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Racial Bias and the No-Impeachment Rule
By Mark A. Flores

“The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court’s insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general rule of the no-impeachment rule. It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history.”

Blatant racial animus in the criminal jury room cannot remain protected pursuant to Federal Rule of Evidence 606(b) and other similar state rules of evidence according to a 5–3 decision recently handed down by the U.S. Supreme Court that found such rules violate the Sixth Amendment of the U.S. Constitution. Peña-Rodriguez, 197 L. Ed. 2d at 127. These evidentiary rules, known as “no-impeachment” rules, generally state:

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The Court may not receive a juror’s affidavit of evidence of a juror’s statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury’s attention;
(B) an outside influence was improperly brought to bear on any juror; or
(C) a mistake was made in entering the verdict on the verdict form.

Fed. R. Evid. 606(b).

A Colorado trial court, as affirmed in subsequent Colorado appellate decisions, used a similar “no-impeachment” rule to prevent the use of juror affidavits stating that a juror who served on a panel that convicted a Hispanic man of unlawful sexual contact and harassment showed overt bias based on race or national origin, or both, during deliberations.

According to affidavits, the juror made statements such as “I think he did it because he’s Mexican and Mexican men take whatever they want,” and “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.” Peña-Rodriguez, 197 L. Ed. 2d at 116–17. The suspect juror also took issue with Peña-Rodriguez’s alibi witness’s immigration status and national origin. As stated in the same affidavits, the juror questioned the reliability of
the alibi witness’s testimony because the witness was “an illegal” despite testimony that the alibi witness was a legal resident of the United States. *Id.* at 117.

While the justices agreed that the conduct in *Peña-Rodriguez* exposed the public’s trust in the jury system to great harm, they differed on how to approach the issue because of questions about the protections already in place regarding juror misconduct and the finality of jury verdicts.

**The Exclusion of the Affidavits Violated the Sixth Amendment**

The majority concluded that the refusal to create an exception to the “no-impeachment” rule in the face of outright racial bias violated Peña-Rodriguez’s Sixth Amendment trial right. Justice Anthony Kennedy, who wrote the majority opinion joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, stated “[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons” and recognized the country’s “imperative to purge racial prejudice from the administration of justice” as directed by the ratification of the Civil War amendments. *Id.* at 122. Justice Kennedy noted that racial prejudice in the administration of justice threatens both “the promise of the [Fourteenth] Amendment” and the “integrity of the jury trial” itself, which has required the Supreme Court’s repeated intervention into the judicial system since the end of the Civil War. *Id.*

Multiple examples of previous interventions to stop “state-sponsored racial discrimination” were discussed in the opinion. *Id.* at 122–23. As stated by Justice Kennedy,

> [b]eginning in 1880, the Court interpreted the Fourteenth Amendment to prohibit the exclusion of jurors on the basis of race. The Court has repeatedly struck down laws and practices that systematically exclude racial minorities from juries. To guard against discrimination in jury selection, the Court has ruled that no litigant may exclude a prospective juror on the basis of race. In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias in *voir dire.*

*Id.* at 123–24 (citations omitted).

As the majority put it, “[t]he unmistakable principle underlying these precedents is that discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’” *Id.* at 124 (citation omitted).

Having recognized the Court’s role in “seeking to eliminate racial bias in the jury system,” the majority opinion next determined whether the use of present safeguards like “[v]oir dire at the outset of trial, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial” sufficed “to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.” *Id.* Justice Kennedy began by recognizing that the inherent issues
associated with racially charged voir dire and the stigma of racial bias, which prevents jurors from self-reporting, made these methods “less effective in rooting out racial bias than other kinds of bias.” Id. While “[a]ll forms of improper bias pose challenges to the trial process,” the majority stated, “there is a sound basis to treat racial bias with added precaution.” Id. at 124–25. Thus, “[a] constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.” Id. at 125.

This led to the creation of a test by which a criminal defendant could submit evidence otherwise prohibited by the “no-impeachment” rule to show racial animus tainted the verdict. “Where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.” Id. Justice Kennedy quickly noted, however, that not every comment would justify this exception to the “no-impeachment” rule:

For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict. Whether the threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Id.

The majority recognized that local rules of professional ethics and the local courts would still apply in protecting jurors from harassment. Id. at 125–26. Through this exception mandated by the Sixth Amendment, the majority stated, “[t]he Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.” Id. at 126.

Does the Exception Go Too Far in Removing Confidentiality from Juror Deliberations?
The dissent written by Justice Samuel Alito and joined by Chief Justice John Roberts and Justice Clarence Thomas raised concerns about eroding the confidential nature of juror deliberations, regardless of the majority’s “admirable intention of providing justice to one criminal defendant.” Id. at 132 (Alito, J., dissenting). Justice Alito described this exception to the “no-impeachment” rule as a holding that “rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution.” Id. The dissent recognized “that even a tincture of racial bias can inflict great damage on [the criminal justice system], which is dependent on the
public trust” but questioned the creation of exceptions to rules meant to safeguard “circumstances in which confidentiality is thought to be essential.” *Id.* at 131–32.

The dissent pointed out that “[r]ules barring the admission of juror testimony to impeach a verdict (so-called ‘no-impeachment rules’) have a long history” pre-dating the Constitution. *Id.* at 132 According to Justice Alito, Federal Rule of Evidence 606(b) and similar rules across the country were “the epitome of reasoned democratic rulemaking” that “continue to be ‘viewed as both promoting the finality of verdicts and insulating the jury from outside influences.’” *Id.* at 134-35 (citations omitted). Justice Alito also noted that the Court on two separate occasions refused to create an exception to the no-impeachment rule, despite cases of juror misconduct such as drinking while in the jury box or lying during voir dire because “no-impeachment rules advance crucial interest” and “the right to trial by an impartial jury is adequately protected by mechanisms other than the use of juror testimony regarding jury deliberations.” *Id.* at 135–36

The dissent also argued that the protections already in place sufficiently protected criminal defendants from racial bias tainting the jury pool. *Id.* at 137–40 (discussing protections afforded by “(1) voir dire; (2) observation by the court, counsel, and court personnel; (3) pre-verdict reports by the jurors; and (4) non-juror evidence”).

Further, the dissent questioned the propriety of what it called “[t]he real thrust of the majority opinion . . . that the Constitution is less tolerant of racial bias than other forms of juror misconduct,” a position the dissent found irreconcilable with the “nature of the Sixth Amendment” right to an “impartial jury.” *Id.* at 140. Noting the difficulty in discerning “a dividing line between different types of juror bias or misconduct, whereby one form of partiality would implicate a party’s Sixth Amendment right while another would not,” Justice Alito laid out the following scenario as illustrative of the dissent’s objections to the majority’s decision:

Imagine two cellmates serving lengthy prison terms. Both were convicted for homicides committed in unrelated barroom fights. At the trial of the first prisoner, a juror, during deliberations, expressed animosity toward the defendant because of his race. At the trial of the second prisoner, a juror, during deliberations, expressed animosity toward the defendant because he was wearing the jersey of a hated football team. In both cases, jurors come forward after the trial and reveal what the biased juror said in the jury room. The Court would say to the first prisoner: “You are entitled to introduce the juror’s testimony, because racial bias is damaging to our society.” To the second, the Court would say: “Even if you did not have an impartial jury, you must stay in prison because sports rivalries are not a major societal issue.”

*Id.* at 141.

The dissent likewise rejected any argument that the case implicated any concerns under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 141–42.
Justice Alito concluded his dissent by raising the specter of potential harms likely to occur as a result of the Court’s holding. First, “‘postverdict scrutiny of juror conduct’ will inhibit ‘full and frank discussion in the jury room.’” *Id.* at 142. The dissent quoted the Senate Report on Rule 606(b), which states that “[c]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts.” *Id.*

Second, the dissent argues that the holding “will also prompt losing parties and their friends, supporters, and attorneys to contact and seek to question jurors, and this pestering may erode citizens’ willingness to serve on juries.” *Id.* Finally, the dissent states that “[t]he majority’s approach will also undermine the finality of verdicts.” *Id.* at 144. While Justice Alito called the majority’s decision “well-intentioned,” he questioned “whether our system of trial by jury can endure this attempt to perfect it.” *Id.*

**Conclusion**

While future courts may have to deal with the concerns expressed in the dissent, the Court’s uniform belief that racial bias against a criminal defendant in the jury room can inflict significant harm to the system cannot be ignored. Compare *id.* at 123 (“Permitting racial prejudice in the jury system damages ‘both the fact and the perception’ of the jury’s role as a ‘vital check against the wrongful exercise of power by the state.’”)* with *id.* at 132 (Alito, J., dissenting) (“[T]he court is surely correct that even a tincture of racial bias can inflict great damage on [the criminal justice system,] which is dependent on the public’s trust.”). No doubt the application of this exception to the no-impeachment rule can serve this interest. That said, “the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution” may be even more important to removing racial bias from the jury room, our government, and our country as a whole.

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Do Law Firm Communications about Diversity and Inclusion Efforts Affect Retention of Attorneys in Underrepresented Groups?

By Kathleen Nalty

Higher attrition rates continue to undermine law firms’ diversity efforts. Year after year, attorneys in already underrepresented groups, including female and racially/ethnically diverse lawyers, leave their law firms at higher rates. For example, according to the New York City Bar Association’s 2015 survey of law firm members, attrition rates were 43 percent higher for female attorneys and 62 percent higher for racially/ethnically diverse attorneys than for white male lawyers. The 2015 Vault/MCCA survey also documented higher attrition rates for attorneys in underrepresented groups.

Several national research studies point to the disparate impact of hidden barriers and unconscious bias as the major cause of higher attrition rates among female and racially/ethnically diverse lawyers. But could the way a law firm communicates about its approach to diversity and inclusion also play a role?

A study published in October 2016 by the American Psychological Association indicates that the way a law firm communicates about its approach to diversity may correspond with attrition for attorneys in already underrepresented groups. Researchers found a correlation between the type of diversity-related statements on law firms’ websites and attrition rates among female and racially/ethnically diverse associates in those firms.

Over 150 big law firms’ websites were analyzed for indicia of two different approaches to diversity. The first approach—“value in equality” (VIE)—was evidenced by several phrases focused on ensuring fair and equal access to opportunities in the firm based on one’s accomplishments, irrespective of social group membership. The second approach—“value in difference” (VID)—was found in phrases that focused on the importance of social group differences for conducting business, but also for creating a climate that is open, inclusive, and sensitive to issues of diversity. The study determined that women and racially/ethnically diverse people respond differently to each approach. The researchers theorized that the reaction of a particular group to either value statement depends on their numerical representation in the organization.

To test this premise, they conducted controlled experiments involving white and black professionals. Participants were asked to review the website of an elite consulting firm where they presumably worked. The content represented either the VIE or VID approach. Responses varied, depending on whether study participants thought their social identity group was moderately represented in the organization (40 percent) or whether they were in a small minority (5 percent). No matter what their race, when the study participants believed they were part of the
5 percent group, the VIE approach led to greater performance and persistence on cognitive exercises. But the opposite occurred when study participants thought they were in the 40 percent group; in that case, they had greater performance and persistence on cognitive exercises when presented with the VID approach.

**According to the researchers**, the two approaches can work against each other when representation-based concerns are salient for one group but not for the other:

The key to understanding our results, we believe, is appreciating that the difference in the relative size of these groups influences how concerned they are with “sticking out” as representatives of their group. While the value in difference approach may energize groups, like white women, who are represented in moderate numbers—helping affirm the importance of their different background and perspectives to the firm—the very same message may, ironically, undermine groups who are represented in very small numbers, like black women and men. Even well intentioned efforts to “value differences” may only fuel concerns among black women and men that others will think their position, promotion, or positive evaluation is due to their race, rather than their qualifications or competence. The value in equality approach is more effective for groups in very small numbers as it makes them feel less distinct from others while affirming a commitment to equal and fair access to opportunities.

In most big law firms, female associates are represented in moderate numbers—between 40 and 50 percent—and women account for about one-third of lawyers overall. Thus, gender may not be as salient and women might not have as many representation-based concerns. Racially/ethnically diverse attorneys, on the other hand, are usually found in a very small numbers in law firms. Their race or ethnicity could, therefore, be more salient and representation-based concerns may be more prevalent. Based on their earlier findings regarding representation-based concerns, the researchers theorized that retention of female attorneys would be better in firms with a high VID approach, whereas attorneys of color would have higher retention rates in firms with a high VIE approach. That hypothesis was supported in the analysis of the data. Higher levels of VIE statements on law firm websites was correlated with lower attrition rates for racially/ethnically associates while higher levels of VID statements equated with lower attrition rates for women. Of course, a major limitation of the study is the assumption that language included on a firm’s website actually represents the approach the firm takes or firm leaders’ philosophy about diversity. That may not be the case. What the firm’s marketing department puts on the website may not have any real connection to what firm leaders believe, the firm’s formal approach, or what happens in the firm on a day-to-day basis. Clearly, an attorney’s decision to leave his or her firm has more to do with lived experience than what is posted on the website. While it is unfortunate the researchers had to use an imperfect source as an indicator of law firms’ approach to diversity and inclusion, that doesn’t mean the findings have no value.

But what are law firms supposed to do with this research, which seems to present a “catch-22” situation? In an article published in the *Harvard Business Review*, one of the researchers—Dr. Evan Apfelbaum—stated that “no approach to talking about differences and diversity will work
uniformly well across groups and contexts.” He suggested that law firms consider who is being targeted before deciding whether to focus on a VIE or VID approach. It was further suggested that firms could sequence the approaches, starting with a greater emphasis on VIE, because it represents “a foundational priority—a commitment to fairness and equality.” Then, as a social group’s representation increases (in the case of law firms, the representation of attorneys of color) and that group’s concerns about “standing out” diminish, the firm could build on this foundation by explicitly acknowledging group differences and communicating a VID approach. But that raises the practical problem that law firms are struggling with retention of both female and racially/ethnically diverse lawyers and cannot afford to focus on one group over the other because retention for both groups is critically important. Adopting a sequenced approach is also impractical because it would likely take decades for attorneys of color to become adequately represented in law firms to the point where their race or ethnicity is not salient.

Would emphasizing both approaches at the same time work better to retain female and racially/ethnically diverse lawyers? While the researchers noted that further research is necessary on this point, there was some evidence in the website study that better retention rates fall apart when both approaches are emphasized. In particular, the researchers found a correlation between higher attrition rates for racially/ethnically diverse lawyers in firms with both high VID and high VIE approaches. Dr. Apfelbaum speculated that “saying you care about differences and think they are important—and at the same time, you don’t—could both dilute the broader message and come across as inauthentic.”

Despite its inherent limitations, the website study has value if the findings prompt law firms to give more careful consideration to their current diversity approach and how the approach is communicated. Firms may need to find a better calibrated message that avoids the trap of inauthenticity that the researchers suspect may underlie higher attrition when both approaches are used. To do so will require the law firm’s members to

- have a much deeper understanding of the issues and educate each other about diversity and inclusion in much more sophisticated ways to try to change automatic reactions to the firm’s messaging, including any representation-based concerns;
- develop a more nuanced approach to diversity and inclusion (that seamlessly weaves together both VIE and VID approaches);
- take more concrete actions to advance diversity and inclusion in the firm (as opposed to merely “talking the talk,” which could lead to perceptions of inauthenticity); and
- communicate more effectively about the firm’s approach and include descriptions of specific actions taken to implement that approach (“walking the talk”).

**A More Advanced Understanding of Diversity and Inclusion**

Given this research, it would be beneficial for law firm leaders to engage in deeper discussions about their firm’s existing diversity approach or approaches and gain a greater understanding of the concepts that underlie any given approach. The researchers emphasized this point by stating that “the present findings clearly indicate the need to shift the ways that scholars, professionals,
and laypeople alike conceive of the optimal approach to diversity.” Thus, training is necessary for everyone in the firm to understand the difference between diversity and inclusion, unconscious bias, hidden barriers, how to create an inclusive workplace, as well as the research studies that demonstrate the internal business case for diversity and inclusion.

Law firms vary widely in their levels of sophistication around diversity and, particularly, the new paradigm of inclusion. Some firms simply add the word “inclusion” to existing language on the firm’s website page that lists traditional diversity efforts (e.g., memberships, sponsorships, recruiting efforts, scholarships, affinity groups, celebrations) without making any of the changes an authentic inclusion initiative would require. Other firms are more advanced in understanding diversity and inclusion as separate but intricately related concepts and how inclusion principles need to be embedded throughout the firm’s culture, behavior, and structure to make diversity not merely part of the fabric of the firm but sustainably so.

It is important to note from the website research study that it isn’t the existence of a particular approach in and of itself that necessarily contributes to higher attrition. Rather, it is how the approach is viewed by different groups; depending on the salience of their group, identity dictates whether the firm’s messaging contributes to retention, or attrition, of different groups. So how does a law firm affect the perception of different groups? How can law firms change mind-sets and, consequently, attrition risk? And whose mind-sets must be impacted? Representation-based concerns rest on the premise that stereotypes and bias (conscious and unconscious) are more likely triggered against persons who fall into “minority” categories. To reduce these concerns, firms have to change the mind-sets not only of these persons but also of those in “majority” groups. Comprehensive training on unconscious bias, including follow-up sessions focused on participants’ actions to interrupt their unconscious bias, is essential in changing how the majority views and interacts with those in the minority and, thus, whether those in the minority will feel they are treated equitably.

Recognition of the pervasive role of unconscious bias is growing in the legal industry. In its annual diversity and inclusion report, Bloomberg Law reported that 69 percent of survey respondents identified “implicit bias” as the top challenge in advancing diversity and inclusion in law firms. Nothing will change in the legal industry, however, until lawyers and professional staff in legal organizations have a good grasp of the key concepts underlying implicit bias and actively work to interrupt those biases. “One and done” training on unconscious bias is simply not effective, especially if there is no accountability for changed behaviors. Progress happens only with repeated educational opportunities, accountability, and, most importantly, embedding “bias-busters” in processes and procedures that law firm members are required to follow.

**Hidden Barriers Disproportionately Affect Attorneys in Underrepresented Groups**

Representation-based concerns of those in small minority groups can also be reduced through focused work—at the behavioral, cultural, and structural levels—on the hidden barriers that operate in legal organizations to disproportionately and negatively affect the careers of female and racially/ethnically diverse lawyers. According to the multiple national research studies
identifying these hidden barriers, key opportunities are shared unevenly by people in positions of power and influence, often without the realization that certain groups are disproportionately excluded, causing them to remain on the margins in law firms. Specifically, the research shows that attorneys who are female; lesbian, gay, bisexual, transgender, or queer (LGBTQ); disabled; and racially/ethnically diverse have less access to

1. networking—informal and formal
2. insider information
3. access to decision makers
4. mentors and sponsors
5. meaningful work assignments
6. candid and frequent feedback
7. social integration
8. training and development
9. client contact
10. promotions

The research studies all point to bias as the major cause of these hidden barriers. Certainly, conscious, overt discrimination still exists and contributes to this dynamic. But it turns out that a specific kind of unconscious and, therefore, unintentional bias plays the biggest role. Affinity bias, which is a bias for others who are more like you, causes people to develop deeper work relationships with those who have similar identities, interests, and backgrounds. When senior attorneys, the vast majority of whom are white and male, gravitate toward, and share opportunities with, others who are like themselves, they unwittingly leave out female, LGBTQ, disabled, and racially/ethnically diverse attorneys.

Law firms that engage in this deeper level work—by training on unconscious bias and embedding bias-busting protocols within firm processes to eliminate the hidden barriers—would be “walking the talk” on a VIE approach in a very authentic way. This would presumably go a long way toward assuring lawyers of color (as well as other groups in small minorities like LGBTQ and disabled attorneys) that the firm is serious about equality, which should help with their retention. This approach should also appeal to women lawyers, despite their better representation, because the research studies show that they also run into the hidden barriers at disproportionately higher rates.

**The Business Case for Diversity and Inclusion**

It is also important for all lawyers to learn more about how social differences (the VID approach) are actually critical to the success of an organization. Research shows that diverse teams consistently outperform homogeneous groups, resulting in greater innovation, productivity, better decision making, and organizational performance. When presented with these findings, most people assume that the underlying reason is that diverse people bring new and different information in their interactions. Certainly, that happens in group dynamics, but the research points to a different cause: When you introduce a socially different newcomer into a
homogeneous group, it causes existing group members to work harder cognitively. If female and racially/ethnically diverse lawyers are viewed as bringing value—not just in providing new or different perspectives or information—but also in the fact that they force colleagues of different races/ethnicities and genders to think harder and smarter, that could potentially make all groups more receptive to the VID approach.

This research is one reason corporate law departments are increasingly insisting on diversity among outside counsel and spending more on diverse legal teams. More than half (55 percent) of the corporate counsel participating in Bloomberg Law’s annual survey indicated that diversity and inclusion are important factors in decisions to hire outside counsel. A significant number (43 percent) of law firm attorneys who participated in the study indicated they know that diversity and inclusion in their legal practice is important to clients and can have an impact on whether their firm is retained. In addition, a global survey of over 1,700 senior in-house counsel found that corporate counsel spend 25 percent more on outside counsel teams they rated very diverse compared with teams that are not at all diverse. The very diverse legal teams also received higher performance ratings and were more likely to be recommended to peers than non-diverse teams. Although the business case for diversity and inclusion is compelling, communication about clients’ wants and needs on these issues is inadequate. Nearly half of the law firm attorneys participating in the Bloomberg study pointed to a lack of awareness of the business case for diversity as a significant challenge to advancing diversity and inclusion in law firms. More extensive training on both the internal and external business case is, therefore, necessary. If diverse and non-diverse lawyers understood the intrinsic value of diversity of all kinds—both internally, for better decision making and organizational performance, and externally, to meet client needs and wants—the VID approach would be better received and would thus promote retention.

Changing the Mind- Sets of White Male Attorneys
White male attorneys are more often among the most influential decision makers in law firms. Hence, these education efforts are not just necessary to change the perspectives of female and racially/ethnically diverse lawyers to reduce representation-based concerns and attrition, they are also critical for white male attorneys to help them (1) recognize and interrupt their unconscious biases, (2) identify and remove hidden barriers (which also affect them) that disproportionately affect women and lawyers of color, and (3) recognize and genuinely value the fact that differences of all kinds improve the quality and performance of the firm’s legal teams.

But there is another reason for educating white male attorneys more extensively about diversity and inclusion. In a study reported in January 2016, researchers found evidence that the presence of an organizational diversity statement “makes white men believe that women and minorities are being treated fairly—whether that’s true or not—[and] makes them more likely to believe that they themselves are being treated unfairly.” In this study, white men participated in a hiring simulation for an entry-level job at a fictional technology firm. Half of the “applicants” were asked to review recruitment materials that included a brief statement about the company’s pro-diversity values. The other half received materials with no mention of diversity. All of the study...
subjects then participated in a mock job interview that was videotaped. Their cardiovascular responses were measured as well. Afterward, the men exposed to the pro-diversity statement reported that they “expected more unfair treatment and discrimination” against whites by the company. They also performed more poorly during the job interview, as judged by independent raters. Further, their cardiovascular responses indicated they were more stressed. The researchers noted that the “diversity messages led to these effects regardless of these men’s political ideology, attitudes toward minority groups, beliefs about the prevalence of discrimination against whites, or beliefs about the fairness of the world.” This is significant because negative responses to diversity (even on an unconscious basis, as measured by the stress test) existed “even among those who endorse the tenets of diversity and inclusion.”

This study could explain, in part, why the legal industry struggles with its traditional diversity efforts. According to National Association for Law Placement data, 74 percent of partners in U.S. law firms are white men. The involvement and active engagement of white men in diversity and inclusion efforts is absolutely essential to the success of a diversity and inclusion initiative. But if the mere presence of a diversity statement (let alone active efforts) feels threatening (at least on an unconscious level) to white men, including champions and allies for the cause, that could undermine the success of a diversity and inclusion initiative.

Clearly, people need to know about this research and assumptions need to be confronted. This process should include documentation of the hidden barriers at work in the firm that disproportionately disadvantage attorneys in already underrepresented groups. But the legal industry also needs to do a better job of changing the conversation around diversity generally. White men’s responses should be different if they recognize the value of diversity without unconscious bias.

**An Expanded Concept of Diversity**

Law firms traditionally have viewed diversity from a narrow, quantitative perspective—how many people from historically underrepresented groups work in the organization. Diversity is viewed more broadly today. Everyone—including straight, white men—brings different perspectives and backgrounds to group interactions that need to be fully incorporated into the fabric of the organization. A kaleidoscope of differences fosters diversity of thought (cognitive diversity), which leads to new insights, better decisions, and greater business success.

Visible aspects of diversity are just the tip of the iceberg compared with the myriad of human differences that make us unique. Thus, in terms of social identities, diversity encompasses the wide variety of human differences, including the more visible (e.g., race, age, gender, gender expression, ethnicity, disabilities, appearance, health) as well as those that are less apparent (e.g., religion, marital status, socioeconomic status, sexual orientation, lifestyle, education, parental status, geographic background, language ability, veteran status, occupational status).

Diversity efforts in the legal profession have primarily focused on female, racially/ethnically diverse, LGBTQ, and disabled lawyers because these groups have been historically excluded and...
remain underrepresented. Yet, diversity is much more than that and includes social identities possessed by white men. If a law firm emphasizes that its diversity and inclusion efforts are aimed at ensuring all its attorneys, including white men, receive the opportunities and support they need to succeed at the highest possible level, this could change how white men react to the firm’s diversity and inclusion efforts.

If this is not done skillfully, however, it could backfire, causing skepticism about the authenticity of the firm’s diversity and inclusion efforts among racially/ethnically diverse and female lawyers. The website study’s authors proposed that the authenticity of a law firm’s diversity approach might be a “potential mitigating factor” with respect to attrition. They warned that “stigmatized groups may be especially skeptical of the value in equality approach.” This is understandable given the body of research documenting how hidden barriers are thriving in law firms. Yet, the research documenting hidden barriers shows that white men can be affected as well. For example, the Catalyst research revealed hidden barriers affected groups differently:

<table>
<thead>
<tr>
<th>Category</th>
<th>Women of Color</th>
<th>White Women</th>
<th>Men of Color</th>
<th>White Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack influential mentors or sponsors</td>
<td>33.5%</td>
<td>21.7%</td>
<td>37.5%</td>
<td>20.2%</td>
</tr>
<tr>
<td>Lack informal networking with</td>
<td>25.8%</td>
<td>18.7%</td>
<td>33.3%</td>
<td>19.3%</td>
</tr>
<tr>
<td>influential colleagues</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lack candid and constructive feedback</td>
<td>25.7%</td>
<td>16.9%</td>
<td>20.8%</td>
<td>14.4%</td>
</tr>
<tr>
<td>Lack professional development</td>
<td>23.8%</td>
<td>13.0%</td>
<td>21.1%</td>
<td>11.5%</td>
</tr>
<tr>
<td>opportunities</td>
<td></td>
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</tbody>
</table>

Because equity and fairness are foundational in any diversity and inclusion initiative, it is critical to acknowledge that white men can be affected by hidden barriers. Yet, at the same time, it is essential to emphasize that female and racially/ethnically diverse lawyers are at greater risk and affected at higher rates. Messaging effectively on these points is challenging but necessary. But actions always speak louder than words. Authenticity requires backing up words with meaningful and effective actions. That’s where inclusiveness plays such a critical role.

**Adding Inclusion to Traditional Diversity Efforts**

Whether people are treated equitably and how differences are actually incorporated (and then beneficially leveraged) depends on the degree to which the structure, culture, and behaviors in the organization are inclusive. It is inclusiveness that delivers on the promise represented by diverse viewpoints. Without inclusiveness, diversity (of all kinds) cannot be leveraged for better organizational performance and business success.
An inclusive workplace includes elements of both the VIE and VID approach. The VIE approach is a foundational “must-have” given the fact that attrition gaps in the legal industry are caused by hidden barriers—unequal access to key opportunities. No law firm can say it is inclusive if the hidden barriers have not been addressed. But creating an inclusive environment also requires valuing and integrating differences—the VID approach.

Organizational inclusion exists when all people in the organization feel

- equally advantaged (because hidden barriers have been removed);
- appreciated (because all differences are recognized and valued);
- empowered to be fully authentic by the firm and with one another (so they don’t have to leave their identities at the door to be successful);
- fully informed and knowledgeable about what they need to do to attain higher levels of personal and organizational success (a by-product of more transparency);
- included in all pertinent processes and decisions, as well as the social fabric of the organization; and
- engaged and motivated to bring their best work to bear on the firm’s success.

This definition includes elements of both the VIE and VID approaches. A comprehensive Diversity + Inclusion competencies framework describes behaviors that support (“skilled” and “highly skilled”) or detract (“unskilled”) from an inclusive environment. With respect to the first framework component—which I characterize as “equally advantaged”—the differences in competencies are described as follows:

**Equally Advantageous (Fairness)**

<table>
<thead>
<tr>
<th>Unskilled</th>
<th>Skilled</th>
<th>Highly Skilled</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Does not know how hidden barriers operate</td>
<td>• Understands how hidden barriers operate, including the role of affinity bias</td>
<td>• Proactively shares opportunities with and develops colleagues to enhance their knowledge and skills so they can do their best work for the organization</td>
</tr>
<tr>
<td>• Does not share critical, career-enhancing opportunities with colleagues on an equal basis</td>
<td>• Analyzes where he or she may consciously or unconsciously contribute to hidden barriers</td>
<td></td>
</tr>
<tr>
<td>• Exhibits affinity bias toward personal favorites (consciously or unconsciously)</td>
<td>• Eliminates hidden barriers and shares critical, career-enhancing opportunities on an equal basis</td>
<td></td>
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</tbody>
</table>

The VID components of an inclusive workplace come into play with the second and third elements of an inclusive workplace—recognition and appreciation of differences as well as
empowerment around authenticity. The specific competencies for those components are as follows:

**Recognition and Appreciation of Differences**

<table>
<thead>
<tr>
<th>Unskilled</th>
<th>Skilled</th>
<th>Highly Skilled</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Acts as if different social identities are irrelevant and insists he or she is “color” or “gender” blind</td>
<td>• Appreciates/actively seeks out differences and incorporates them into his or her work (decisions, processes, procedures, culture, activities)</td>
<td>• Is highly curious and reaches out to others to learn about their perspectives, values, cultural norms, and preferences</td>
</tr>
<tr>
<td>• Unable to articulate why differences of all kinds are critically important to business success and why they must be incorporated and integrated into everything</td>
<td>• Develops meaningful and productive work relationships with colleagues from all backgrounds</td>
<td>• Demonstrates a high degree of comfort with differences of all kinds; is fluent in a wide variety of human differences</td>
</tr>
<tr>
<td>• Perceives the world through only one lens (his or her own)</td>
<td>• Can articulate why difference is a valuable asset that drives organizational innovation and performance and how to better include/leverage differences of all kinds</td>
<td>• Perceives behaviors through multiple lenses; understands how different people think, what they value, their cultural norms, and what motivates them</td>
</tr>
</tbody>
</table>

**Empowered to Be Fully Authentic**

<table>
<thead>
<tr>
<th>Unskilled</th>
<th>Skilled</th>
<th>Highly Skilled</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Engages in behaviors that denigrate others because of their social identities (micro-aggressions), which forces people to hide/cover their identities</td>
<td>• Engages in behaviors (micro-affirmations) that value colleagues</td>
<td>• Acknowledges own vulnerabilities and mistakes to build greater respect, trust, and authenticity with colleagues</td>
</tr>
<tr>
<td></td>
<td>• Makes colleagues feel that they belong and can be their authentic selves at work</td>
<td>• Displays high levels of empathy and</td>
</tr>
</tbody>
</table>
Part of the problem with respect to law firms’ struggle with diversity and inclusion is that there is so little understanding of the new paradigm of inclusion and how to incorporate it. Currently, most lawyers do not know what they need to do, specifically, to foster an inclusive environment. If lawyers view inclusiveness as a skill to be developed and are educated about what behaviors they can implement to build their skill sets, that would spread responsibility and efforts for inclusion throughout the firm as opposed to assuming a few people will handle diversity and inclusion for the firm.

A law firm that is really serious about diversity and inclusion would embed some of these individual behavioral competencies into job duties and responsibilities and hold everyone accountable for becoming “skilled” and “highly skilled” at inclusion. This requires comprehensive training on diversity and inclusion-related topics, including the hidden barriers, unconscious bias (with follow-up sessions), and the business case for diversity and inclusion.

**Changing Structures to Advance Diversity and Inclusiveness**

Other concrete actions necessary to build a fully inclusive firm where diversity thrives center on eliminating hidden barriers, including changes embedded in structures and processes to help people interrupt their biases.

There is a new movement to institutionalize diversity and inclusion through what are called “inclusion nudges.” The term “nudge” comes from the field of behavioral economics. In 2008, Richard Thaler and Cass Sunstein published *Nudge: Improving Decisions about Health, Wealth, and Happiness*, which described how small changes in processes and procedures can nudge people to make better decisions. For example, research shows that schoolchildren will take and eat healthier food if it is placed more strategically in the cafeteria lunch line. Tinna Nielsen and Lisa Kepinski first coined the term “inclusion nudge.” They are leading the way in the diversity and inclusion field and encouraging advocates to design nudges for all kinds of systems and processes in organizations that help people interrupt their unconscious biases and foster an inclusive workplace where diversity can thrive.

There are a myriad of nudges that can be made in the recruiting and hiring process—for example, changes to the firm’s website:
<table>
<thead>
<tr>
<th>Recruiting &amp; Hiring Processes</th>
<th></th>
</tr>
</thead>
</table>
| **Analyze Your Organization’s Website** | Take a fresh look at your organization’s website and how you are attracting or potentially repelling candidates from different social backgrounds.  
  - What kinds of pictures are featured on the site? Research shows that including equal numbers of pictures of men and women increases the attractiveness of an organization to potential female candidates.  
  - What policies and values statements are included?  
  - How are diversity and inclusion messaged? Including comments from people in underrepresented groups in your organization about their experiences in their own words could help attract a wider pool of applicants. Also, include video or written messages from leaders about the value of diversity and inclusion and specifics about how it is being advanced in the organization.  
  - In describing the organization’s diversity and inclusion initiative, are specific actions included that advance the initiative (beyond traditional diversity efforts, which haven’t been working)?  
  - Are diversity and inclusion woven throughout the website or are they addressed on one separate page?  
  - Is the word “qualified” used just on the diversity page of the website?  
  - Get some feedback from a diverse group of disinterested parties about what your website communicates to them. Use the feedback to make improvements. |
| **Evaluate and Rewrite Job Announcements** | Evaluate and rewrite job announcements to be more inclusive.  
  - Research demonstrates that women often don’t apply for jobs until they meet all criteria, whereas men apply when they meet many, but not all, of the criteria. Do your job announcements include criteria that aren’t really essential and may be limiting applications by women?  
  - Also, research shows that job announcements including more gendered terms can be subtly off-putting (e.g., “high-powered” or “relationship-oriented”). Do you really need those kinds of phrases? Can you reword the job announcement to be more inclusive of both men and women? Some companies are using web-based applications, like Textio, to flag words and phrases that are clichéd, gender-based, or otherwise off-putting to certain groups.  
  - Further, does the job description include phrases that go to personal qualities or personality type that might keep an otherwise qualified candidate from applying (such as “outgoing”)?  
  - Are there additional phrases or statements that could be included that would encourage applications from a wide variety of people (like |
your organization’s commitment and specific efforts with respect to diversity and inclusion)? Research also shows that organizations that emphasize employee growth and development are more appealing to women than ones that boast about hiring people who are already highly accomplished (rock stars).

- If your organization is working to advance diversity and inclusion, do you include statements about D+I competencies and cultural competence within your job criteria and announcement? After all, to foster an inclusive workplace where diversity thrives, everyone must play an active role so that would be a useful skillset to require of new hires.

These are examples of just a few nudges within a single process. Institutionalizing diversity and inclusion would require nudging all processes and procedures so that inclusion becomes a natural part of what people do every day.

**Conclusion**

As law firms work to advance diversity and inclusion efforts, it is critical for law firm leaders to examine their firms’ underlying philosophy about the need for and value of these efforts. Law firms’ public diversity statements may or may not fully represent how leaders are communicating about diversity internally. They may also have no connection to what is actually happening on a daily basis in the firm. But the website research study points to the need for law firm leaders to be more intentional about how they approach diversity and inclusion and communicate about these concepts. It would be a mistake, however, to fall into the trap of thinking in the binary way the website study seems to encourage—either a VIE or VID approach. Successful and authentic diversity and inclusion efforts involve a more advanced philosophy that somewhat contradicts the summation of the research study; it just isn’t as simple as taking the VIE or VID approach.

Clearly, though, firms that are not expending the effort and sophistication required to achieve meaningful diversity and inclusion risk greater attrition among female and racially/ethnically diverse lawyers, which hurts organizational performance and the bottom line. Law firms that fall behind on diversity and inclusion also risk losing not only current clients but also potential new clients that are increasingly insisting on diverse teams of lawyers (log-in required). Diversity and inclusion are not just the right thing to do, they are a business imperative. Smart law firm leaders recognize this fact and are doubling efforts to incorporate meaningful and sustainable diversity and inclusion efforts into the fabric of the firm.

Kathleen Nalty is the founder of Kathleen Nalty Consulting, LLC, in Denver, Colorado.
HP General Counsel Tells Law Firms to Meet Diversity Mandate or Forfeit Up to 10 Percent of Fees

By Debra Cassens Weiss

The general counsel of HP has informed its outside law firms that the company may withhold up to 10 percent of invoiced fees for failure to meet its diversity standards.

Kim Rivera informed law firms of her “diversity holdback” mandate in a February 8 [letter](#) (PDF), Corporate Counsel (sub. req.) reports.

The mandate won’t be enforced for the first year during the company’s engagement with a law firm. “So, even for those firms that do not immediately meet minimal diversity staffing, there will be ample time to work toward achieving the metric,” Rivera’s letter says. HP is planning a pilot program to test the new initiative.

The mandate will apply to all U.S.-based law firms with 10 or more lawyers. Specifically, it requires firms to “field (i) at least one diverse firm relationship partner, regularly engaged with HP on billing and staffing issues; or (ii) at least one woman and one racially/ethnically diverse attorney, each performing or managing at least 10% of the billable hours worked on HP matters.”

HP says its definition of a diverse lawyer “is limited to race/ethnicity, gender, LGBT status, and disability status.” A lawyer who is both a woman and who is racially/ethnically diverse and performs or manages at least 10 percent of the billable hours worked on HP matters satisfies the minimal diversity staffing requirement.

The idea of a fee holdback appears new, according to lawyers who spoke with Corporate Counsel.

“Some general counsel have talked about favoring law firms that are more successful in diversity and inclusion and, in extreme cases, deciding to work less with law firms that were less aggressive [on diversity],” said Gary Sasso, president and chief executive of Carlton Fields Jorden Burt and vice-chairman of talent development for the Leadership Council on Legal Diversity. “I haven’t seen anything like this.”

Debra Cassens Weiss is a senior writer with the ABA Journal.

This article appeared in a similar form in the ABA Journal on February 15, 2017.
NALP Report on Law Firm Diversity Highlights "Incredibly Slow Pace of Change"
By Debra Cassens Weiss

The percentage of female and black associates increased slightly in law firms in 2016, though the representation is still below 2009 levels, according to a new report by the National Association for Law Placement.

The report also found increases in the percentage of female and black partners, as well as increases in Asians and Hispanic lawyers at the partner and associate levels.

NALP executive director James Leipold said in a press release that the statistics help highlight "the overall progress, or lack thereof, in achieving greater diversity among the lawyers working in U.S. law firms."

"While it is encouraging to see small gains in most areas this year," Leipold said, "the incredibly slow pace of change continues to be discouraging."

Leipold said the national figures mask significant differences by law firm size and geography. The largest law firms have achieved much greater diversity than smaller law firms, he said.

The report, which is based on information in a NALP directory of legal employers, found that:

- The percentage of women associates in 2016 was 45 percent, compared to 44.68 percent in 2015 and 45.66 percent in 2009. The percentage of women partners was 22.13 percent in 2016, up from 21.46 percent in 2015 and 19.21 percent in 2009.
- The percentage of black associates in 2016 was 4.11 percent, compared to 3.95 percent in 2015 and 4.66 percent in 2009. The percentage of black partners was 1.81 percent in 2016, up from 1.77 percent in 2015 and 1.71 percent in 2009.
- The percentage of Hispanic associates was 4.42 percent in 2016, up from 4.28 percent in 2015 and 3.89 percent in 2009. The percentage of Hispanic partners was 2.31 percent in 2016, up from 2.19 percent in 2015 and 1.65 percent in 1009.
- The percentage of Asian associates was 11.25 percent in 2016, up from 10.93 percent in 2015 and 9.28 percent in 2009. The percentage of Asian partners was 3.13 percent in 2016, up from 2.89 percent in 2015 and 2.20 percent in 2009.

The report also found that representation of women and minorities in the summer associate ranks compares much more favorably to the population of recent law school graduates. But diversity levels decline from summer associates classes, to associates, to partners.
The dropoff, Leipold said, “underscores that retention and promotion remain the primary challenges that law firms face with respect to diversity.”

Debra Cassens Weiss is a senior writer with the ABA Journal.

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