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# DIVERSITY IN THE LEGAL PROFESSION: MOVING FROM RHETORIC TO REALITY

HELIA GARRIDO HULL\*

*The legal profession, more than others, is uniquely positioned at the helm of social change. The law is shaped by cultural shifts, and it is the lawyer that plays the role of architect. Yet, the legal profession is the least diverse and inclusive profession of all, failing to adapt to the ever changing demographics of American society. Despite numerous attempts at creating diversity and inclusion within the profession, the legal profession remains today much as it was at its inception—white, male dominated. This Article aims to make contributions that will raise awareness to the crucial need for diversity and inclusion within the legal profession such as logical measures beyond sanctions, which are cost effective, responsible, and deeply rooted in the profession. The current call by diversity groups for an affirmative ethics rule that would sanction lawyers who engage in discrimination in employment practices would be costly and duplicative. Thus, this Article discusses a cross-section of available rules that are less costly, more manageable alternatives. The Article proposes that the goal of diversity and inclusion within the profession cannot be forced, but must be realized through consistent measures aimed at creating accountability, educational awareness, and building supporting connections at each level of the professional hierarchy.*

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*“Diversity may be the hardest thing for a society to live with, and perhaps the most dangerous thing for a society to be without.”<sup>1</sup>*

## I. INTRODUCTION

Law has historically served as a key driver of social change.<sup>2</sup> Steeped in rigid traditions, the law has proven remarkably malleable in addressing changing perspectives on what society is willing to accept as the norm.<sup>3</sup> As a direct result of legal advocacy,<sup>4</sup> equality of opportunity in the workplace has emerged as an expectation in modern day society. Today, most professions have embraced a culture of inclusiveness that encourages diversity with respect to gender, race, ethnicity, disability, sexual orientation, and other classifications. Yet, the legal community has been slow to embrace such change. Despite being the architects of significant, positive societal advancement over the last half of the twentieth century, members of the legal community continue to struggle with the inequality that exists

<sup>1</sup> WILLIAM S. COFFIN, *THE HEART IS A LITTLE TO THE LEFT: ESSAYS ON PUBLIC MORALITY* 69–70 (1999).

<sup>2</sup> AUSTIN SARAT & STUART A. SCHEINGOLD, *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 1 (Austin Sarat & Stuart A. Scheingold eds., Stanford University Press 2006).

<sup>3</sup> *Id.*

<sup>4</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that where an employer uses a neutral policy or rule, or utilizes a neutral test, and this policy or test disproportionately affects minorities or women in an adverse manner, then the employer must justify the neutral rule or test by proving it is justified by business necessity); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding that Title VII’s prohibition against sex discrimination means that employers cannot discriminate on the basis of sex plus other factors such as having school age children); Mia Macy, *2012 EEOPUB LEXIS 1181* (2012) (Equal Employment Opportunity Commission held that discrimination against an individual because that person is transgender is discrimination on the basis of sex and therefore is covered under Title VII of the Civil Rights Act of 1964); *E.E.O.C. v. Convergys Customer Mgmt. Grp., Inc.*, 491 F.3d 790 (8th Cir. 2007) (held that an employer’s duty to reasonably accommodate an employee’s disability is triggered where the employee makes the employer “aware of the need for an accommodation,” even though he does not request a specific accommodation).

within their own ranks.<sup>5</sup> Today, the legal profession remains the least diverse white-collar profession in this country.<sup>6</sup> While the root cause of this lack of diversity may be found in inadequacies within the educational system, the impact is compounded by the legal community's unwillingness to take the effective steps necessary to promote diversity within the profession.<sup>7</sup>

America is becoming more diverse.<sup>8</sup> For the first time in history, ethnic minorities make up more than half (50.4%) of all children born in this country.<sup>9</sup> Non-Hispanic whites are projected to become a minority group by 2042.<sup>10</sup> Further, it is estimated that 20.5% of the workforce is currently comprised of persons with disabilities.<sup>11</sup> These changes in demographics warrant changes to the legal profession.<sup>12</sup> Yet, the legal community remains critically out of touch with changing demographics.<sup>13</sup> The profession is still comprised primarily of white males, much as it was throughout its entire history, and there is little hope that change is imminent.<sup>14</sup> Indeed, the American Bar Association (ABA) has openly acknowledged that current efforts to obtain diversity within the profession are likely to fail.<sup>15</sup> Despite the ABA's express commitment to eliminate bias within the profession, minorities, women, individuals with disabilities, and persons of differing sexual orientations and gender identities remain underrepresented in the legal profession. For change to occur, both mentoring and educational programs should be widely implemented, to address and eventually eliminate traditional perspectives that act to discourage diversity within the profession. Further, the legal profession should develop a centralized database that will track its progress towards diversity, offering an opportunity for transparency in hiring and promotional decisions that is currently lacking within the profession.

Section II of this Article briefly examines the development of the legal profession in the United States and its long history of exclusion of groups that remain underrepresented in the profession today. It then examines the current diversity initiatives within the legal profession and explores why these initiatives have largely failed to achieve their desired goal of increasing diversity. Section III evaluates the need for additional regulation to achieve diversity and examines alternatives to regulation that have had some success in promoting understanding of the values of diversity within the profession. Section IV offers recommendations for action to promote diversity.

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<sup>5</sup> See Kathleen Nalty, *Diversity: Lagging Behind in the Legal Profession*, DIVERSITY IS NATURAL (2011), <http://www.diversityisnatural.com/knalty/>.

<sup>6</sup> *Id.*

<sup>7</sup> See generally SARAH E. REDFIELD, DIVERSITY REALIZED: PUTTING THE WALK WITH THE TALK FOR DIVERSITY IN THE LEGAL PROFESSION (Vandeplas Publ'g, 2009).

<sup>8</sup> See Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950–2050*, MONTHLY LABOR REVIEW, May 2002, at 15–16, available at <http://www.bls.gov/opub/mlr/2002/05/art2full.pdf>.

<sup>9</sup> *Most Children Younger than Age 1 Are Minorities*, U.S. CENSUS BUREAU (May 17, 2012), <http://www.census.gov/newsroom/releases/archives/population/cb12-90.html>.

<sup>10</sup> *An Older and More Diverse Nation by Midcentury*, U.S. CENSUS BUREAU (Aug. 14, 2008), <http://www.census.gov/newsroom/releases/archives/population/cb08-123.html>.

<sup>11</sup> *Office of Disability Emp't Policy*, U.S. DEP'T OF LABOR, <http://www.dol.gov/odep/> (last visited Oct. 21, 2013).

<sup>12</sup> AM. BAR ASS'N, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 1, 5 (2010), [http://www.americanbar.org/content/dam/aba/administrative/diversity/next\\_steps\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf) [hereinafter ABA NEXT STEPS].

<sup>13</sup> REDFIELD, *supra* note 7, at xv.

<sup>14</sup> See BUREAU OF LABOR STATISTICS, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2011 Table 8 (2011), <http://www.bls.gov/cps/cpsrace2011.pdf>.

<sup>15</sup> AM. BAR ASS'N LEADERSHIP, OFF. OF DIVERSITY INITIATIVES, <http://www.americanbar.org/groups/leadership/diversity.html> (last visited Oct. 21, 2013).

## II. A HISTORY OF EXCLUSION WITHIN THE LEGAL PROFESSION

The history of exclusion in the legal profession finds its roots in the origin of common law. The early common law in England developed largely to protect property rights, which typically could only be held by the King or select males who obtained some interest in property from the King.<sup>16</sup> Under the patriarchal view of early English common law, women were viewed as chattel and had no individual legal rights.<sup>17</sup> The court, as it existed, was utilized primarily as a mechanism to enforce property rights, and cases were typically resolved by males appointed to the court by the nobility.<sup>18</sup> Early American legal practice looked much the same as it did in England; male lawyers trained other males to become lawyers through a highly selective, exclusive apprenticeship process.<sup>19</sup>

As the legal community grew, prominent male lawyers gathered to address the need for a national organization. In 1878, the lawyers from twenty-one states convened to create the ABA.<sup>20</sup> The ABA was formed to “advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among members of the American Bar.”<sup>21</sup> Noticeably absent from these foundational goals was any commitment to promote diversity within the profession. With no guiding principle on inclusion, the ABA, and the legal profession as a whole, continued its exclusive practices.

In 1844, Macon Bolling Allen became the first African American admitted to practice law in the United States.<sup>22</sup> However, more than thirty years later when a prominent group of lawyers formed the ABA as part of the Progressive Movement, the group excluded all black lawyers from membership.<sup>23</sup> It was not until 1943 that African Americans were knowingly admitted for membership into the ABA.<sup>24</sup> Women did not fare much better. In 1868, Phoebe Couzens became the first woman admitted to law school, and one year later, Arabella Mansfield became the first woman admitted to practice law in the United States when she passed the Iowa bar examination.<sup>25</sup> Yet, women were not formally admitted into law school until the following year and were not admitted to the ABA until 1918.<sup>26</sup>

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<sup>16</sup> Following his victory at the Battle of Hastings, William the Conqueror consolidated all ownership in property in England under the crown. He granted estates in certain land to select males in return for the males’ pledges of allegiance of service to the crown. Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. C.R.–C.L. L. REV. 141, 146–47 (2012).

<sup>17</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*442–45 (noting that the very being or legal existence of the woman was suspended during the marriage during that period).

<sup>18</sup> The Court of Common Pleas had exclusive jurisdiction over matters of real property. The court was staffed by a single Chief Justice and a number of puisne justices, who were required to be Serjeants-at-Law (an order of barristers at the English bar created as a body under King Henry II).

<sup>19</sup> See Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.–KENT L. REV. 429, 438–40 (1981).

<sup>20</sup> *History of the American Bar Association*, AM. BAR ASS’N, [http://www.americanbar.org/utility/about\\_the\\_aba/history.html](http://www.americanbar.org/utility/about_the_aba/history.html) (last visited Jan. 25, 2014).

<sup>21</sup> *ABA Timeline*, AM. BAR ASS’N, [http://www.americanbar.org/utility/about\\_the\\_aba/timeline.html](http://www.americanbar.org/utility/about_the_aba/timeline.html) (“First: American Bar Associations Forms”) (last visited Jan. 25, 2014).

<sup>22</sup> See *First African American Lawyers*, JUST THE BEGINNING FOUNDATION, <http://www.jtbfg.org/index.php?src=gendocs&ref=FirstAfricanAmericanLawyers&category=Inte> (last visited Jan. 25, 2014) (showing that Macon Bolling Allen was admitted to practice in Maine in 1844).

<sup>23</sup> OLOLADE OLAKANMI, SEGREGATION WITHIN NATIONAL PROFESSIONAL ASSOCIATIONS 1, 6, <http://www.ama-assn.org/resources/doc/ethics/segregation.pdf>.

<sup>24</sup> *Id.* (noting that three African–American attorneys were unknowingly admitted into the American Bar Association in 1912, but it was not until 1943 that African Americans were knowingly admitted for membership).

<sup>25</sup> SHERYL J. GRANA, WOMEN AND JUSTICE 116–17 (Rowman & Littlefield Pubs., 2d ed. 2010).

<sup>26</sup> Selma Moidel Smith, *Women Lawyers: A Century of Achievement*, EXPERIENCE, Fall 1998, at 6, 10.

Since its inception, the ABA has played an integral role in the development of the legal profession in the United States.<sup>27</sup> As the largest voluntary organization in the world, the ABA exerts considerable influence through its actions. Since the early 1980s, the ABA has actively endeavored to develop a cohesive plan that fully integrates members of diverse groups (including women, racial and ethnic minorities, persons with disabilities, and LGBT persons) into the legal profession.<sup>28</sup> In 1986, a report with recommendations was presented to the ABA House of Delegates to expand the goals of the ABA to include promoting diversity of minorities and women in the profession.<sup>29</sup> The ABA adopted this recommendation as Goal IX whereby the ABA resolved “[t]o Promote Full and Equal Participation in the Profession by Minorities and Women.”<sup>30</sup> These goals were expanded by the ABA in 1999 to include “persons with disabilities” and then again in 2007 to include “persons of differing sexual orientations and gender identities.”<sup>31</sup> The ABA amended the language in 2008 to broaden its scope and chose to rename the provision Goal III. The express purpose of Goal III is to eliminate bias and enhance diversity within the profession by: (1) promoting the full and equal participation in the association, the legal profession, and the justice system by all persons; and (2) eliminating bias in the legal profession and the justice system.<sup>32</sup>

The ABA has adopted the position that the legal community benefits from diversification, and has espoused four rationales to support greater diversity within the profession. First, the ABA believes that diversity is consistent with democracy. According to the ABA, diversity in the profession is necessary because “lawyers and judges have a unique responsibility for sustaining a political system with broad participation by all its citizens.”<sup>33</sup> The ABA added that “a diverse bar and bench creates greater trust in the mechanisms of government and the rule of law.”<sup>34</sup> Second, diversity makes good business sense. The ABA stated that “business entities are rapidly responding to the needs of global customers, suppliers, and competitors by creating workforces from many different backgrounds, perspectives, skill sets, and tastes.”<sup>35</sup> To meet these requirements, law firms must recognize that “clients expect and sometimes demand lawyers who are culturally and linguistically proficient.”<sup>36</sup> Third, the ABA recognized that legal training provides individuals with the skills they need to become effective leaders in society, because “individuals with law degrees often possess the communication and interpersonal skills and the social networks to rise into civic leadership positions, both in and out of politics.”<sup>37</sup> As such, “access to the profession must be broadly inclusive.”<sup>38</sup> Finally, the ABA acknowledged that diversity within the legal profession is necessary to meet the changing demographics in the United States.<sup>39</sup> It recognized that “the profile of LGBT lawyers and lawyers with disabilities will increase more rapidly . . . and that [the] U.S. will soon become a ‘majority minority’ country.”<sup>40</sup>

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<sup>27</sup> AM. BAR ASS’N, ABA DISABILITY STATISTICS REPORT (2011), [http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314\\_aba\\_disability\\_statistics\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314_aba_disability_statistics_report.authcheckdam.pdf) [hereinafter ABA DISABILITY].

<sup>28</sup> ABA NEXT STEPS, *supra* note 12, at 9.

<sup>29</sup> AM. BAR ASS’N, GOAL III (FORMERLY GOAL IX) REPORT CARD: AN ANNUAL REPORT ON WOMEN’S ADVANCEMENT INTO LEADERSHIP POSITIONS IN THE AMERICAN BAR ASSOCIATION 4 (2009), [http://www.americanbar.org/content/dam/aba/migrated/women/goalix/2009goal\\_iii\\_women.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/women/goalix/2009goal_iii_women.authcheckdam.pdf).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> ABA NEXT STEPS, *supra* note 12, at 5.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> ABA NEXT STEPS, *supra* note 12, at 5.

<sup>38</sup> *Id.* (agreeing with Justice Sandra Day O’Connor’s view that the legal profession must be broadly inclusive to serve this important purpose in society).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

The ABA's efforts and the rationales it adopted in support of its call for greater diversity strongly suggest that promotion of diversity within the profession is a means toward preserving the profession's reputation. Yet, the ABA cannot control lawyer attitudes or beliefs, and it cannot influence many of the factors underlying the lack of diversity in the legal profession. Although the legal profession has changed, the culture of exclusion that developed early in the profession persists.<sup>41</sup> As a result, the ABA has acknowledged that its efforts alone are insufficient to increase diversity within the legal community.<sup>42</sup> Recent data on diversity within the legal profession suggests that the ABA is correct and that additional action is warranted.

### A. Gender in the Profession: It's Still a Man's World

During the last fifty years, the rights and roles of women in society changed substantially, but opportunities for women in the law were slow to emerge. The male-dominated legal profession was slow to embrace the entry of women into the profession, even women possessing superior intellect such as former Supreme Court Justice Sandra O'Connor. Following her graduation near the top of her class at Stanford Law School in 1952, Justice O'Connor could not find a job as an attorney.<sup>43</sup> The only private sector job offer she received was one as a legal secretary.<sup>44</sup> Comparatively, former Supreme Court Chief Justice William Rehnquist, who similarly graduated at the top of Stanford's 1952 class, had a much different experience. Justice Rehnquist was hired for the prestigious position of law clerk for Justice Robert H. Jackson promptly after graduation, entered a successful private practice a year later, and in 1972 was nominated and confirmed as Associate Justice of the United States Supreme Court,<sup>45</sup> ten years before his fellow law school classmate, Sandra O'Connor.

The trend towards greater gender inclusion in the legal profession slowly continued and female lawyers eventually found their place in the profession, albeit not to the same extent of men. As late as 1960, 96% of all lawyers in the United States were white men.<sup>46</sup> That began to change as women entered the legal profession in larger numbers in the 1970s.<sup>47</sup> The composition of law school classes increased from approximately 10% female in 1970 to a peak of almost 50% in 2000.<sup>48</sup> With this change, it appeared that the percentage of women would eventually approach or even surpass the percentage of males in the profession. That did not occur, however, as the number of females enrolling in and graduating from law schools thereafter started to decline. The entering law school class for 2011-12 was comprised of 53.3% men and 46.7% women. Today, women comprise only one third of the legal profession.<sup>49</sup> The downward trend is related, in part, to the great disparity in gender equality that still exists in the legal profession.

<sup>41</sup> See *id.* at 12 (citing statistics showing a lack of diversity).

<sup>42</sup> ABA NEXT STEPS, *supra* note 12, at 5.

<sup>43</sup> Chang-Tai Hsieh et al., *The Allocation of Talent and U.S. Economic Growth* 2-3 (Nat'l Bureau of Econ. Research, Working Paper No. 18693, 2012), available at <http://www.nber.org/papers/w18693>.

<sup>44</sup> *Id.*

<sup>45</sup> Joan Biskupic, *Rehnquist Left Supreme Court with Conservative Legacy*, USA TODAY (Sept. 29, 2005, 2:15 PM), [http://usatoday30.usatoday.com/news/washington/judicial/supremecourtjustices/2005-09-04-rehnquist-legacy\\_x.htm](http://usatoday30.usatoday.com/news/washington/judicial/supremecourtjustices/2005-09-04-rehnquist-legacy_x.htm).

<sup>46</sup> Chrystia Freeland, *Equal Rights Makes Sense for U.S. Economy*, N.Y. TIMES (May 17, 2012), [http://www.nytimes.com/2012/05/18/us/18iht-letter18.html?\\_r=0&g=4711074DFEDA43CF64940C850012FB66](http://www.nytimes.com/2012/05/18/us/18iht-letter18.html?_r=0&g=4711074DFEDA43CF64940C850012FB66).

<sup>47</sup> AM. BAR ASS'N, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1947-2011 1-2, available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/jd\\_enrollment\\_1yr\\_total\\_gender.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf).

<sup>48</sup> *Id.*

<sup>49</sup> AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 2 (2013), available at [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_feb2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_feb2013.authcheckdam.pdf).

Today, less than half (45%) of first and second year law firm associates are female.<sup>50</sup> Those women who continue their careers face less opportunity for advancement than their male counterparts. For example, women comprise only 19.9% of partners,<sup>51</sup> 15% of equity partners,<sup>52</sup> and only 4% of managing partners in the largest 200 law firms.<sup>53</sup> Similar trends exist for women seeking to serve in house as general counsel. Among all general counsel for Fortune 500 companies, approximately one fifth (21.6%) are female.<sup>54</sup> Among all general counsel of Fortune 501–1000 companies, only 15.6% are women.<sup>55</sup>

Within the ABA, women also continue to lag behind men in leadership roles. Of the 136 Presidents of the ABA, only five have been women.<sup>56</sup> The House of Delegates, the policy-making body of the Association, continues to be controlled (68.1%) by men.<sup>57</sup> Currently, fourteen jurisdictions have no women delegates in the House of Delegates.<sup>58</sup> Women constitute only 28.9% of the ABA's Board of Governors, the body responsible for overseeing the general operation of the Association and the development of specific plans of action.<sup>59</sup> This is less than the ratio of women in the profession and women lawyers in the ABA.<sup>60</sup> Further, the percentage of women section and division chairs continues to decline, from a high of 39.3% in 2010 to 25.9% in 2013.<sup>61</sup>

In addition to facing inequities with respect to opportunities, women frequently face gender bias with respect to compensation. In 2011, women lawyers earned only 86% of what male lawyers earned.<sup>62</sup> The trend is similar for women equity partners in the 200 largest firms, who earn roughly 89% of the compensation earned by their male peers.<sup>63</sup> The ABA has recently initiated efforts to promote gender-pay equality at law firms, but there is no evidence that such efforts will be effective in changing this trend.<sup>64</sup> Many female attorneys also suffer from other attitudinal barriers that may prevent their

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<sup>50</sup> NAT'L ASS'N FOR LAW PLACEMENT, REPRESENTATION OF WOMEN AMONG ASSOCIATES CONTINUES TO FALL, EVEN AS MINORITY ASSOCIATES MAKE GAINS 5 (December 13, 2012), [www.nalp.org/uploads/PressReleases/2012WomenandMinoritiesPressRelease.pdf](http://www.nalp.org/uploads/PressReleases/2012WomenandMinoritiesPressRelease.pdf).

<sup>51</sup> *Id.*

<sup>52</sup> BARBARA M. FLOM, REPORT OF THE SEVENTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3 (2012), *available at* <http://nawl.timberlakepublishing.com/files/NAWL%202012%20Survey%20Report%20final.pdf>.

<sup>53</sup> *Id.* at 5.

<sup>54</sup> *Id.*

<sup>55</sup> MINORITY CORPORATE COUNSEL ASS'N, MCCA'S 13TH ANNUAL GENERAL COUNSEL SURVEY: MEASURING THE PROGRESS OF THE NATION'S LEGAL LEADERS 19–29 (2012), *available at* <http://content.yudu.com/A1yfrd/DivTheBarSeptOct2012/resources/index.htm>; *see also* AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 3 (2013), *available at* [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_feb2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_feb2013.authcheckdam.pdf).

<sup>56</sup> *See* AM. BAR ASS'N, 2012-2013 LEADERSHIP DIRECTORY 293–92, *available at* <http://www.americanbar.org/content/dam/aba/administrative/leadership/2012-2013-aba-leadership-directory-redbook.authcheckdam.pdf>, *see also* A CURRENT GLANCE, *supra* note 55 at 7.

<sup>57</sup> AM. BAR ASS'N, GOAL III REPORT: AN ANNUAL REPORT ON WOMEN'S ADVANCEMENT INTO LEADERSHIP POSITIONS IN THE AMERICAN BAR ASSOCIATION 6 (2013), *available at* [http://www.americanbar.org/content/dam/aba/administrative/women/2012\\_goal3\\_women.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/women/2012_goal3_women.authcheckdam.pdf).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 5.

<sup>62</sup> BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES 3 (2011), [www.bls.gov/cps/cpsaat39.pdf](http://www.bls.gov/cps/cpsaat39.pdf).

<sup>63</sup> FLOM, *supra* note 52, at 5.

<sup>64</sup> *American Bar Association Launches New Initiative to Promote Gender Pay at Law Firms*, EQUALITY LAW (Mar. 15,



advancement. For example, male attorneys and judges have been reprimanded for engaging in disparaging and condescending name-calling toward women.<sup>65</sup> These pressures and others may influence the percentage of women in law schools and contribute to declining enrollment each year since 2002.<sup>66</sup> Ultimately, this trend does not bode well for increasing female diversity in the profession.

## B. Race and Ethnicity: A Profession Void of Color

Despite decades of change impacting racial and ethnic diversity in the workplace, the legal profession remains one of the least racially and ethnically diverse professions in the United States.<sup>67</sup> Minorities are significantly underrepresented at all levels of the legal profession relative to their percentage of the general population. While 72% of the U.S. population in 2010 was Caucasian,<sup>68</sup> nearly 90% of all employed lawyers were white.<sup>69</sup> Of the remaining lawyers, 5.3% were black or African American, 4.2% were Asian, and 3.2% were Hispanic or Latino.<sup>70</sup>

Minority representation is highest among entry-level faculty (25.1% in 2008–09), law firm associates (19.5% in 2010), federal government attorneys (17.6% in 2006), and federal appellate judges (16.2% in 2010).<sup>71</sup> However, minority representation is significantly lower among law partners (6.2% in 2010) and corporate counsel (11% in 2006).<sup>72</sup> The trend is worse for minority women, who make up just 2% of all partners nationwide.<sup>73</sup>

Racial and ethnic minorities also struggle to attain leadership positions within the ABA. The ABA elected its first African American president in 2003, and its first Hispanic American President in 2009.<sup>74</sup> No minority woman has ever held the presidency. Minorities currently comprise less than 10% of the Association's membership, and their participation in leadership roles has increased in some areas and decreased in others.<sup>75</sup> In 2011–12, seven of the thirty-eight (18.4%) elected members of the ABA Board

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2013), <http://www.equality-law.co.uk/news/3109/66/American-Bar-Association-launches-new-initiative-to-promote-gender-pay-at-law-firms/>.

<sup>65</sup> See *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 184 (Sup. Ct. 1992) (court sanctioned an attorney for referring to an opposing female attorney in a deposition as “little girl,” “little mouse,” and “little lady”—words that the court described as “a paradigm of rudeness” that “condescend, disparage, and degrade a colleague upon the basis that she is female”); see also *In re Kirby*, 354 N.W.2d 410, 414–15 (Minn. 1984) (judge censured for addressing two female attorneys as “lawyerette” and “attorney generalette”).

<sup>66</sup> Leigh Jones, *Fewer Women Are Seeking Law Degrees*, NAT'L L.J. (Oct. 2, 2007), <http://www.lawjobs.com/newsandviews/LawArticleFriendly.jsp?id=900005557617&slreturn=20130922034236>.

<sup>67</sup> ABA NEXT STEPS, *supra* note 12, at 12.

<sup>68</sup> LINDSAY HIXSON ET AL., *THE WHITE POPULATION: 2010* 3 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-05.pdf>.

<sup>69</sup> BUREAU OF LABOR STATISTICS, *LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY 2011* 22 (2012), available at <http://www.bls.gov/cps/cpsrace2011.pdf>.

<sup>70</sup> *Id.*

<sup>71</sup> Elizabeth Chambliss, *The Demographics of the Profession*, in *IILP REVIEW 2011: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION* 12 (2011), available at [http://www.theiilp.com/resources/Documents/IILP2011\\_Review\\_final.pdf](http://www.theiilp.com/resources/Documents/IILP2011_Review_final.pdf).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 11.

<sup>74</sup> See *101 African American Firsts*, BLACKPAST.ORG, <http://www.blackpast.org/?q=aah/101-african-american-firsts> (last visited Nov. 10, 2013). See also *American Bar Association Elects Miami Lawyer Stephen N. Zack President-Elect: First Hispanic American Prepares for ABA's Highest Office*, AM. BAR ASS'N (Aug. 4, 2009), [http://apps.americanbar.org/abanet/media/release/news\\_release.cfm?releaseid=740](http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=740).

<sup>75</sup> AM. BAR ASS'N, *COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION 2012, GOAL III REPORT: THE STATE OF RACIAL AND ETHNIC DIVERSITY IN THE AMERICAN BAR ASSOCIATION* 6 (2012), available at

of Governors were minorities.<sup>76</sup> Overall, during the 2011-12 administration 34% of the total number of presidential appointments were made to minorities.<sup>77</sup>

### C. Disability: Incorporating the Differently Abled

Individuals with disabilities are often considered America's largest minority group.<sup>78</sup> The reason for this is that many people do not openly reveal their disability and may exhibit no outward visible signs to indicate the presence of a disability. Indeed, today, approximately, 20% of Americans have a disability.<sup>79</sup>

Greater recognition of disability, along with the introduction of methods used to accommodate individuals with special needs, has helped many students with disabilities thrive in the classroom. Yet, individuals with disabilities are less likely to apply and be admitted to law school in the first place; this may be a consequence of the difficulty in overcoming the procedural barriers to admission, including the Law School Admissions Test (LSAT).<sup>80</sup> For those who do matriculate, many face additional hurdles that have little to do with their ability to practice law. For instance, attitudinal barriers continue to impede employment opportunities for many of these individuals.<sup>81</sup> As a group, individuals with disabilities face employment rates and salaries far below those of individuals without disabilities.<sup>82</sup>

In 2011, "only 2.6% of persons employed in the legal profession (e.g., lawyers, judges, magistrates, law clerks, court reporters, paralegals) had a disability."<sup>83</sup> But the problem may be worse, because many legal employers fail to keep data on opportunities made available for disabled individuals under the business case rationale.<sup>84</sup> Moreover, many people with disabilities purposely choose not to identify their disability status out of a fear of discrimination and bias that may result from such revelation.<sup>85</sup> For example, a 2011 ABA member survey showed that only 4.56% of its members responded as having a disability, a number that is far below the prevalence of disability within the U.S. population (20%).<sup>86</sup> These problems have led the ABA to promote disability diversity in the profession by asking legal employers to sign a pledge that affirms the signatory's commitment to disability diversity.<sup>87</sup>

The ABA has had mixed results with increasing opportunities for individuals with disabilities within its organization. In 2011-12, the number of lawyers who held leadership roles in the ABA

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[http://www.americanbar.org/content/dam/aba/administrative/racial\\_ethnic\\_diversity/REG3Rpt12\\_finalweb\\_updated\\_3\\_13\\_12.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/REG3Rpt12_finalweb_updated_3_13_12.authcheckdam.pdf)

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> ABA DISABILITY, *supra* note 27.

<sup>79</sup> MATTHEW W. BRAULT, AMERICANS WITH DISABILITIES: 2010, HOUSEHOLD ECONOMIC STUDIES 4 (2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf>.

<sup>80</sup> See AM. BAR ASS'N, COMM'N ON DISABILITY RIGHTS, GOAL III REPORT, AN ANNUAL REPORT ON THE PARTICIPATION OF PERSONS WITH DISABILITIES IN ABA LEADERSHIP POSITIONS 7-8 (2012), available at [http://www.americanbar.org/content/dam/aba/administrative/mental\\_physical\\_disability/2012\\_goaliii\\_cdr.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/2012_goaliii_cdr.authcheckdam.pdf) [hereinafter GOAL III DISABILITIES].

<sup>81</sup> ABA DISABILITY, *supra* note 27.

<sup>82</sup> *Id.*

<sup>83</sup> GOAL III DISABILITIES, *supra* note 80, at 7.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Pledge for Change: Disability Diversity in the Legal Profession*, AM. BAR ASS'N, [http://www.americanbar.org/groups/disabilityrights/initiatives\\_awards/pledge\\_for\\_change.html](http://www.americanbar.org/groups/disabilityrights/initiatives_awards/pledge_for_change.html) (last visited Nov. 10, 2013).

increased from twenty-three to seventy.<sup>88</sup> Among all sections, divisions, and forums, approximately 44% had attorneys with disabilities in leadership positions.<sup>89</sup> However, less than 3% of the members of the Board of Governors report having a disability, less than 2% of the 732 ABA Presidential Appointments went to individuals who reported having a disability, and less than 1% of the 561 members of the House of Delegates reported having a disability.<sup>90</sup> These numbers do not fairly reflect the number of individuals with disabilities in the Association and suggest more effort is needed to increase disability diversity.

#### D. Sexual Orientation: Out and Still Underrepresented

Approximately 4% of the general population identifies as Lesbian, Gay, Bisexual, or Transgender (LGBT).<sup>91</sup> Prior to 1971, there were no laws, ordinances, or policies prohibiting discrimination against lesbian women and gay men.<sup>92</sup> The legal community has been instrumental in the development of laws that address discrimination on the basis of sexual orientation in employment, housing, and places of public accommodation.<sup>93</sup> Today, nine states and the District of Columbia have laws against discrimination based on sexual orientation, gender identity, and expression.<sup>94</sup>

Given the involvement of lawyers in this social change, it is somewhat surprising that it was not until August of 2007 that the ABA created the Commission on Sexual Orientation and Gender Identity to promote sexual orientation diversity and inclusion.<sup>95</sup> Despite the ABA's efforts, LGBT individuals remain underrepresented within the legal profession.<sup>96</sup> The overall percentage of openly LGBT lawyers reported in the National Association for Law Placement (NALP) Directory of Legal Employers in 2012 increased to 2.07% from 1.88% in 2011.<sup>97</sup> Over half (56%) of all law offices reported at least one LGBT lawyer.<sup>98</sup> The presence of LGBT lawyers continues to be highest among associates (2.69%) and in large law firms (3.22% in firms of 701 or more lawyers).<sup>99</sup> Openly LGBT partners are also best represented at large law firms with 701 or more lawyers (1.9%) compared with overall partners (1.58%).<sup>100</sup> Although progress has been made, more is needed to create an equitable environment for LGBT lawyers.<sup>101</sup> LGBT attorneys often have negative perceptions of the opportunities available within the profession, which in turn leads to lower job satisfaction and commitment, which will likely translate into higher rates of

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<sup>88</sup> GOAL III DISABILITIES, *supra* note 80, at 7.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> GARY J. GATES, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL OR TRANSGENDER? 6 (2011), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

<sup>92</sup> WILLIAM B. RUBENSTEIN ET AL., CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW xxvi (3d ed. 2008).

<sup>93</sup> *Id.*

<sup>94</sup> 1 KAREN MOULDING, SEXUAL ORIENTATION AND THE LAW 716 (2012-2013) (these states include Wisconsin, Massachusetts, Hawaii, Connecticut, California, New Jersey, Rhode Island, Vermont, and Minnesota).

<sup>95</sup> AM. BAR ASS'N, COMM'N ON SEXUAL ORIENTATION & GENDER IDENTITY, GOAL III REPORT FOR 2011–2012: FOURTH ANNUAL REVIEW OF THE STATUS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PARTICIPATION AT THE AM. BAR ASS'N 4 (2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/sexual\\_orientation/2012\\_sogigoali.iii.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/2012_sogigoali.iii.authcheckdam.pdf) [hereinafter *Goal III LGBT IV*].

<sup>96</sup> MOULDING, *supra* note 94, at 716.

<sup>97</sup> *LGBT Representation Up in 2012*, NAT'L ASS'N FOR LAW PLACEMENT (Jan. 2013), [http://www.nalp.org/lgbt\\_representation\\_up\\_in\\_2012](http://www.nalp.org/lgbt_representation_up_in_2012) [hereinafter NALP].

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See* MINORITY CORP. COUNSEL ASS'N, THE NEW PARADIGM OF LGBT INCLUSION: A RECOMMENDED RESOURCE FOR LAW FIRMS (2010), *available at* [http://www.mcca.com/\\_data/global/images/Research/2010\\_LavBook\\_%20Final.pdf](http://www.mcca.com/_data/global/images/Research/2010_LavBook_%20Final.pdf) (explaining the unique challenges LGBT attorneys still experience).

attrition and a corresponding decline in diversity.<sup>102</sup> To promote retention, approximately 88% of all law firms are collecting data on diversity with respect to LGBT attorneys.<sup>103</sup>

LGBT attorney participation within the ABA—much like LGBT participation in the legal profession itself—continues to be disproportionately low.<sup>104</sup> Of the ABA's 392,434 members, only 788 (0.2%) identified as LGBT.<sup>105</sup> Only one of the thirty-eight members of the ABA Board of Governors identified as LGBT.<sup>106</sup> Although the number of entities that had participation of one or more LGBT members in both general membership and leadership increased by 44% from 2011-12, the number of entities that had participation of one or more LGBT members in leadership roles decreased by 28%.<sup>107</sup> Total LGBT member presidential appointments increased, however, from 2.92% (22 of 751) in 2011-12 to 3.96% (29 of 732) in 2012-13.<sup>108</sup>

Although there has been progress with regard to LGBT acceptance within the legal community, this progress must be viewed against the reality that in many areas of the country it remains perfectly legal for a private sector employer to deny employment solely on the basis of sexual orientation.<sup>109</sup> As a result, opportunities for LGBT lawyers are typically found in areas that are more tolerant of LGBT individuals. Approximately 60% of the reported openly LGBT lawyers are employed in just four cities: New York City, Washington D.C., Los Angeles, and San Francisco. The LGBT populations in these cities exceed the national average for these groups. Thus, it is unsurprising that more members of these groups seek opportunities there.<sup>110</sup> The percentage of openly LGBT summer associates is also higher, about 4.4% compared with 3.47% nationwide, in these same four cities.<sup>111</sup>

### **E. Towards Closing the Gap: Current Efforts Towards Racial Inclusion Fall Flat**

The history of America is one marked by the evils of racial discrimination and exclusion. Race, more than any other minority class distinction, has been the focus of diversity efforts to mitigate the deep-seated effects of discrimination. Even though society has come a long way since the days of racial segregation, there is still much to be done towards realizing true racial diversity in society and inclusion in the legal profession. As part of its effort to eliminate bias and enhance diversity within the legal profession, the ABA has worked closely with state bar associations and other non-profit organizations to develop methods and practices that the profession can utilize to promote diversity on all levels.<sup>112</sup> Significant emphasis has been placed on so called “pipeline” programs designed to encourage racial minorities to pursue a legal career. These programs typically follow minority students throughout their academic careers with a goal of improving diversity in the legal profession by facilitating those students’ law school entrances and eventual entries into the legal profession. Each stage of these programs has achieved mixed results.

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<sup>102</sup> *Id.*

<sup>103</sup> NALP, *supra* note 97.

<sup>104</sup> AM. BAR ASS'N COMM'N ON SEXUAL ORIENTATION & GENDER IDENTITY, GOAL III REPORT FOR 2012–13: FIFTH ANNUAL REVIEW OF THE STATUS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PARTICIPATION AT THE AMERICAN BAR ASSOCIATION 5 (2013), *available at* [http://www.americanbar.org/content/dam/aba/administrative/sexual\\_orientation/2013\\_sogi\\_goaliii.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/2013_sogi_goaliii.authcheckdam.pdf) [hereinafter GOAL III LGBT V].

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> MOULDING, *supra* note 97, at 716.

<sup>110</sup> Gary J. Gates & Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, GALLUP (Feb. 15, 2013), <http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx>.

<sup>111</sup> NALP, *supra* note 97.

<sup>112</sup> *Diversity*, AM. BAR ASS'N, <http://www.americanbar.org/portals/diversity.html> (last visited Feb. 20, 2013).

## 1. Getting Minorities to Law School

To promote interest in the legal profession, some state bar associations and organizations are reaching out to those groups that are underrepresented in the legal community and encouraging them to consider a career in the legal profession.<sup>113</sup> Under this approach, minority students are mentored, supported financially, encouraged to continue their education into law school, and then supported throughout law school and as they move into the profession.<sup>114</sup> For example, groups such as Legal Outreach in New York City utilize a high school-to-college pipeline that helps minority, inner city children develop the critical skills they will need to graduate from high school and succeed in college, while simultaneously incorporating basic legal principles into the curriculum to stimulate early interest in the practice of law.<sup>115</sup> Other groups, such as Street Law, Inc., identify high school students of color and work to educate them about the law, democracy, and human rights to encourage them to pursue legal careers.<sup>116</sup> This group has teamed with the Law School Admission Council (LSAC) to improve diversity within the law school applicant pool and legal profession at large.<sup>117</sup>

The ABA created the Council on Legal Education Opportunity (CLEO), one of its non-profit entities, in 1968 to diversify the legal profession.<sup>118</sup> CLEO has worked to help minority, low-income, and disadvantaged students gain access to law school, successfully matriculate, and pass the bar exam.<sup>119</sup> LSAC offers need-based fee waivers for the LSAT, registration with LSAC, and application processing.<sup>120</sup> Many law schools also offer need-based fee waivers for application fees to encourage a more diverse applicant pool.<sup>121</sup> A variety of scholarships is now available to draw minority students to law school in an effort to diversify the legal profession.<sup>122</sup>

Ostensibly, these efforts appear to provide sufficient incentives for minority students to enter the legal profession. In reality, these efforts have not been very effective. The legal profession reflects the diversity of law school students, and there are significant deficits in the pipeline approach. As one recent report noted, the pipeline approach has not been successful in increasing diversity within the law school community because there are too few under-represented minorities moving through the pipeline, too

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<sup>113</sup> *Attorney Works to Promote Diversity in Law*, NAT'L PUB. RADIO (June 12, 2007), <http://www.npr.org/templates/story/story.php?storyId=10982535>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Diversity*, ST. LAW, <http://www.streetlaw.org/en/topics/diversity> (last visited Jan. 25, 2014).

<sup>117</sup> *Law School Diversity Pipeline Program*, ST. LAW, [http://www.streetlaw.org/en/programs/law\\_school\\_diversity\\_pipeline\\_program](http://www.streetlaw.org/en/programs/law_school_diversity_pipeline_program) (last visited Jan. 26, 2014).

<sup>118</sup> *What is CLEO*, CLEO, [http://www.cleoadmin.com/all\\_about\\_cleo/index.htm](http://www.cleoadmin.com/all_about_cleo/index.htm) (last visited Jan. 26, 2014).

<sup>119</sup> *Id.*

<sup>120</sup> *See The LSAT: Fee Waivers for the LSAT and Credential Assembly Service (CAS)*, LAW SCH. ADMISSIONS COUNCIL, <http://www.lsac.org/jd/lsat/fee-waivers> (last visited Nov. 2, 2013).

<sup>121</sup> *See, e.g., Fee Waiver Information*, UNIV. OF KAN. SCH. OF LAW, <http://www.law.ku.edu/fee-waivers> (last visited Nov. 10, 2013).

<sup>122</sup> Today, a large variety of legal scholarships exists to help promote diversity in the law school community. These include: the NAACP Scholarship Fund, sexual orientation scholarships (LGBT); the Dickstein Shapiro Diversity Scholarship; Michael Greenberg (LGBT) Student Writing Competition, the National LGBT Bar Association; the American Association of University Women Educational Foundation; the Leonard C. Horn Scholarships, the Miss America Organization; the Leadership Institute Scholarship, the Leadership Institute for Women of Color Attorneys in Law & Business; the Adam A. Milani Disability Law Writing Competition, the ABA Commission on Mental & Physical Disability; the Alexander Graham Bell Association for the Deaf Scholarship; the American Council of the Blind Scholarship.

few graduating high school, too few persisting and succeeding in college, and too few presenting LSAT scores and Grade Point Averages (GPAs) that meet today's requirements for admission to law school.<sup>123</sup>

The LSAT represents a significant obstacle for many minority students and has proven particularly onerous for African-American students.<sup>124</sup> For example, in 2008 the average LSAT score for Blacks was 144, but 150 for those admitted; whereas, the average LSAT score for Whites was 155, but 157 for those admitted.<sup>125</sup> Given that the LSAT is one of the most important criteria used in admission decisions, this trend suggests that African Americans will continue to struggle to gain entry into law school. While minority enrollment in law schools has generally increased over several decades, today minority enrollment is flat or decreasing and stands at about twenty percent.<sup>126</sup> African Americans constitute the largest racial minority group that remains underrepresented in the legal profession, and their low enrollment in law school suggests that the problem of diversity in the profession will remain absent additional action.

## 2. Navigating the Landmines of Law School and Entry into the Bar

Critics of the pipeline approach also stress that encouraging minorities to attend law school is only part of the battle. Once admitted, minorities must find a reason to remain. Evidence suggests that many minority students who enroll in law school experience racial and ethnic bias by fellow students that negatively shape their view of the legal profession.<sup>127</sup> Achieving diversity in the legal profession for minorities will take more than just increasing enrollment. It will require improving the experience of those who enter.<sup>128</sup> A recent study evaluating minority perspectives of their law school experience revealed some startling results. Many students noted that bias against minorities and racism is palpable in the classroom.<sup>129</sup> This is particularly true in classes that openly discuss the evolution of social relationships and its impact on issues such as race relations, women's suffrage, disability rights, and sexual orientation discrimination.<sup>130</sup>

Within the larger law school community, these issues persist. Minorities admitted through alternative admissions standards are often subjected to harsh criticism about the unfair process. For many minorities, these comments are less about the process and more about other students' deeply ingrained negative perception regarding the abilities of minorities.<sup>131</sup> Indeed, some have argued that such alternative admission standards harm aspiring minority law students more than they help the students.<sup>132</sup>

Despite significant changes in race relations in the United States, many believe race still matters for those who seek to become American lawyers.<sup>133</sup> From the perspective of many African Americans who progressed through the pipeline and into law school, "race is still a pervasive factor in navigating the

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<sup>123</sup> REDFIELD, *supra* note 7, at 2–3, 9.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 49.

<sup>126</sup> See, e.g., *Graphs and Data*, A DISTURBING TREND IN LAW SCH. DIVERSITY, <http://blogs.law.columbia.edu/salt/> (last visited Nov. 10, 2013) (showing there was a 7.5% decrease in the proportion of African Americans in the 2008 class as compared with the 1993 class).

<sup>127</sup> DOROTHY H. EVENSEN & CARLA D. PRATT, *THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION 2* (2012).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 56.

<sup>130</sup> *Id.*

<sup>131</sup> EVENSEN & PRATT, *supra* note 127, at 57, 98 (noting that black students are often confronted with the reality that their non-black peers view them as intellectually inferior "affirmative action babies").

<sup>132</sup> *Id.* at 93.

<sup>133</sup> *Id.* at 90.

pipeline to the legal profession.”<sup>134</sup> Many minority students develop a belief early in law school that they must work harder to be recognized for the same actions.<sup>135</sup> Once a minority student experiences such biases, that student will likely never feel that he or she is viewed as an equal whether in the classroom or in the law firm. This reality has far-ranging implications and plays a significant role in any effort to achieve long-term diversity within the profession.

Navigating all of the social landmines that emerge during law school is only part of the challenge for minority law students. As a group, minorities have lower pass rates on the bar exam than non-minorities.<sup>136</sup> This is particularly true for African Americans, whose average national first time pass rates over the past twenty years have averaged thirty percent lower than Caucasians.<sup>137</sup>

### 3. Recruitment, Retention, and Promotion of Minority Attorneys

Once matriculated, minorities must have meaningful opportunities to gain employment in the legal profession. To address the fact that many minorities are underrepresented, some firms now actively consider diversity in their hiring practices. For example, one firm has enhanced its efforts to improve the firm’s diversity by enlisting the services of a diversity recruiter to discover and promote diverse legal talent.<sup>138</sup> That individual works closely with the firm’s Diversity Chair to promote diversity within the firm.<sup>139</sup> The firm provides minority scholarships to promote its efforts at recruitment.<sup>140</sup> Another firm employs a diversity committee that meets regularly to “discuss both industry and firm initiatives, to consult with diversity experts, and to implement plans that will promote diversity goals.”<sup>141</sup> Another firm hosts a half-day Diversity Seminar for its attorneys and clients, which have incorporated lessons that seek to broaden understanding of diversity issues with thought-provoking and interactive programming presented by nationally recognized diversity experts.<sup>142</sup>

While these pre-hiring diversity initiatives are beneficial, they are isolated and do not reflect the more general preferential hiring patterns. Moreover, they do not address opportunities available to minorities once employed. Much more is needed to sustain diversity in the profession. Indeed, the ABA has stated that, “even when diversity efforts were successful at recruitment, they often failed to improve the retention of diverse attorneys.”<sup>143</sup> The ABA added that “while the legal profession has achieved some diversity in the ‘lower ranks,’ diversity remains thin in the ‘higher ranks’ of law firm managing and equity partners, general counsel, state or federal appellate judges, and tenured law professors.”<sup>144</sup>

Even if the current trends were reversed and law schools admitted and graduated substantially more minorities and legal employers hired more minorities, meaningful diversification within the profession would not necessarily follow. Given that almost ninety percent of lawyers in the profession

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<sup>134</sup> *Id.*

<sup>135</sup> EVENSEN & PRATT, *supra* note 127, at 94.

<sup>136</sup> REDFIELD, *supra* note 7, at 49.

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., *Initiatives*, JACKSON LEWIS, <http://www.jacksonlewis.com/diversity/initiatives.php> (last visited Nov. 10, 2013).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See, e.g., *Our Commitment to Diversity*, DAVIS & GILBERT LLP, <http://www.dglaw.com/diversity.cfm> (last visited Nov. 10, 2013).

<sup>142</sup> See, e.g., *Diversity*, BARACK FERRAZZANO KIRSCHBAUM & NAGELBERG LLP, <http://www.bfkn.com/about-diversity.html> (last visited Nov. 10, 2013).

<sup>143</sup> ABA NEXT STEPS, *supra* note 12, at 12 (discussing the 2006 ABA Commission on Women in the Profession’s report, *Visible Invisibility: Women of Color in Law Firms*).

<sup>144</sup> *Id.*

are white, diversity may remain elusive until many white practitioners leave the field.<sup>145</sup> Indeed, the ABA has stated that “the proportion of minorities in the legal profession is not likely to attain parity with that in the general population in the foreseeable future.”<sup>146</sup> The failure to achieve diversity within the legal profession despite decades of efforts by the ABA, state bars, and legal employers has led to calls for increased regulation of lawyers.

### III. TO REGULATE OR NOT: FORCING DIVERSITY THROUGH MANDATORY INCLUSION

In 2012, the Institute for Inclusion in the Legal Profession (IILP) submitted a recommendation to the Standing Committee on Ethics and Professional Responsibility of the ABA to amend the Model Rules of Professional Conduct to address diversity in the profession.<sup>147</sup> IILP recommended that the Model Rules should be amended to make the attainment of diversity in the profession an affirmative ethical duty among lawyers.<sup>148</sup> The IILP asserted that despite significant prior efforts to promote diversity, the legal profession lags behind other professions in terms of diversity.<sup>149</sup> The IILP effectively took the position that, absent mandatory regulation, the profession was incapable of reaching an appropriate degree of diversity.<sup>150</sup>

The ABA rejected the proposed amendment. In a letter to the IILP, the ABA opined that additional regulation was unwarranted because the Model Rules already address the achievement of diversity.<sup>151</sup> Specifically, the ABA asserted that Model Rule 8.4, Comment 3 clarifies “that any conduct that manifests by words or conduct bias or prejudice is prejudicial to the administration of justice, and, therefore, is prohibited.”<sup>152</sup>

The propriety of mandating diversity through professional rules of conduct is at best questionable. Adding new regulations creates accountability where it has not existed before and places the burden on those who are in the best position to remedy the situation, those making hiring and promotion decisions. Moreover, adding regulation would send a clear message to the public that the legal profession will no longer tolerate policies of exclusion that discriminate. Finally, additional regulation might prompt states to follow and create more uniform requirements to promote diversity. However, some argue that additional regulation may be unnecessary in the legal profession.<sup>153</sup> Lawyers who engage in discriminatory conduct are already subject to disciplinary rules concerning discrimination.<sup>154</sup> Further, rules that prohibit attorney conduct prejudicial to the administration of justice already exist.<sup>155</sup> Adding another rule to address bias could be duplicative because state rules already provide a disciplinary remedy

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<sup>145</sup> REDFIELD, *supra* note 7, at 2.

<sup>146</sup> AM. BAR ASS'N LEADERSHIP, *supra* note 15.

<sup>147</sup> Letter from Marc Firestone, Chairman, Inst. for Inclusion in the Legal Profession & Robert A. Clifford, III, State Delegate, Inst. for Inclusion in the Legal Profession, to Laurel G. Bellows, et al. (Sept. 14, 2012), *available at* <http://www.theiilp.com/Resources/Documents/ModelRulesofProfessionalConduct.pdf>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Letter from Jack L. Rives, Exec. Dir. & Chief Operating Officer, Am. Bar Ass'n, to Marc Firestone, Chairman, Inst. for Inclusion in the Legal Profession & Robert A. Clifford, Clifford Law Offices (Dec. 12, 2012), *available at* <http://www.theiilp.com/Resources/Documents/ABAResponse2012.pdf> [hereinafter ABA Letter].

<sup>152</sup> *Id.*

<sup>153</sup> Brenda Jones Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response to Discrimination on the Rise*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 54 (1993).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*



for bias and discrimination in the practice of law in varying situations.<sup>156</sup> Indeed, nearly every state bar in the United States already includes a discrimination or bias rule in its ethics codes, except Alaska, Georgia, Hawaii, Texas, Kentucky, and Virginia.<sup>157</sup> However, most of those rules only impose sanctions for discriminatory conduct in the practice of law and leave opportunities for discrimination in hiring practices and promotion decisions that may not be overtly discriminatory or subject the lawyer to other disciplinary rules. For example, Florida's Rule 4-8.4(d) provides:

A lawyer shall not: (d) *engage in conduct in connection with the practice of law* that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.<sup>158</sup>

This rule only applies to conduct in connection with the practice of law. It is under-inclusive, as it does not preclude discriminatory conduct in hiring, promotion, or employment practices. Although a rule was proposed to prevent discrimination in "employment, partnership, or compensation decisions," the Florida Supreme Court noted that its constitutional authority over Florida courts and attorneys "does not extend to the employment practices of lawyers."<sup>159</sup> The court also noted that both federal and state laws already provide adequate protections and procedures relating to employment discrimination.<sup>160</sup>

New York adds protection for discrimination in employment practices. There, Rule 8.4(g) provides:

A lawyer shall not: (g) *unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment* on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, *a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination* by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.<sup>161</sup>

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<sup>156</sup> See, e.g., ABA Letter, *supra* note 151.

<sup>157</sup> See generally ALASKA RULES OF PROF'L CONDUCT R. 8.4 (2013) (Alaska's Rules of Professional Conduct are void of bias or discrimination prohibitions); GA. STATE BAR GOVERNANCE RULES PART IX ASPIRATIONAL STATEMENT (2013) (aspirational language asking lawyers to avoid all forms of wrongful discrimination in all activities including discrimination on the basis of race, religion, sex, age, handicap, veteran status, or national origin); HAW. RULES OF PROF'L CONDUCT R. 8.4 (2013) (Hawaii's Rules are void of bias or discrimination prohibitions); TEX. RULES OF PROF'L CONDUCT R. 8.04 (2013) (Texas's Rules are void of bias or discrimination prohibitions); KY. RULES OF PROF'L CONDUCT R. 8.3 (2013) (Kentucky's Rules are void of bias or discrimination prohibitions); VA. RULES OF PROF'L CONDUCT R. 8.4 (2013) (Virginia's Rules are void of bias or discrimination prohibitions).

<sup>158</sup> RULES REGULATING THE FLA. BAR R. 4-8.4(d) (2013) (emphasis added).

<sup>159</sup> The Fla. Bar re Amendments to Rules Regulating the Fla. Bar, 624 So.2d 720, 722 (Fla. 1993).

<sup>160</sup> Adele I. Stone, *Professional Ethics: 1993 Leading Cases and Significant Developments in Florida Law*, 18 NOVA L. REV. 597, 601 (1993).

<sup>161</sup> N.Y. STATE RULES OF PROF'L CONDUCT R. 8.4(g) (2013) (emphasis added).

The New York rule allows for claims to be made for discrimination in the hiring, promotion, or other conditions of employment, but only after a final judgment has been entered in a discrimination suit and all appellate remedies have been exhausted. The burden of bringing such a suit in terms of time, expense, and exposure of oneself to employer backlash presents a significant impediment to the disciplinary process and the overall goal of eliminating bias.

Like New York, California affords relief but only after the plaintiff receives a judgment warranting such relief. California: Rule 2-400(B)(2) provides:

(B) In the *management or operation of a law practice*, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in: (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or (2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule *unless and until a tribunal of competent jurisdiction*, other than a disciplinary tribunal, shall have *first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred*. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

Discussion to Rule:

In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.

A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.

A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.<sup>162</sup>

While the California rule has the potential to give those who report discrimination some relief, it is ineffective for the most part because an affirmative legal finding of discrimination is required before disciplinary investigations can commence.

On the other hand, in Minnesota, the legislature may have gone too far with its attempt to provide protections. Minnesota's Rule 8.4(g) & (h) provides:

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<sup>162</sup> CAL. RULES OF PROF'L CONDUCT R. 2-400 (1994).

“It is professional misconduct for a lawyer to: (g) *harass a person* on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status *in connection with a lawyer's professional activities*; (h) *commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer*. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: (1) the seriousness of the act; (2) whether the lawyer knew that the act was prohibited by statute or ordinance; (3) whether the act was part of a pattern of prohibited conduct; and (4) whether the act was committed in connection with the lawyer's professional activities.”<sup>163</sup>

The Minnesota rule may be over-inclusive. The rule prohibits harassment in connection with a lawyer's professional activities. As one author notes, “deciding on when the personal becomes the professional will often be difficult, despite a consensus regarding the outside parameters of such misconduct.”<sup>164</sup> Minnesota's approach may be problematic due to its breadth. There, lawyers are prohibited from engaging in bias in connection with their professional activities and may be subject to a claim of professional misconduct if they “commit a discriminatory act, prohibited by federal, state, or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer.”<sup>165</sup>

The approaches adopted in Florida, New York, and California appear beneficial, but the burden placed on the plaintiff in those states makes it likely that the protections afforded under these provisions will prove meaningless for many individuals. This is because these states' rules require as a prerequisite to action a favorable final judgment of discrimination against the employer. The lengthy process to obtain such a result, coupled with the fact that the plaintiff will likely lose his or her job and be largely unemployable, make it unlikely that many aggrieved parties will actually take advantage of the protections afforded. Moreover, Title VII claims are difficult to bring because the burden is great, thus very few people meet the requirement to file a disciplinary action with the bar association.<sup>166</sup>

Despite decades of efforts to address diversification, the legal profession remains one of the least diverse professions in the United States. Minorities continue to be underrepresented in law school, law firms (particularly at the higher ranks), and in leadership positions within the ABA. The profession and the pathways to the profession are critically out of line with the nation's emerging demographics.<sup>167</sup> Given these problems, and the fact that the legal profession remains a white, male dominated profession, it is time to try another approach.

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<sup>163</sup> MINN. RULES OF PROF'L CONDUCT R. 8.4(g)(h) (2005) (emphasis added).

<sup>164</sup> Edward J. Cleary, *Accountability or Overkill: Disciplining Private Behavior*, BENCH & B. OF MINN., <http://www.mnbar.org/benchandbar/2001/feb01/prof-resp.htm> (last updated Feb. 2001).

<sup>165</sup> Ashley Kissinger, *Civil Rights and Professional Wrongs: A Female Lawyer's Dilemma*, 73 TEX. L. REV. 1419, 1453 (1995).

<sup>166</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2006). Title VIII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise, to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals [sic] race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2006). Protection against discrimination based on disability was added in 1990. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2007). *See* Damon Ritenhouse, *A Primer on Title VII Claims: Part One*, 2 GPSOLO EREPORT, no. 6, Jan. 2013, [http://www.americanbar.org/publications/gpsolo\\_ereport/2013/January\\_2013/primer\\_title\\_vii\\_part\\_one.html](http://www.americanbar.org/publications/gpsolo_ereport/2013/January_2013/primer_title_vii_part_one.html) (explaining why it is so difficult for plaintiffs to bring Title VII claims).

<sup>167</sup> REDFIELD, *supra* note 7, at 7.

#### IV. RECOMMENDATIONS

The legal profession remains the white, male dominated profession it has been for hundreds of years, but significant progress has been made over the last several decades to make the profession more inclusive. To change the complexion of the profession, it is essential to change the perceptions both of individuals in leadership roles and of those entering or training to enter the profession. To create a diverse legal profession the following actions should be taken.

##### A. Create a Central Diversity Database

The ABA has acknowledged that “there is no one convenient location for finding up-to-date statistical data on the topic of diversity in the profession.”<sup>168</sup> This is true despite the strong recognition by all pertinent stakeholders that clear access to data on diversity is a necessary prerequisite to achieving workplace diversity.<sup>169</sup> Stakeholders must have access to quantitative data to assess their progress, and that data must be tied directly to qualitative data obtained from applicants, employees and clients for it to be useful.<sup>170</sup> Lack of access to data has played a part in the inaction on diversity by many legal employers. Given the changes in U.S. demographics—and the failure of the legal profession to adequately address diversity in the profession—the development of an open, centralized database on diversity is warranted for several reasons.

First, creation of a national database will prove particularly valuable for minority attorneys, especially those with disabilities, and will allow employers to understand clearly what is needed to reach an acceptable level of diversity within their organization. State bar associations should require employers to report data on hiring, promotion, and retention of minorities to the centralized database. Such action increases accessibility to diversity statistics. The state bar should also require each member of the bar to report qualitative data related to interviews in which they have engaged, jobs they have held, and the experiences related to those activities that have influenced their views on diversity in the profession. The reports should be anonymous to promote candor, but mandatory to assure that sufficient qualitative data is collected. The failure of the employer to report quantitative data and the failure of the employee to report qualitative data should be subject to reasonable sanctions by the bar.

Second, the creation of a centralized database makes logical and economic sense. Such a database is logical to address the lack of diversity, because the database will provide employers with objective data that can be utilized to address diversity issues. An open access, centralized database also makes economic sense for several reasons. Making the information openly accessible will create transparency concerning the ways that legal employers conduct business and the way they interact with minority candidates and employees. This in turn makes compliant employers more recognizable and more desirable to work for. Further, making the data accessible allows non-legal businesses to make informed decisions when selecting a firm to represent their interests. For some, this can become an important component of their business marketing plan. Today, for example, many big corporations such as Wal-Mart and Sara Lee require firms that represent them have a clear commitment to diversity including diversity at the upper levels.<sup>171</sup> In response to this, some firms have accelerated their efforts to diversify to capture some of the business lost by those firms that fail to change.<sup>172</sup>

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<sup>168</sup> ABA NEXT STEPS, *supra* note 12.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Natalie White, *Under Pressure: Corporate Demands for Minority Hiring Have Law Firms Paying Attention, But Will Fundamental Changes Occur?*, MASS. LAW. WKLY., Nov. 21, 2005, at 23, available at [http://masslawyersweekly.com/wp-files/pdfs/ma/05/CCS\\_112105.pdf](http://masslawyersweekly.com/wp-files/pdfs/ma/05/CCS_112105.pdf).

<sup>172</sup> *Id.*

Finally, making the information available has the advantage of promoting competitive altruism among firms with respect to diversity initiatives. Just as new associates migrate toward those firms offering the highest compensation, firms that have a clear commitment to diversity and equality of opportunity will draw in the best minority candidates. Such competition would likely create diversity among the best firms and benefit minorities.

## B. Continuing Legal Education Requirement: Retraining the Brain

Once licensed to practice law, lawyers may be subject to continuing education requirements. In many states, completion of continuing legal education (CLE) programs is required to retain licensure. The scope and breadth of the CLE requirements are state specific. Of the states that require completion of CLE programs, all require the programs to provide education in the areas of ethics or professional responsibility.<sup>173</sup> However, only a few states require programs to address the elimination of bias in the legal profession, and of those, most only require a few hours. For example, Minnesota requires attorneys to participate in two hours of CLE programs that address the elimination of bias, which is defined to include:

[A] course directly related to the practice of law that is designed to educate attorneys to identify and eliminate from the legal profession and from the practice of law, biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation.<sup>174</sup>

An evaluation of Minnesota's course revealed some interesting perspectives held by participants. Some expressed resentment that the course was mandated, while others indicated that the course should be attended by all members of the legal profession.<sup>175</sup> Some believed the program provided an "eye-opening" experience that helped participants realize some of their biases, while others expressed aggravation that the program failed to provide actual solutions to address the problem.<sup>176</sup> Others felt that the program was preachy and followed a "political agenda," and that "diversity programs stifle true debate and promote intolerance."<sup>177</sup> Overall, the elimination of bias CLEs received evaluation scores not significantly more negative than the scores given by attorneys attending other types of CLE programs.<sup>178</sup> Approximately half (49%) of the program attendees gave positive reviews of the program, while slightly more than a quarter (27%) gave negative reviews.<sup>179</sup> Attorneys attending the program appeared more interested in programs that address bias in the practice of law rather than bias in society at large and were more interested in the issues that the attorneys dealt with on a day-to-day basis.<sup>180</sup> These results suggest that there is a need for CLE programs on diversity in the profession and that those programs should be

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<sup>173</sup> California, Hawaii, West Virginia, and Minnesota require completion of elimination of bias CLE hours. Minnesota is the most stringent requiring forty-five hours every three years, with three hours ethics and two hours elimination of bias.

<sup>174</sup> *MBCLE Frequently Asked Questions*, MINN. BD. OF CONTINUING LEGAL ED., <http://www.mbcle.state.mn.us/mbcle/pages/faq.asp#CLE> (last updated Mar. 15, 2013) (addressing the requirement to meet the elimination of bias CLE).

<sup>175</sup> Report of the Board of Continuing Legal Education on Elimination of Bias CLE at 4, No. C2-84-2163 (Minn. July 8, 1998), available at [http://www.mncourts.gov/Documents/0/Public/administration/AdministrationFiles/Continuing%20Legal%20Education%20ADM09-8008%20\(formerly%20C2-84-2163\)/1998-07-01%20CLE%20Rpt%20Re%20Elimination%20of%20Bias.pdf](http://www.mncourts.gov/Documents/0/Public/administration/AdministrationFiles/Continuing%20Legal%20Education%20ADM09-8008%20(formerly%20C2-84-2163)/1998-07-01%20CLE%20Rpt%20Re%20Elimination%20of%20Bias.pdf) (outlining the results of the Report of the Board of Continuing Legal Education on Elimination of Bias).

<sup>176</sup> *Id.* at 4–5.

<sup>177</sup> *Id.* at 6.

<sup>178</sup> *Id.* at 8.

<sup>179</sup> *Id.* at 4.

<sup>180</sup> *Id.* at 4–6.

tied more closely to the realities of legal practice. The results also demonstrate that many attorneys are willing to address diversity in the workplace once they understand the issues that create the disparity and are given tools to effectively address the problem.

To increase diversity in the workplace, members of the legal profession must first understand what drives many of the issues that prevent the achievement of diversity. Those in positions of power are frequently stuck in a generational chasm that makes it difficult to comprehend how societal attitudes have shifted. Those individuals must confront their own ignorance and biases before they can ever effectively change how they respond. By requiring additional CLE training in bias and discrimination in employment, bar associations may force lawyers to gain awareness of the multifaceted bias and inclusion issues that exist within law firms in terms of hiring, promotion, and retention practice. To be effective vehicles of change, CLE courses should be developed with the goal of promoting greater understanding of how actions, policies, and procedures utilized by legal employers contribute to the lack of diversity. Courses should include information relevant to gender, race, and socioeconomic status; access to justice; institutional support for prejudice and bias in the education, employment, and retention of lawyers and judges; and the responsibility lawyers have to improve the administration of justice.<sup>181</sup> Requiring CLEs that address bias and discrimination in the workplace is necessary to educate attorneys who may be unaware that some of the hiring, promotion, and retention decisions that are made are discriminatory in nature.

The proceeds from CLE programs are typically retained by the state bar. Given the ongoing efforts of many state bars to help the legal profession diversify, reinvesting these proceeds into diversity promotion activities makes sense. Moreover, the establishment of CLE programs that address bias and discrimination in the workplace is good for business. As more and more businesses consider commitment to diversity in their decision to hire a law firm, those that engage in these activities will likely increase their chances of obtaining a client while simultaneously working to achieve social justice.

### C. CLE-Based Mentoring

The legal profession in the United States was founded on the principle of mentorship, but in today's fast-paced legal environment, mentoring has taken on a limited role.<sup>182</sup> Recent calls for a return to mentoring underscore its value to the profession.<sup>183</sup> Although defined differently, mentoring can be described as a "teaching and development process that assists lawyers in becoming practitioners; instills loyalty in the firm; promotes involvement in civic and community work; and prepares junior lawyers to be future leaders in the firm."<sup>184</sup> Successful attorneys, regardless of status, credit their success in overcoming obstacles in their career to the help of their mentors.<sup>185</sup>

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<sup>181</sup> Jayne Reardon, *Building Diversity and Inclusion Through CLE and Lawyer-to-Lawyer Mentoring*, 5 DIVERSITY MATTERS, no. 1, 8–9, (June 2011) available at <http://www.isba.org/sites/default/files/sections/diversityleadershipcouncil/newsletter/Diversity%20Leadership%20Council%20June%202011.pdf>.

<sup>182</sup> Kathryn Alfasi, *Mentoring Opportunities for Today's Lawyers*, DC BAR (Aug. 2006), [http://www.dcbar.org/for\\_lawyers/resources/publications/washington\\_lawyer/august\\_2006/mentor.cfm](http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/august_2006/mentor.cfm).

<sup>183</sup> *Id.*

<sup>184</sup> MARK KORF & TAMMY PATTERSON, THE STATE OF MENTORING IN THE LEGAL PROFESSION: NEW TOOLS AND BEST PRACTICES 16 (2013), available at [http://www.alanet.org/conf/2013/handouts/HR14\\_The\\_State\\_of\\_Mentoring.pdf](http://www.alanet.org/conf/2013/handouts/HR14_The_State_of_Mentoring.pdf).

<sup>185</sup> David K. Kirkpatrick, *Judge's Mentor: Part Guide, Part Foil*, N.Y. TIMES (June 21, 2009), <http://www.nytimes.com/2009/06/22/us/politics/22mentors.html?pagewanted=1&r=4>; see also Richard Wolf, *Sotomayor Makes Surprising Revelations in Book*, USA TODAY (Jan. 13, 2013), <http://www.usatoday.com/story/news/politics/2013/01/13/sotomayor-hopes-to-extend-reach-as-role-model/1830613/>.

In addition to teaching substantive legal knowledge, mentors provide invaluable help to new lawyers seeking to avoid pitfalls that create problems for clients, and help them navigate the political realities of law firm practice. This, in turn, can encourage attorney retention that will ultimately strengthen the talent and knowledge base for the employer.<sup>186</sup> Given its value to the profession, mentorship, both formal and informal, should be encouraged.

Today, only a few state bar associations incorporate any form of lawyer-to-lawyer mentoring program into their CLE requirement. In states that do include a mentoring component in their CLE requirements, mentors and mentees alike can engage in valuable relationship building, outside of the work environment, while earning CLE credit.<sup>187</sup> Such a program could be particularly valuable for minorities. Where the mentoring program structures around activities that address diversity and inclusion, the mentee gains the added knowledge that someone above him or her in the firm, in a position of power, understands the issues he or she is facing as a minority. This understanding may prove invaluable and may be the difference in any decision made by the mentee on whether to leave or remain at the firm. Because many minorities leave firms within the first five years of employment due to the stress of discrimination (less favorable assignments, no assignments, jokes, exclusion), the presence of a senior attorney in whom he or she can confide may limit his exodus.<sup>188</sup>

## V. CONCLUSION

The legal system has been used to implement some of the most significant changes in American society. Yet, the profession that seeks to prevent injustice and promote equality still struggles to attain such goals within its own ranks. Today, despite significant efforts by many advocacy groups, the legal profession remains one of the least diverse of any profession. To meet the challenges presented by changing U.S. demographics and business dynamics, the legal profession must change to embrace a degree of diversity that is consistent with broader changes in society. As the United States begins the shift to a majority-minority country, it is the responsibility of individuals at all levels of the legal profession to embrace a new paradigm that recognizes the value of diversity.

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<sup>186</sup> Reardon, *supra* note 181.

<sup>187</sup> *Id.*

<sup>188</sup> Beth Hawkins, *Law Firms Struggle with Recruiting and Retaining Minority Lawyers*, MINNPOST (Dec. 2, 2011), <http://www.minnpost.com/politics-policy/2011/12/law-firms-struggle-recruiting-and-retaining-minority-lawyers>; Debra Cassens Weiss, *Why More Than 75% of Minority Female Lawyers Leave Law Firms Within 5 Years*, ABA JOURNAL (July 22, 2009, 8:41 AM), [http://www.abajournal.com/news/article/why\\_more\\_than\\_75\\_of\\_minority\\_female\\_lawyers\\_leave\\_law\\_firms\\_within\\_5\\_years/](http://www.abajournal.com/news/article/why_more_than_75_of_minority_female_lawyers_leave_law_firms_within_5_years/); Reardon, *supra* note 181.