.wikipedia.org/wiki/Transformative_learning#cite_note-2 (last visited August 18, 2020).

159 Id.

160 Edmund O'Sullivan, *Bringing a perspective of transformative learning to globalized consumption*, International Journal of Consumer Studies, 27(4), 326-330 (2003), *available at* https://www.deepdyve.com/lp/wiley/bringing-a-perspective-of-transformative-learning-to-globalized-yrN7BtqkOh.

161 Dr. Thomas Bowers, *Transformation Fund for Leadership Education Launched by Foundation*, The Stewardship Report, *available at* http://www.stewardshipreport.com/transformation-fund/ (last visited August 18, 2020).

162 *Constitutional Law and the Civil Rights Movement*, STETSON UNIVERSITY, *available at* https://catalog.stetson.edu/law/#coursestext.

163 Jack Roth, *Freedom Riders*, Stetson University Today (July 28, 2020), *available at* https://www.stetson.edu/today/2020/07/freedom-riders/.

164 Id.

165 Errin Whack, *Who was Edmund Pettis?*, Smithsonian Magazine (March 7, 2015), *available at* *https://www.smithsonianmag.com/history/who-was-edmund-pettus-180954501/*.

166 *See* Roth, *supra.*

167 Id.

168 Id.

169 Id.

170 Ann Curry-Stevens, *Pedagogy for the Privileged: Building Theory, Curriculum and Critical Practices (Doctoral dissertation, University of Toronto 2005)*, Journal of Transformative Education (2007); *available at* https://www.researchgate.net/profile/Ann_CurryStevens/publication/249634418_New_Forms_of_Transformative_Education_Pedagogy_for_the_Privileged/links/552fb6f80cf20ea0a06d4908/New-Forms-of-Transformative-Education-Pedagogy-for-the-Privileged.pdf.

171 Id.

172 Id.

173 Diether Gebert, Claudia Buengeler, and Kathrin Heinitz, *Tolerance: A Neglected Dimension in Diversity Training?*, University of Amsterdam Academy of Management Learning & Education (2017), *available at* https://dare.uva.nl/search?identifier=f528624b-10a6-4f47-ac74-77b3e1ab97c3 (last visited August 18, 2020).

174 Id.

175 Id.

176 *Diversity Committee*, NAT'L ASS'N OF BOND LAWYERS, https://www.nabl.org/About-NABL/Committees-Projects/Diversity-Committee (last visited April 16, 2019).

177 *Definition for Diversity*, QUEENSBOROUGH CMTY. COLL., http://www.qcc.cuny.edu/diversity/definition.html (last visited April 16, 2019).

178 *NABL Diversity Initiative*, NAT'L ASS'N OF BOND LAWYERS https://www.nabl.org/Portals/0/Governance%20manual/Diversity%20Initiative.pdf. (last visited April 16, 2019).

179 Id.