# Diversity& Inclusion: Harnessing Tomorrow's Opportunities

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## Introduction

The most recent United States Census shows the United States becoming increasingly diverse. By 2060 the nation will become a "plurality" of ethnic groups rather than any one dominant majority.[1] Yet despite compelling evidence of the inherent power in the nation's cultural diversity, American law firms[2] are lagging in hiring and retaining lawyers from traditionally underrepresented[3] groups. As a matter of both ethics and good business practice, this deficiency must be addressed.

Decades of research point to the economic benefits of corporate social diversity. Increased innovation, productivity and profitability are all correlated with output from teams that are diverse rather than homogeneous. Many law firms make pronouncements to their legal staff in recruiting materials, policy statements and other internal documents indicating that the firm is committed to equal employment opportunity. Law firms make similar statements on their websites and in attorney advertisements, all with the well-intentioned purpose of affirming the firm's embrace of diversity and inclusion.

Yet, like other professional groups and corporate entities, U.S. law firms are struggling to drive cultural change within their organizations that results in increased diversity and inclusion. There are many historical reasons that make a culture shift difficult. The driving force of social change in this country has been through the laws and court decisions of the civil rights era. However, many of those are under attack, and the growing public realization of the

[1] Sandra L. Colby & Jennifer M. Ortman, *Projections of the Size and Composition of the U.S. Population: 2014-2060*, U.S. DEPARTMENT OF COMMERCE ECONOMICS AND STATISTICS ADMINISTRATION (Mar. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf.

[2] This paper is limited to an overview of the problem of lack of diversity in law firms and does not address other segments of the legal community such as corporate legal departments, public interest legal groups, law school faculty and the judiciary.

[3] For purposes of this paper, the term "underrepresented" encompasses women and other individuals considered to be members of minority groups, such as, Hispanic/Latinx, Black/African American, Asian, Arab, disabled, and lesbian, gay, bisexual, transgender and queer.

implications of an increasingly diverse republic has become a central issue in the nation's current political polarization. Important issues like sexual harassment, xenophobia, homophobia, transphobia and other biases may be said to have captured the *zeitgeist* of the nation and spilled over into the workplace.

The evidence suggests that law firms face a unique challenge in sustaining meaningful diversity and inclusiveness because of the unconscious social biases that are unknowingly embedded in the firm's institutionalized employment practices. These unconscious biases may be systemic and create a silent barrier that denies underrepresented lawyers such things as access to the right mentors, better work, and the full benefits of the employment relationship. For example, it is often the case that the work of important firm clients is staffed by tightly knit teams of lawyers that are put together based on a partner's comfort with lawyers with whom there is apparent commonality. This is one form of unconscious bias – commonly referred to as affinity bias[4] – that can result in the same kind of negative consequences as overt discrimination. Despite their earnest outreach to hire lawyers from underrepresented groups, law firms generally have been slow to address the complex factors associated with unconscious bias that contribute to the lack of inclusiveness, retention and advancement of underrepresented lawyers. This in part may be due to a long-standing belief that law firms are managed as meritocracies.

Ironically, the public perception is that law firms have the lowest commitment to diversity when it comes to hiring and retaining underrepresented lawyers, ranking the lowest among eleven industry groups that include media, finance and healthcare.[5] This perception is borne

[4] https://kathleennaltyconsulting.com/wp-content/uploads/2016/05/*Strategies for Confronting-Unconscious-Bias* (last visited October 25, 2019).
[5] https://www.thenationaltriallawyers.org/2016/04/the-public-perceives-that-law-firms-rank-last-in-comitment-to-diversity/ (last visited October 25, 2019).

out by U.S. Bureau of Labor Statistics for 2017 that show the legal industry in last place compared to other professions with respect to race and ethnic diversity.[6]

Recognizing the pervasiveness of unconscious bias in the legal profession, several state bars now require lawyers to enroll in diversity and inclusion continuing legal education (CLE) courses. For instance, effective July 1, 2017, under the Amended Illinois Supreme Court Rule 794, Illinois attorneys must earn one hour of diversity and inclusion CLE as well as one hour of mental health and substance abuse CLE as part of the six hours of the required professional responsibility credits.[7]

Similarly, effective January 1, 2018, experienced New York attorneys are required to complete biennially at least one credit hour of CLE in diversity, inclusion and elimination of bias.[8] The NY rule states that such "courses, programs and activities must relate to the practice of law and may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel."[9] Currently, approximately seven states have some form of a diversity and/or mental health CLE requirement.[10]

One recent controversial development of note is the debate over the ethical rules governing lawyers' conduct. In 2016, the American Bar Association (ABA) amended Rule 8.4(g) of the Model Rules of Professional Conduct (MRPC) to make it an express violation of the ethics canons for lawyers to engage in discriminatory or harassing conduct.[11] The stated purpose of the

[6] https://www.bls.gov/opub/reports/race-and-ethnicity/2017/home.htm (last visited October 25, 2019).
[7] IL. Sup. Ct. Rule 794(d).
[8] 22 NYCRR 1500.2(g).
[9] *Id*.
[10] California, Minnesota, Oregon, West Virginia, Illinois, New York, Indiana.
[11] MRPC Rule 8.4(g) provides that "[i]t 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

amendment was to "cultivate a legal community free of harassment and discrimination, wherein lawyers are consistently ethical and professional in the practice of law."[12] Comment [3] to MRPC Rule 8.4(g) explains that harassment and discrimination by lawyers in violation of this Rule undermine confidence in the legal profession and the legal system at large.[13]

The Rule is not self-executing; it must be adopted by each state. As of October 2019, only New Mexico, Vermont, American Samoa and the Northern Mariana Islands had adopted Rule 8.4(g) in its entirety.[14] Maine adopted an analogous rule,[15] nine states affirmatively declined to adopt the Rule,[16] and twelve states and Puerto Rico are still weighing whether to adopt the Rule or not.[17]

Twenty states already had a pre-existing rule analogous to MRPC Rule 8.4(g). But they differ from the model Rule in the definition of discrimination and harassment. For example, under New York's Professional Conduct Rule, it is professional misconduct for lawyers and law firms to engage in *unlawful* discrimination and harassment in the practice of law,[18] a narrower

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origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016). Previously, language covering such behavior was included in a comment to the pre-amended model rule but was not considered as authoritative as specific language which is now contained in the Rule. *ABA Strengthens Provision Making Harassment, Discrimination "Professional Misconduct,"* AM. BAR ASS'N (Aug. 12, 2016) https://www.americanbar.org/news/abanews/aba-news-archives/2016/08/aba_strengthens_prov/.

[12] Kristine A. Kubes, *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination and Harassment in the Practice of Law*, 20 UNDER CONSTRUCTION, no. 3 (Am. Bar Ass'n), Mar. 8, 2019, https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring2019/model_rule_8_4/.

[13] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. Comment [4] states: "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 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." *Id.*

[14] AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY POLICY IMPLEMENTATION COMM., *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N (October 18, 2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.pdf.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.00 r. 8.4(g) (2018).

standard than the ABA model rule which encompasses *any* conduct that a lawyer knows or should reasonably know could be discrimination or harassment.

The ABA's model rule has been roundly criticized chiefly on the grounds that it is unconstitutionally overbroad, vague and apt to ensnare the unwary lawyer. One fierce opponent of the model Rule wrote:

> *Say that some lawyers put on a Continuing Legal Education event that included a debate on same-sex marriage, or on whether there should be limits on immigration from Muslim countries, or on whether people should be allowed to use the bathrooms that correspond to their gender identity rather than their biological sex. In the process, unsurprisingly, the debater on one side said something that was critical of gays, Muslims or transgender people. If the rule is adopted, the debater could well be disciplined by the state bar.*
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> *Or say you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters – Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage …. One of the people is offended and files a complaint. Again, you've engaged in "verbal . . . conduct that the bar may see "manifest[ing] bias or prejudice and thus as "harmful."*
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> *The state bar, if it adopts this rule, might thus discipline you for your "harassment." And, of course, the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you're fine; if you express the contrary viewpoints, you're risking disciplinary action.*[19]

A proponent of the model Rule countered:

> *The preposterous claim that the First Amendment entitles lawyers to make racist, sexist, and homophobic statements in connection with law practice is an embarrassment. It has come almost exclusively from white men who apparently see some advantage in being able to do so.*[20]

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[19] Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints That Express 'Bias,' Including in Law-Related Social Activities*, WASH. POST (Aug. 10, 2016), 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/.

[20] Melissa Heelan Stanzione, *Maine Second State to Adopt ABA Anti-Harassment Ethics Rule*, BLOOMBERG LAW: BIG LAW BUS. (Jun. 11, 2019), https://biglawbusiness.com/maine-second-state-to-adopt-aba-anti-harassment-ethics-rule (quotation of Stephen Gillers, New York University School of Law legal ethics professor).

These commentaries were each made by law school professors whose respective vitriolic points of view suggest the difficulty in reaching accord even about what is appropriate "lawyer speak" when the subject matter is socially or politically sensitive or controversial. The goal of the ABA to establish a universal ethics standard to combat discrimination and harassment in the legal practice is a worthy and necessary one if the profession is to maintain its standing as a noble one. However, many lawyers may not be familiar with the rules that define harassment and discrimination in the workplace and other legal settings. Equally, law firm management may not readily perceive that conversations within a law firm, or at a law function, such as described above, may not simply be "free speech" but rather may be reflective of an unconscious bias on the part of the speaker that is tacitly sanctioned by the firm. This deficit of understanding of what constitutes unacceptable behavior is not self-correcting and manifests itself in lawsuits and the costly exodus of women and minority lawyers from law firms in growing numbers.

This paper presents a high-level overview of several discrete yet related topics affecting diversity initiatives in American law firms. First, it selectively considers a few historical events that shaped the nation's bumpy and uncertain path from legalized state and federal discrimination to laws protecting certain defined classes of workers against discriminatory workplace conduct and practices. It also touches on the current treatment by courts of the notion of "implicit bias" in cases of workplace discrimination. Second, the paper looks at select studies that provide evidence of implicit bias as a significant barrier to law firm diversity. Third, the paper addresses the growing recognition by corporate entities of the business necessity for diversity in the workplace today and the ways implicit bias undermines performance, productivity and profits. Finally, the paper describes a few initiatives in the legal industry aimed at counteracting the lack of diversity in American law firms.

## Legal Discrimination in the United States

In 1844, Macon B. Allen became the first Black American[21] to be formally admitted to the practice of law in the United States at a time when most Black people in the United States were enslaved. His admission to the bar of the state of Maine as a "free man" occurred twenty-one years before the enactment of the Thirteenth Amendment to the U.S. Constitution abolishing slavery and twenty-four years before ratification of the Fourteenth Amendment guaranteed to all persons born or naturalized in the United States national and state citizenship, due process and equal protection of the law (as that term was then understood).

That in 1841 a person of color could apprentice for three years at a White law firm in the United States in preparation for membership to a state bar was, in and of itself, a spectacular accomplishment, however, Black lawyers who entered the profession prior to the American Civil War were undeniably entering a White man's profession subject to its attendant social norms. As such, and by virtue of the nation's then ethos, Black lawyers were limited, by necessity, to representing Black clientele and only as to certain matters.

The Reconstruction period between 1865 and 1876 ushered in a comparatively more progressive time for the nation with Blacks winning elections to southern state governments, to the U.S. Congress, and even to a state supreme court judgeship. But racism was still a potent force in the country, and reactionary forces, driven in part by the severe economic depression that began in 1873, would reverse the relatively tolerant racial relations of the twenty or so years after the Civil War. By 1890, the Jim Crow legal system and the de facto discriminatory local practices were well-integrated in the South with extreme segregation of the races and exploitative labor laws that held down Black wages in part to achieve what race prejudice could not do by itself. Blacks

[21] For purposes of consistency, the names of ethnic or racial groups will be capitalized.

and Whites were prohibited, among other things, from riding together on railroads, working in the same room, and entering through the same door. Schools, hospitals, orphanages, restaurants and the military were segregated. Courts kept two bibles: one for Black witnesses and one for White witnesses. Businesses could (indeed were required to) openly discriminate in providing access to housing, dining, shopping, and employment through practices that included use of "White only" and "Colored only" signage.[22] During this segregationist fervor, the nation's first Black state supreme court judge was coerced to resign presumably because of the unwritten system of customs and racial order propelled by Jim Crowism.[23] For similar reasons, Charlotte Ray, who in 1872 was the first Black woman lawyer in the United States and the first admitted to the Washington D.C bar, was precluded because of her gender and race from practicing law. She eventually became a teacher in New York City instead.[24]

Tragically, in 1896 in the case of *Plessy v. Ferguson,*[25] the U.S. Supreme Court enshrined Jim Crowism into American law under the "separate but equal" doctrine. In a near unanimous decision (one justice did not participate, and one dissented), the Court ruled that establishing separate but equal public accommodations and facilities was a reasonable exercise of

[22] *See, e.g.*, CONSTITUTIONAL RIGHTS FOUND., *A Brief History of Jim Crow*, https://www.crf-usa.org/black-history-month/a-brief-history-of-jim-crow (last visited October 22, 2019) ("Jim Crow was a derisive slang term for a black man. It came to mean any state law passed in the South that established different rules for blacks and whites.").
[23] The first state in the nation to have a black supreme court justice was South Carolina. Jonathan Jasper Wright took office in 1870. After that, there was not another black state supreme court justice until Harold A. Stevens joined the State of New York Court of Appeals in 1955. Oregon was the latest state to have added their first black high court justice, Adrienne Nelson, who took office in 2018. Eighteen states (36 percent of states) have yet to see a black justice on their supreme court bench. *First Black Judges on the State Supreme Court,* https://www.ballotpedia.org/first_black_judges_on_the_state_supreme_courts (last visited October 25, 2019). As recounted by Adrienne Nelson, people around the courthouses often assumed she was a paralegal, social worker or the suspect's girlfriend. *Oregon's First Black Supreme Court Justice Earned Respect in Her Journey,* https://newsone.com/3767291/adrienne-nelson-oregon-first-black-supreme-court-judge/(last visited October 25, 2019).
[24] *10 Most Important Black Women in U.S. History*, https://www.thoughtco.com/notable-african-american-women-415177 (last visited October 22, 2019).
[25] 163 U.S. 537 (1896).

the police power of a state to promote the public good.[26] The decision distinguished legal equality from social equality with the Court reasoning that "[the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social…..equality[.]"[27] The Court concluded that "[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."[28] In other words, the Court refused to outlaw legislation that prohibited commingling of the races because it believed that these laws reflected the sentiment of the community – what was then in the hearts and minds of men. *Plessy* kept the principle of separate but equal alive and robust for the next 58 years, thereby validating intentional discrimination and arguably laying the foundation for some of the obstacles to diversity initiatives in the workplace today.

This blight on American history met its most ferocious challenge in 1954 in the case of *Brown v. Board of Education of Topeka*[29] (a consolidation of five cases), which was argued for the plaintiffs by Thurgood Marshall, later to become the nation's first Black Supreme Court justice.[30] Earl Warren, then Chief Justice of the Supreme Court, speaking for a unanimous Court, issued a ruling that many hoped would change the social fabric of the United States. The Court ruled that segregation of children in public schools based on race was inherently unequal even if physical and other tangible factors were equal.

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[26] *Id.* at 550.
[27] *Id.* at 544.
[28] *Id.* at 551.
[29] 347 U.S. 483 (1954).
[30] *Thurgood Marshall*, OYEZ, https://www.oyez.org/justices/thurgood_marshall (last visited Oct. 22, 2019). Notably, Charles Hamilton Houston, dubbed "The Man Who Killed Jim Crow" was a black lawyer with an undergraduate degree, Phi Beta Kappa, from Amherst College, and a Harvard Law School degree. Charles J. Ogletree, Jr., *All Deliberate Speed: Reflections on the First Half-Century of* Brown v. Board of Education, 66 MONT. L. REV. 283, 284-85 (2005). Houston was credited with playing a role in nearly every civil rights case from 1930 to *Brown* and was a mentor to Thurgood Marshall. *Id.* Though he was the first Black American to be elected to the Harvard Law Review, Houston could not find a job in a white law firm because of his race. *Id.* The resistance encountered by Macon B. Allen in 1844 sadly was still present nearly 80 years later illustrating the persistent elusiveness of diversity in the practice of law. *Id.*

The *Brown* decision should have been fatal to segregation and a boon to social equality. However, a year later in a subsequent hearing to address questions about the scope and implementation of *Brown,* the Supreme Court instructed the lower federal courts to act "with all deliberate speed" to achieve the goal of desegregation.[31] Much has been written about the Court's intent in issuing this directive, but it was generally understood that "with all deliberate speed" was the equivalent of "make haste slowly" thereby putting school desegregation on a slow burner.[32] This was borne out by the plethora of post-*Brown* litigation either challenging desegregation remedies or the constitutionality of practices that appeared to thwart the desegregation principles enunciated in *Brown.*[33] No doubt, the task of desegregating American schools was fraught with layers of complexity exacerbated by such factors as "White flight" from inner-city schools and the rise of charter schools. It is not surprising that a retroactive lookback on the 65th anniversary of *Brown* reveals a steady resurgence of racial and economic segregation in the nation's public schools owing in part to the U.S. Supreme Court's decisions in the 1990's that served to eviscerate hundreds of desegregation orders and plans across the nation.[34]

The nation's inability to establish real and lasting school desegregation in its public schools despite the promise of *Brown* is one important piece of evidence demonstrating the country's ambivalence towards social equality and diversity. This same tentativeness riddled

[31] Ogletree, *supra* note 30, at 289.
[32] *Id.*
[33] Even as recently as 2018, the struggle for desegregation continues. In 2018 in New Jersey, a coalition of civil rights groups and students saw no choice but to sue the state to have the promise of *Brown* fulfilled. Colleen O'Dea, *New Jersey Hit With Major Lawsuit Arguing It Must End School Segregation*, WHYY (May 20, 2018), https://whyy.org/articles/new-jersey-hit-with-major-lawsuit-arguing-it-must-end-school-segregation/. Nearly one-half of all Black and Hispanics in the state, approximately 270,000 children attend schools that are more than 90 percent non-white. *Id.*
[34] Erica Frankenberg et al., *Harming our Common Future: America's Segregated Schools 65 Years After* Brown, UCLA CIV. RTS. PROJECT (May 10, 2019), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf.

America's workplaces for generations since the passage of the 14th Amendment, affecting not just Black Americans but also immigrants from Germany, Italy, Japan, Jews, Catholics and anyone who did not fit into the prevailing group. As the longest victimized group, the frustration of Black Americans finally was channeled into numerous organized, and sometimes violent, civil rights marches throughout the '50s and '60s that demanded equality in all aspects of life -- housing, public accommodations, voting, and employment opportunities.

The civil rights protests were in large measure the impetus for the federal anti-discrimination employment laws that were enacted in 1964 and are in place still today. The importance of these laws in establishing the foundational principles of equal opportunity at all levels in the workplace cannot be underestimated. Yet, while few would disagree that prohibiting discrimination and promoting equal opportunity in the work place are worthy objectives, there is much stumbling afoot about how to effectively create a sustainable diverse and inclusive workforce.

## Anti-Discrimination Laws – Civil Rights Act of 1964

It is the 55th anniversary of the passage of the Civil Rights Act of 1964[35] the statute with which the U.S. Congress sought to eliminate the problems of segregation and discrimination in the United States The employment title of the Act – Title VII – covers employment discrimination based on race, color, religion, sex, national origin, or protected activity. Over time, other "protected groups" have been added to the patchwork of federal discrimination laws, for example, age,[36] disability,[37] veteran status,[38] genetic predisposition,[39] and sex-based wage

[35] *42 U.S.C. § 2000e.*
[36] *The Age Discrimination Act of 1967, 29 U.S.C. § 621, prohibits discrimination in employment against persons who are 40 years of age or older.*
[37] *The Americans with Disabilities Act, 42 U.S.C. § 12101, enacted in 1990, prohibits discrimination in employment based on disability, perceived disability, a history of disability or association with a disabled individual.*
[38] *The Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, enacted in 1994.*
[39] *Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff, enacted in 2008.*

discrimination.[40] State and local human rights laws also give legal recognition to other groups prohibiting discrimination on the basis of sexual orientation, gender expression and identity, marital status, domestic violence and transgender status.[41] It has been said that the expanding number of protected categories has rendered every employee protected from discrimination on at least one trait.[42] The national policy of nondiscrimination is firmly rooted in law, however, there are still many impediments to equal employment opportunity.

Notably, in October 2019, the U.S. Supreme Court heard arguments on the question of whether gay and transgender individuals are covered under Title VII.[43] Two of the cases involve gay individuals who claim they were fired due to their sexual orientation. The third case involves a Detroit funeral home's attempt to reverse a lower court ruling that it violated Title VII by firing a transgender funeral director after she disclosed her plans to transition from male to female.

The legal question in all three cases focuses on the definition of "sex" in Title VII. The plaintiffs argue that discrimination against gay and transgender individuals is inherently based on their sex and thus violates Title VII's proscription against sex discrimination. The U.S. Equal Employment Opportunity Commission (the regulatory agency that enforces Title VII) has consistently taken the position that any adverse employment action against an employee based on sexual orientation or gender identity is covered under the umbrella of Title VII and is banned as a

[40] Equal Pay Act, 29 U.S.C. § 206(d).
[41] For example, most New York employers are covered by the New York State Human Rights Law, N.Y. Exec. Law §296, and all NYC-based employers are covered by the New York City Human Rights Law, N.Y. City Admin. Code §8-101. In addition to prohibiting discrimination in employment on the bases protected under federal law – race, color, religion, sex, national origin, age, disability or genetic predisposition – New York's statutes go farther, prohibiting discrimination on additional grounds, such as sexual orientation, military service, genetic carrier status, marital status, creed, alienage, citizenship status, conviction record and transgender status.
[42] NEW YORK CITY BAR COMM. ON LABOR & EMP'T LAW, *Employer Diversity Initiatives: Legal Considerations for Employers and Policymakers* 9 (Apr. 2012), https://www2.nycbar.org/pdf/report/uploads/20072272-EmploymentDiversityInitiatives.pdf.
[43] *R.G. and G.R. Harris Funeral Homes, Inc. v. EEOC,* No. 18-107, and *Altitude Express v. Zarden,* No. 17-1623, consolidated with *Bostock v. Clayton County*, No. 17-1618, now pending before the U.S. Supreme Court.

form of sex discrimination. A ruling on these cases is expected sometime in June 2020. If the Court decides in favor of plaintiffs, it will contribute significantly to improvements in gay and transgender employment and diversity initiatives.

**Legal Framework under Title VII: Disparate Treatment and Disparate Impact**

Generally, claims of discriminatory employment practices are reviewed by the EEOC, state or local human rights agencies or the courts under either a "disparate treatment" or "disparate impact" analysis. For a showing of disparate treatment, an employee must prove the employer at the outset of the employment decision had a discriminatory motive (at least in part). The employee must prove that the employer intentionally discriminated because of the protected trait or class of the individual. But, as a practical matter, proof of the employer's state of mind cannot be established by direct evidence, so the courts have constructed an indirect method of proof by which the employee can carry his burden by showing that the explanation proffered by the employer is pretextual (essentially, unworthy of belief). The result is that if the employer, for example, applies its policies unevenly or even just made a mistake in the administration of a policy so that the employee can show that another employee of another race or group was treated differently under similar circumstances, a jury is permitted to infer that the employer acted with a discriminatory intent.

A disparate impact claim, on the other hand, requires proof that a program or practice had a disproportionate effect on a protected class and that that program or practice did not have a business necessity. Disparate impact claims can result in liability for an employer even though it is utilizing what appears to be a facially-neutral employment practice or program. The employee must identify which practice or program caused the alleged disparate impact. A finding of discrimination in the form of disparate impact does not depend on the existence of an

unlawful motive.[44] Disparate impact analysis is aimed at removing barriers to equal employment that are not necessarily intended or designed to discriminate – "practices that are fair in form, but discriminatory in operation."[45]

Title VII does not directly address the unconscious and implicit biases that may negatively affect employment decisions and create barriers to workplace equality. In 2003, the EEOC addressed the issue of subjective biases in its five-year "Eradicating Racism and Colorism from Employment" initiative.[46] However, the EEOC's recognition of the increase in these nuanced barriers to equal employment has not resulted in a clarification of how they should be dealt with. Similarly, U.S. courts are split on the role of subjective, implicit biases in Title VII cases alleging discrimination based on either a disparate treatment or disparate impact theory.[47] Over 30 years ago, the U.S. Supreme Court noted that an employer's subjective decision making could be analyzed under a disparate impact analysis in certain cases[48]; however, this still requires proof of a specific facially-neutral policy or employment practice that was operationally adverse to the employee.

## Barriers to Diversity: Implicit Bias

"Implicit bias" is defined as "the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. It is activated involuntarily, without awareness or intentional control. It can be either positive or negative, and everyone is susceptible."[49] The original creators of the term believed that "[s]ocial behavior is ordinarily

[44] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[45] *Griggs*, 401 U.S. at 431.
[46] https://www.eeoc.gov/initiatives/e-race/index.cfm (last visited October 19, 2019).
[47] Christopher Cerullo, *Everyone's A Little Bit Racist? Reconciling Implicit Bias and Title VII,* 82 Fordham L. Rev, 127 (2013).
[48] *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).
[49] Cheryl Stats et al., *State of the Science: Implicit Bias Review*, KIRWAN INST. 10 (2017) http://kirwaninstitute.osu.edu/wp-content/uploads/2017/11/2017-SOTS-final-draft-02.pdf.

treated as being under conscious (if not always thoughtful) control. However, considerable evidence now supports the view that social behavior often operates in an implicit or unconscious fashion. The identifying feature of implicit cognition is that experience influences judgment in a fashion not introspectively known by the actor."[50]

Psychologists believe that our brain processes over 11 million pieces of information every second.[51] To be efficient, the brain divides information into two systems where "System 1" drives cognitive responses outside our conscious awareness and "System 2" drives our responses by conscious processing.[52] "Because the implicit associations we hold arise outside of conscious awareness, implicit biases do not necessarily align with our explicit beliefs and stated intentions. This means that even individuals who profess egalitarian intentions and try to treat all individuals fairly can still unknowingly act in ways that reflect their implicit – rather than their explicit – biases. Thus, even well-intentioned individuals can act in ways that produce inequitable outcomes for different groups." [53]

In the book, *The Person You Mean to Be,* Dr. Dolly Chugh describes how implicit bias causes people to act contrary to their explicit beliefs and intentions, admitting herself: a

> I study the psychology of good people. I see myself as a good person and yet my behavior is filled with evidence to the contrary. I cling to antiquated gender stereotypes. I defend systems that favor well-off, well-connected families like mine. I misidentify people of the same race. I let homophobic jokes slide. I am judgmental of people whose gender identities confuse me. None of this makes me proud. At the same time, I fight for equality, donate money to social justice causes, spend time supporting individuals from marginalized groups, and challenge the status quo. [54]

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[50] Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes,* 102 PSYCHOL. REV. 4, 27 (1995).
[51] Emma Bienias et al., *Implicit Bias in the Legal Profession,* INTELL. PROP. OWNERS ASS'N 2 (2017) https://www.ipo.org/wp-content/uploads/2017/11/Implicit-Bias-White-Paper-2.pdf.
[52] *Id*.
[53] *Id*. at 3.
[54] Dolly Chugh, THE PERSON YOU MEAN TO BE, 6-7 (1st ed. 2018).

Within the legal industry, implicit bias emerges as a factor in interviewing, hiring, compensation, billing credit, work assignments, and promotions.[55] In the white paper, *Written in Black and White,* Dr. Arin Reeves researched ways unconscious bias affects reviews of writing assignments between black and white associates.[56] Reviewers were given the same memo but informed that it was written by black or white associates.[57] Regardless of the race of the reviewer, participants that believed they were reviewing work by black associates rated the memo on average 3.2/5 while white associates were rated 4.1/5.0 on the same memo.[58] This confirmed the hypothesis that implicit bias drives the belief that African American lawyers were subpar in writing skills compared to white peers.[59]

Dr. Reeves explained the findings as follows: "There are commonly held racially-based perceptions about writing ability that unconsciously impact our ability to objectively evaluate a lawyer's writing. These commonly held perceptions translate into confirmation bias in ways that impact what we see as we evaluate legal writing. We see more errors when we expect to see errors, and we see fewer errors when we do not expect to see errors."[60]

Law firms are not immune from the insidious creep of implicit bias into employment decisions. The challenge is to identify the institutionalized ways of doing business that are antithetical to equality and inclusiveness, and to implement new strategies to overcome (1) stereotypes that influence the perception of lawyers' competence and potential; (2) the inequities in work assignments; and (3) limited access to business development opportunities by women and minority lawyers, to name a few.

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[55] Bienias et al., *supra* note 51, at 12-13.
[56] Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS 4 (2014).
[57] *Id*. at 3.
[58] *Id*.
[59] *Id*.
[60] *Id*. at 6.

## The U.S. is Diversifying, But Where is the Legal Industry?

The U.S. population is changing, leading to increased interaction across racial and economic lines like never. In 1980, the U.S. Census reported the non-White population accounted for only 20% of the U.S. population.[61] In 2000, that number grew to 25%, and to 28% by 2010.[62] It is now estimated that by 2044, the non-White population in the U.S. will account for over 50% of the U.S. population.[63] By 2060, the White population will account for only 44% of the U.S. population as the nation will become a "plurality of racial and ethnic groups" with no group having a majority share of the total population.[64]

Studies show that with this increasingly diverse population there is also increased multi-ethnic economic power. Multi-ethnic spending projections estimated by the University of Georgia and The Selig Center indicate that the total buying power in the U.S. will rise to $17.2 trillion in 2023 compared to 11.2 trillion in 2010, $7.4 trillion in 2000 and $4.3 trillion in 1990.[65] In 2018, it was further reported that the combined buying power of Blacks, Asians, and Native Americans in the U.S. stood at $2.4 trillion, which represented a 162% increase from the $926 billion identified in 2000.[66] By 2023, these groups are projected to account for $3 trillion and represent 17.5% of the nation's total buying power.[67]

A breakdown of the individual groups' economic impact in the market place is even more telling. The buying power of African Americans/Blacks is estimated to rise to $1.5 trillion in 2023 compared to $961 billion in 2010, $609 billion in 2000, and $320 billion in 1990.[68] The

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[61] Marcus Robinson, Charles Pfeffer, & Joan Buccigrossi, *Business Case for Inclusion and Engagement*, WETWARE, INC. 2 (2003), workforcediversitynetwork.com/docs/business_case_3.pdf.
[62] *Id*.
[63] Colby, *supra* note 1, at 9.
[64] *Id*.
[65] Jeffrey M. Humphreys, *The Multicultural Economy*, SELIG CTR FOR ECON. GROWTH 4-5 (2017).
[66] *Id*.
[67] *Id*.
[68] *Id*. at 6-7.

buying power of Asian Pacific Americans is expected to reach $1.3 trillion in 2023 compared to $604 billion in 2010, $276 billion in 2000, and $117 billion in 1990.[69] The buying power of Hispanic/Latino Americans is expected to reach $1.9 trillion in 2023 compared to $604 billion in 2010, $276 billion in 2000 and $117 billion in 1990.[70] While data is still being sourced from the LGBTQ+ community, the total buying power in 2015 was estimated at $917 billion.[71]

These growing diverse communities are expected to direct these resources towards companies that reflect them literally and figuratively. In turn, the business community, and Fortune 500's in particular, have increased efforts to diversify their boards[72] under the premise that as "[a]s demographics and buying power in the United States become increasingly more diverse, forward-thinking boards [must find] ways to gain more diversity of background, experience, and thought in the boardroom."[73]

It is noteworthy that in June 2017 the CEO's of over 150 companies banded together to form a new group called CEO Action for Diversity & Inclusion. One of the requirements for membership is training in the principles of unconscious bias. Just two years later, there are over 800 companies participating in this program, with the result that millions of employees of these companies are learning how to engage with their colleagues, supervisors and direct reports within a collaborative and diverse work setting.[74] The return on investment is increased productivity that translates to an uptick of the bottom line.

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[69] *Id*. at 7-8.
[70] *Id*. at 9-10.
[71] Bach Polakowski *America's LGBT 2015 Buying Power Estimated at $917 Billion*, ASS'N OF LGBTQ JOURNALISTS (Jul. 20, 2016), https://www.nlgja.org/outnewswire/2016/07/20/americas-lgbt-2015-buying-power-estimated-at-917-billion/.
[72] *Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards*, DELOITTE 5 (Feb. 5, 2019), https://www.catalyst.org/wp-content/uploads/2019/01/missing_pieces_report_01152019_final.pdf.
[73] *Id*.
[74] https://www.ceoaction.org (last visited October 25, 2019).

Where do law firms stand in the current drive for diversity and inclusion? Lawyers are often considered key leaders in American society. For example, of the 56 signers to the Declaration of Independence, 25 (44%) were lawyers.[75] In 1964, of the 535 members of 88th Congress, 315 (59%) were lawyers.[76] Today, the percentage of lawyers in the 115th Congress remains high with 168 (38%) of the US House of Representatives and 50 (or 50%) of the U.S. Senate identifying their occupation as lawyers.[77] Companies have also researched the impact that lawyers have on private corporations. In one study of 3,500 CEOs, it was determined that "[f]irms run by CEOs with legal expertise were associated with much *less* corporate litigation."[78] These results were economically meaningful since reduction in law suits meant less cost to the company bottom line.[79]

Considering how influential lawyers are, it is essential to ensure this group has the best representation of the diverse society it serves, which it currently lacks. In 1998, women represented 28.5% of the legal profession and grew to only 37.4% by 2018.[80] Compared to other professions, women represent 55.2% of financial managers, 60.6% of accountants and auditors, 47.5% of biological scientists, and 51.5% of management and professional workforce.[81]

There is similarly low representation of minority lawyers, standing at 16.5%.[82] In contrast, minorities represent 24.9% of financial managers, 29.6% among accountants and

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[75] *See How Many Lawyers Signed the Declaration of Independence?*, SG&T BLOG (Jul. 2, 2015) https://www.sgtlaw.com/2015/07/how-many-lawyers-signed-the-declaration-of-independence/.
[76] Andrew Hacker *Are There Too Many Lawyers in Congress?*, N.Y. TIMES (Jan. 5, 1964), https://www.nytimes.com/1964/01/05/are-there-too-many-lawyers-in-congress.html.
[77] CONG. RESEARCH SERV., *Membership of the 115th Congress: A Profile* (Dec. 20, 2018), https://fas.org/sgp/crs/misc/R44762.pdf.
[78] M. Todd Henderson, *Do Lawyers Make Better CEOs Than MBAs?*, HARV. BUS. REV. (Oct. 30, 2017), https://hbr.org/2017/08/do-lawyers-make-better-ceos-than-mbas.
[79] *Id*.
[80] Philip Lee, *IILP Review 2019-2020: The State of Diversity and Inclusion in the Legal Profession*, INST. FOR INCLUSION IN THE LEGAL PROFESSION 13 (2019), http://www.theiilp.com/resources/Documents/IILP_2019_FINAL_web.pdf.
[81] *Id*.
[82] *Id*.

auditors, and 27.8% among management and professional workforce.[83] In the last 12 years, the number of African American attorneys increased by less than half a percent to 5.2% (2016-18) from 4.8% (2006-08); Hispanic lawyers only increased less than two percent to 5.5% (2016-18) from 3.7% (2006-08); and Asian American lawyers only increased less than two percent to 4.7% (2016-08) from 2.8% (2006-08).

While there is limited data as to other diverse groups, LGBTQ lawyers have risen to 5.9% in 2018 from 3.7% in 2009 and disabled attorneys from .5% in 2009 to 1% in 2018.[84]

The flagging numbers of underrepresented lawyers in law firms suggest the need for stepped-up measures to recruit and hire more underrepresented lawyers and to curb the high attrition rate that eviscerates a law firm's hiring gains.

**Attrition Rate of Underrepresented Groups**

The 2018 Vault/Minority Corporate Counsel Association (MCAA) Law Firm Diversity Report[85] concludes that attrition rates for attorneys who are people of color have been increasing in lockstep with hiring rates.[86] Racial minorities, in, represented a disproportionate segment of the lawyers who left their firms. Minority lawyers represented 17% of lawyers employed by firms in 2017 but 22% of the attorneys who left their firms.[87] Among associates, that number climbed to 28%.[88] These were the highest attrition figures for minority lawyers reported in the Vault/NCAA surveys in the last eleven years.[89]

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[83] *Id*. at 15.
[84] *Id*. at 17 (combining both associate and partner statistics).
[85] Vault/MCAA Law Firm Diversity Survey,https://www.mcca.com/wp-content/uploads/2018/11/2018-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf (last visited October 23, 2019). The Vault/Minority Corporate Counsel Association (MCCA) Law Firm Diversity Survey was established in 2004 as a way of measuring diversity progress in law firms. 230 U.S. law firms nationwide participated in the 2018 survey.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*

Research conducted in 2018 by MCAA in partnership with Russell Reynolds Associates (MCCA/RRA Survey)[90] is also illuminating. The Inclusion Index Survey measured responses from 661 respondents from law firms and law corporate departments to questions related to culture and inclusiveness. The factors considered were: (1) working across differences; (2) leveraging of different perspectives; (3) workplace respect; (4) leadership commitment; (5) organizational fairness; (6) accommodating differences; (7) employee recruitment, development and retention; and (8) voice and influence.

The Survey shows that the lowest-scoring category was organizational fairness, which drives a sense of "belonging." Attorneys from underrepresented groups indicated that they do not feel a strong sense of belonging at their workplace.[91] The chief reason for this was attributed to a sense that law firms allow implicit bias to creep into hiring and promotion processes, limiting opportunities for people of color (including those who identify as Asian, Black or African-American, Hispanic or Latinx. Law firm management was relying on longstanding networks and personal familiarity rather than merits.[92]

Attorneys who identify as Asian, Black or African-American, Hispanic or Latinx rated organizational fairness much lower than those who are white; attorneys who identify as LGBT rated fairness lower than those identifying as heterosexual.[93] Notably, the difference between men's and women's scores was negligible, which the researchers explained may be due to relative representation levels by women who make up close to half of associate classes and more

[90] Unleashing the Power of Diversity Through Inclusive Leadership Executive Summary, https://corpgov.law.harvard.edu/2019/05/20/unleashing-the-power-of-diversity-through-inclusive/leadership (last visited October 24, 2019).
[91] *Id.*
[92] *Id.*
[93] *Id.*

than 20% of all equity partners, compared to people of color who collectively hold half as many associate positions and 9% of equity partner titles.[94]

Another inclusion factor rated low by people of color is their sense that they do not have much voice and influence in how decisions affecting their careers are made, nor effective means to express their concerns. The scores of people of color and those identifying as LGBT were exceptionally lower in this category than for women and white men.

It is evident that although law firms are making well-intentioned efforts to recruit and hire underrepresented lawyers, those efforts are undermined by hidden cultural biases that get translated into feelings by the affected individual of not being a valued and appreciated contributor.

**Diversity Increases Opportunities for Everyone**

Companies gain when they embrace diversity and inclusion. The evidence shows that diversity leads to improved decision making which correlates to increased profitability.

In 2017, the marketing research firm CloverPop reviewed 600 business decisions made by 200 different business teams in a variety of companies over two years to evaluate the impact of diversity.[95] The study reported better business decisions were made 87% of the time when made by inclusive teams (based on gender, age and demographic diversity), which were also found to reach their decisions two times faster with half the necessary meetings.[96] Further still, teams that emphasized gender diversity were found to outperform and make 74% better business decisions compared to all-male teams.[97] Because company performance is 95% correlated to decision making, "[d]iversity drives better business performance because diverse teams drive

[94] *Id.*
[95] *Hacking Diversity with Inclusive Decision Making*, CLOVERPOP, https://www.cloverpop.com/hubfs/Whitepapers/Cloverpop_Hacking_Diversity_Inclusive_Decision_Making_White_Paper.pdf (last visited October 23, 2019).
[96] *Id*. at 2.
[97] *Id*.

better decision making."[98] The study concluded that companies that purposefully include diversity at every step of the decision making process would be more successful in the global workforce.[99]

In 2018, Boston Consulting Group released a two year study of 1700 companies from eight countries (Austria, Brazil, China, France, Germany, India, Switzerland, and the U.S.) across varying industries and company size to evaluate the impact of diversity in decision making.[100] The researchers looked at perceptions of diversity at the management level across six dimensions—gender, age, nation of origin (meaning employees born in a country other than the one in which the company is headquartered), career path, industry background, and education (meaning employees' focus of study in college or graduate school). The study reported a "statistically significant correlation between the diversity of management teams and overall innovation."[101] Companies with more diverse teams achieved 19% higher revenue due to innovation.[102] "In an increasingly dynamic business environment, that kind of turbocharged innovation means that these companies are better able to quickly adapt to changes in customer demand."[103] Further, these companies were found to have EBIT margins nine percentage (9%) points higher than those of companies with below average diversity.[104]

The research compels the conclusion that when business decisions are achieved through the collaboration of a diverse group of individuals – both in experience, background, gender, race, age and other characteristics – there is more opportunity for productivity and profitability.

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[98] *Id*. at 3-4.
[99] *Id*.
[100] *See* Rocio Lorenzo et al., *How Diverse Leadership Teams Boost Innovation*, BOSTON CONSULTING GRP. (Jan. 23, 2018), https://www.bcg.com/en-us/publications/2018/how-diverse-leadership-teams-boost-innovation.aspx.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*.

## Industry Auto-Correct: Overview of Initiatives in the Legal Profession to Improve Diversity and Inclusion

Recognizing the importance of diversity and inclusion and the limited representation of underrepresented lawyers in the legal industry, many law firms have recently implemented initiatives to advance diverse talent. Perhaps the most prominent initiative today is the "Mansfield Rule" spearheaded by the DiversityLab.[105]

Under the Mansfield Rule program, participating law firms establish policies and protocols to advance diverse talent with a goal towards at least 30% representation in diverse (women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities) candidate pools for leadership roles, equity partner promotions, formal client pitch opportunities, and senior lateral hiring.[106] The program believes that by 1) tracking and documenting diverse candidates for these positions, 2) increasing management awareness of candidates in the pipeline for these positions, and 3) improving the inclusivity and transparency of the process, there will be broadened representation of diverse attorneys in law.[107]

The initial pilot of the Mansfield Rule program launched in 2017 with 44 law firm signatories.[108] By the following year, 41 of the participating law firms achieved the Mansfield requirements.[109] Building on this progress, Mansfield Rule 2.0 launched in July 2018 with 60 law firm signatories.[110] All participants of Mansfield Rule 2.0 reported their methods to track the diversity of their candidate pools for hiring and promotions improved.[111] Additionally, 94% of

[105] *Mansfield Rule 2.0*, DIVERSITYLAB, https://www.diversitylab.com/pilot-projects/mansfield-rule-2-0/ (last visited October 23, 2019).
[106] *Id*.
[107] *Id*.
[108] *Id.*
[109] DIVERSITYLAB, *Mansfield Rule 2.0, 2018-2019 Mid-Point Progress Report*, 1 (2019) https://diversitylab.box.com/s/xp05sdcn3vk7weeypv6xk6bst320dza1.
[110] *Id*.
[111] *Id*.

participating firms saw diversity increase in pitch teams, 79% reported an increase of diversity in lateral partner hiring and 76% an increase in diverse equity partner promotions.[112] Mansfield Rule is now on its third iteration, launching with 102 signatory law firms and now tracking progress of lawyers with disabilities as well as women, lawyers of color, and LGBTQ+ candidates.[113] Efforts like the Mansfield Rule, American Bar Association Resolution 113,[114] 170 GCs for Lawfirm Diversity[115] and others, will enable the profession to establish a long-term, sustainable and diverse and inclusive law workforce.

## Conclusion: Where Do We Go From Here?

Imagine a world of slate grey. No colors, no contrasts. No variety of candles on a birthday cake. No variance of traffic signals. All grey. Would we know if it were day or night? Would we feel the sun any different(ly) or notice the moon's contrast to stars? Would life be enough with just grey?

We look at a field of flowers and appreciate beauty of each. The rose differs from a tulip and the tulip from the lily. We pick sunflower bouquets for some occasions and carnations for others. Why? They are not merely flowers; they are not grey. Colors move us; and, when it comes to flowers, we appreciate their unique individual beauty.

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[112] *Mansfield Rule 2.0*, DIVERSITYLAB, https://www.diversitylab.com/pilot-projects/mansfield-rule-2-0/ (last visited October 23, 2019).
[113] *See Mansfield Rule 3.0*, DIVERSITYLAB, https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/ (last visited October 15, 2019).
[114] *See, e.g.* Model Diversity Survey, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/DiversityCommission/model-diversity-survey/ (last visited October 23, 2019) (resolution passed by the American Bar Association and the Commission on Racial and Ethnic Diversity in the Legal Profession, and agreed to by over 90 General Counsels of Fortune 500 companies, to encourage law firms to expand and create opportunities for diverse attorneys including reporting on such efforts in a model diversity survey).
[115] *See An Open Letter to Law Firm Partners*, GCS FOR LAW FIRM DIVERSITY, http://www.theiilp.com/resources/Documents/GCStatementDiversity.pdf (last visited October 23, 2019) (open letter signed by 170 General Counsels and Chief Legal Officers encouraging law firms to retain and reflect the diversity of the legal community).

When it comes to diversity and inclusion, just as we do with roses, tulips, lilies and sunflowers, we can and should also appreciate the individualized uniqueness of every person. Our variety gives us color and we represent a beautiful bouquet.

Embracing diversity and inclusiveness and removing implicit bias from decision-making will enable the legal industry to better reflect the multicultural demographics of our country now and for years to come leading to increased opportunities for all.