

AMERICAN BAR ASSOCIATION

**STANDING COMMITTEE ON CONTINUING LEGAL EDUCATION
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION
NATIONAL NATIVE AMERICAN BAR ASSOCIATION
NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION
NATIONAL BAR ASSOCIATION
ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION
SECTION OF FAMILY LAW
SECTION OF LABOR AND EMPLOYMENT LAW
CRIMINAL JUSTICE SECTION**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the Commentary to Section 2 of the Model Rule for Minimum
2 Continuing Legal Education be amended to include the following language:

3
4 Regulatory systems should require that lawyers, either through a
5 separate credit or through existing ethics and professionalism
6 credits, complete as part of their mandatory continuing legal
7 education those programs related to racial and ethnic diversity and
8 the elimination of bias in the profession. Lawyers who practice in
9 states and territories that do not require mandatory continuing legal
10 education are encouraged to complete these programs as part of
11 their continuing legal education.

REPORT

Introduction

It is a fundamental principle of legal and ethical judicial standards that the appearance of bias is as damaging to public trust and confidence as the reality of bias. We are living in a time when public trust and confidence is seriously eroded. It is therefore critical that judges and lawyers monitor their attitudes and behaviors to make sure that fairness and equal justice are never compromised.ⁱ It has been responsibility of the American Bar Association to support fair and equal application of the law, and to demonstrate the leadership to increase the quality of justice available to all citizens.

Background

Bias in the Legal Workplace

One of the many dramatic changes that has swept through the legal profession over the past 30 years is the growing number of women, minorities and others with diverse backgrounds entering the practice of law. Although, as a whole, the progress of female attorneys and attorneys of color have not matched that of the “typical” white male attorney, there has been advancement in terms of numbers of women and minority lawyers practicing and attaining positions of respect and influence. Attorneys from a variety of backgrounds, including women, people of color, people with disabilities, and people with differing sexual orientations now can be found in virtually every aspect of the legal profession.ⁱⁱ

Why is it important in legal workplaces to deal with the issues of bias?

The benefits outweigh the time, effort and money spent on dealing with these issues after the fact. Workplaces that address these issues before they arise have more satisfied, loyal lawyers. The less lawyers encounter bias, the greater the job satisfaction they experience, and the greater their commitment and loyalty to the firm. Their productivity increases when there is less to complain about; there is lower turnover and ultimately it saves the workplace money to have loyal, dedicated employees who are good ambassadors for their workplace and who remain at the same place of employment through their career. Moreover, clients are increasingly seeking firms that have a diverse workforce of women and minorities.ⁱⁱⁱ

What many firms fail to realize is that there are bottom-line benefits to developing a diverse legal profession. Given the changing demographics of the U.S. population and the globalization of the legal profession, a policy of inclusion reflects reality. Promoting diversity allows a firm to

recruit the best and the brightest candidates of all backgrounds. It is good public relations, and engenders loyalty and higher morale. Additionally, expanding the candidate pool increases networking and rainmaking opportunities, thus enhancing a firm's ability to attract and serve a broader client base. It raises the comfort level of diverse client prospects who want attorneys "like them" – who speak their language and understand their culture- to handle their business.^{iv}

Bias in the Administration of Justice

At least 22 state task forces have found bias in the legal profession to be a serious problem. The perception of bias can undermine the belief in a fair judicial system. Courts must not only be fair, but also be perceived as being fair. The presence of fairness and equality in our court is primarily a product of the people who work there and how they conduct themselves when interacting with the public.

Words, actions and behaviors that indicate bias diminish public trust and violate two fundamental principles of our justice system that:

- Our courts are free of perceived and actual bias; and
- Equal access to fair and dignified treatment in our courts awaits all who enter.^v

The State Bar of Michigan joined the Michigan Supreme Court in its unequivocal position that "a fundamental principle of our constitutional government is that discriminatory treatment on the basis of race, gender, economic class, religion or physical condition cannot and will not be tolerated...the appearance of bias, as well as the reality of bias, damages our profession and our courts in their fundamental role as protector of freedom and dispenser of justice...as we continue to strive for a bias free society and justice system, lawyers, judges and their leaders must be in the forefront of this effort."^{vi}

The State Bar of Michigan Open Justice Commission defines its mission as to:

- raise both public and professional awareness of open justice issues and the impact of race, ethnic origin, gender, religion, sexual orientation or disability on the fair delivery of justice in our state;
- reduce or eliminate such bias or invidious discrimination within the courts or legal profession; and

- increase public confidence in the fairness of the legal profession and the equal application of law for all citizens.

Its goals include:

- Develop judicial, legal and public education programs on fairness and open justice issues.
- Investigate, adopt and implement programs related to all discrimination and bias that impact on the fair delivery of legal services and justice.

The Role of Continuing Legal Education in Raising Awareness of the Importance of a Diverse and Bias Free Legal System

CLE courses in the elimination of bias in the profession create an important forum for discussion and analysis of diversity issues and their impact on the delivery of justice, and identify weaknesses in the system that require attention and resolution. The Minnesota Board of Continuing Legal Education defines its elimination of bias learning goals as follows:

1. to educate attorneys about the elimination of bias or prejudice in the legal profession, in the practice of law, and/or the administration of justice;
2. to educate attorneys regarding barriers to hiring, retention, promotion, professional development and full participation of lawyers of color, women, and those persons referenced in the “course in the elimination of bias in the legal profession and in the practice of law definition (i.) of the Rules of the CLE Board, both in the public and private sector of the legal profession and in the practice of law;
3. to educate attorneys about the problems identified in the Supreme Court’s Race Bias and Gender Fairness Task Force Reports, as well as in other studies, reports or treatises which describe bias and prejudice in the legal profession, in the practice of law, and/or in the administration of justice.

Current Status of Elimination of Bias Credit in MCLE States

Among the 40 states requiring Mandatory Continuing Legal Education, five have embraced this issue and have adopted courses in the elimination of bias in the profession as part of their ethics

and professionalism requirement: California, Minnesota, Oregon, Washington, and West Virginia.

California

All members of the State Bar of California on active status must complete at least 25 hours of approved continuing legal education activities every 36 months. Of the 25 hours:

At least one hour must relate to elimination of bias in the legal profession based on but not limited to: sex, color, race, religion, ancestry, national origin, blindness or other physical disability, age and sexual orientation.

Minnesota

Attorneys must attend 45 hours of accredited CLE courses during their three-year reporting period.

2 of the 45 hours must relate to the elimination of bias.

Oregon

All active members shall complete 45 credit hours of accredited CLE activity every three years.

At least nine of the 45- hour credit requirement shall be devoted to accredited CLE activity in professional responsibility. Professional responsibility includes legal ethics and professionalism and educational activities related to the role of lawyers concerning racial and ethnic issues, gender fairness, disability issues and access to justice.

Washington

Active members shall complete a total of 45 CLE credits within a 3 three year reporting period.

Members must complete a minimum of 6 ethics credits in the 3 -year reporting period. Ethics credits are approved for segments of courses dealing specifically and exclusively with attorney ethics, professionalism and professional responsibility, including substance abuse, anti-bias and diversity training.

West Virginia

All active members of the West Virginia State Bar are required to complete a minimum of 24 mandatory continuing legal education credits by June 30, 2004, and each two years thereafter.

At least three of the credits must be in legal ethics, law office management, substance abuse, or the elimination of bias in the legal profession.

Model Programming

The elimination of bias program can take many forms. These include:

- The Difference Gender Makes in the Legal Profession – Hennepin County Bar Association
- Identifying and Eliminating Bias and Discrimination in the Legal System: Codes, Cases and Other Constraints - University of Minnesota Law School
- Race and the Law – The Aftermath of 9/11 – University of Minnesota Law School
- Elimination of Bias: Racial Profiling and Beyond – Minnesota Legal Services Commission
- Cultural Competence in the Workplace – Hennepin County Bar Association
- Disability: The State of the Profession – Hennepin County Bar Association
- Immigrants Navigating the Legal System –Hennepin County Bar Association
- How Deaf Clients Can Best Be Heard – Hennepin County Bar Association
- Understanding Depression and Mental Illness in the Legal Profession – Minnesota CLE
- Diversity Toolkit – Oregon State Bar
- Cultural Competency – Oregon State Bar
- Immigrants in the Courts – Oregon State Bar
- Representing Clients with Personality Disorders – Oregon State Bar

- Valuing Diversity: From \$\$ to Sense – California Center for Access and Fairness
- Balancing Personal and Professional Lives – California CEB
- Elimination of Bias in the Legal Profession: Strategic Solutions – California CEB
- Gender Bias in the Law: Identification and Prevention – California CEB

Conclusion

As our nation grows in diversity, MCLE, in order to be valuable and relevant, is an important forum for discussion and analysis of the issues. MCLE programs that relate to discrimination and bias that impact on the fair delivery of legal services and justice can identify weaknesses in the system that require attention and resolution, and are a valuable and essential component of the full CLE curriculum. We therefore respectfully request that this language be added to the Commentary to Section 2 of the Model Rule to acknowledge the role that elimination of bias courses can play in ensuring fairness and equal justice.

Respectfully submitted,

Suzanne E. Graber
Chair
Standing Committee on Continuing Legal Education

Lawrence R. Baca
Chair
Commission on Racial and Ethnic Diversity in the Profession

February 2004

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Standing Committee on Continuing Legal Education, Commission on Racial and Ethnic Diversity in the Profession

Submitted By: Suzanne Graber, Lawrence Baca

1. Summary of Recommendation(s).

The Standing Committee on Continuing Legal Education and the Commission on Racial and Ethnic Diversity in the Profession recommend that regulatory systems should require that lawyers, either through a separate credit or through existing ethics and professionalism credits, complete as part of their mandatory continuing legal education those programs related to racial and ethnic diversity and the elimination of bias in the profession. Lawyers who practice in states and territories that do not require mandatory continuing legal education are encouraged to complete these programs as part of their continuing legal education. This resolution provides guidance to those states that are or will be developing standards for approval of these courses.

2. Approval by Submitting Entity.

This Report with Recommendation was formally approved by a vote of the Standing Committee on Continuing Legal Education at the Committee's Retreat held in Montreal on October 11, 2003, and by the Commission on Racial and Ethnic Diversity in the Profession during the ABA Annual Meeting in San Francisco on August 7, 2003.

3. Has this or a similar recommendation been submitted to the House or Board previously?

This Recommendation has not been submitted to the House or Board previously.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The American Bar Association Model Rule on MCLE provides guidance to states that are or will be developing standards for MCLE.

The House of Delegates adopted the ABA Model on MCLE (Resolution #115) at the ABA Annual Meeting in 1988.

Following the 1988 adoption of the Model Rule, our nation's population has grown increasingly diverse. This led the ABA Standing Committee on Continuing Legal Education to re-examine the Model Rule and to determine that the proposed recommendation will encourage the development of MCLE programs related to all discrimination and bias and raise professional awareness of the impact of bias in the courts and the legal profession, at the same time increasing public confidence in the fairness of the legal profession and the equal application of the law for all citizens.

5. What urgency exists which requires action at this meeting of the House?

We are living in a time where public trust and confidence in lawyers and the courts is seriously eroded. CLE courses in the elimination of bias in the profession can create an important forum for discussion and analysis of the issues and their impact on the delivery of justice, and identify weaknesses in the system that require attention and resolution.

6. Status of Legislation. (If applicable.)

Not applicable.

7. Cost to the Association. (Both direct and indirect costs.)

No new or additional funds are required.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals.

This Report with Recommendation has been circulated to ABA Sections, Forums and Divisions concurrently with its submission to the ABA Policy Administration Office. The Report has also been distributed to national providers ALI-ABA and PLI, minority bars represented in the House of Delegates, state and local bars, and other entities with a concern for this issue.

To date, there has been widespread interest expressed for co-sponsorship of this Recommendation. At the time of submission of this Report with Recommendation to the Policy Administration Office, the National Native American Bar Association (NNABA),

the National Asian Pacific Bar Association (NAPABA), the National Bar Association, the Practising Law Institute (PLI), Tom Bolt, Delegate at Large, and the ABA Family Law Section have notified us of their Entities' approved co-sponsorship. We will continue to keep the Policy Administration Office apprised of developments in co-sponsorship for this important MCLE Recommendation.

10. Contact Person. (Prior to the meeting.)

Annette J. Cook, Associate Director
ABA Center for Continuing Legal Education
312-988-6203
acook@staff.abanet.org

11. Contact Person. (Who will present the report to the House.)

Suzanne E. Graber, Chair
Standing Committee on Continuing Legal Education

Lawrence R. Baca, Chair
Commission on Racial and Ethnic Diversity in the Profession

ⁱ Hon. Kurtis T. Wilder, Michigan Court of Appeals and Chair of the Ethics and Disciplinary Standards Committee.

ⁱⁱ "Nice Guys Finish First: Personal Strategies in the Legal Workplace", Seltzer Fontaine Beckwith: Legal Search Consultants.

ⁱⁱⁱ "All in a Day's Work", videotape produced by the Queen's Bench Bar Association of the San Francisco Bay area in conjunction with the American Bar Association Commission on Women in the Profession.

^{iv} "Bias is a Bottom Line Issue", Seltzer Fontaine Beckwith: Legal Search Consultants.

^v "What is Your Role in Reducing Biased Behavior in the Court?", State Bar of California.

^{vi} State Bar of Michigan Report of the Task Force on Race/Ethnic and Gender Issues in the Courts and the Legal Profession, 1997.