Undercover Ethics
Working with Private Investigators

BY JENNIFER B. BECHET

Private investigators are often a valuable resource for attorneys seeking to obtain information relevant to litigation. With the benefits, however, comes ethical responsibility for the investigators’ methods and means. In the “undercover customer” scenario, for example, various ethical rules are implicated—including prohibitions on communication with represented persons, misrepresentation, fraud, and deceit.

Communication by an Attorney

The restrictions the ethical rules place on attorneys concerning communications with represented persons and misrepresentation, fraud, and deceit are fairly clear. Both the Model Rules of Professional Conduct (Model Rules) and the Model Code of Professional Responsibility (Model Code) restrict attorney communication with certain represented people. Rule 4.2 of the Model Rules provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Although nearly identical to Rule 4.2, DR 7-104(a)(1) of the Model Code limits its restriction of attorney communication to that with a represented “party,” as distinguished from the represented “person” of Rule 4.2.

The ethical rules also specifically prevent an attorney from giving a false impression to an unrepresented person about the attorney’s role and the purpose of the communication. Model Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Similarly, DR 7-104(A)(2) of the Model Code provides:

During the course of his representation of a client a lawyer shall not . . . [g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with interests of his client.

Whether or not the third person is “represented,” the Model Rules prohibit an attorney from making misrepresentations in general. Rule 4.1(a) broadly states: “In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.”

Similarly, Model Rule 8.4(c) provides: “It is professional misconduct for a lawyer to . . . engage in professional conduct involving dishonesty, fraud, deceit.”

Walk the Talk:
Creating an Inclusive Legal Workplace

BY JANE DIRENZO PIGOTT

Here are the facts. The legal profession has made progress toward inclusion, but more progress is necessary; continued progress requires leadership. Diversity at all levels is still a goal for the legal profession, not a reality. This two-part article presents a pragmatic approach to diversity in the legal profession, and, hopefully, empowers the audience with tools to lead their respective workplaces towards inclusion.

Part I provides an assessment of where we are now and demonstrates the business case for creating and maintaining an inclusive workplace. Part II, to be published in the next issue, will provide best practices for legal profession employers.

The Baseline

Any strategic business effort requires metrics. Creating an inclusive legal workplace requires the same. In order to measure progress and the ability of specific action items to achieve the intended goals and objectives, a baseline must be established.

According to national statistics, progress has been made, with progress at the lowest levels of the legal profession being the most significant. Leadership within the legal profession, however, remains disproportionately white and male.

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Supreme Irony?

By Manotti L. Jenkins, Edward B. Adams Jr., and Burnadette Norris-Weeks

Co-Chairs of the Minority Trial Lawyer Committee

With the recent re-election of President George W. Bush to a second term, a significant issue that again surfaces is whether President Bush will nominate one or more justices to the U.S. Supreme Court during his final four-year term. It is widely expected that he will. The recent discovery that Chief Justice William Rehnquist is suffering from cancer points toward a nomination. So does the fact that several justices are near what is generally thought of as retirement age, including the chief justice and Justices John Paul Stevens and Sandra Day O’Connor.

In that regard, we as minority trial lawyers cannot help but think about whether President Bush will follow his father’s lead and nominate another minority justice and, if so, what the individual’s judicial temperament and ideological bent will be. It is reasonable to assume that whomever President Bush nominates will be ideologically to the right of the political spectrum, so that really is not the issue. The real issue is just how far to the right he or she may be. According to published reports, there appears to be a handful of minority jurists under consideration by the president for potential Supreme Court nomination, but one particular reported prospect stands out, regardless of how we may feel about her views. As minority trial lawyers, we should be aware of this jurist.

Janice Rogers Brown is a 55-year-old African-American woman and a California Supreme Court justice. She has been described by some, believe it or not, as sitting “squarely to the right” of Justice Clarence Thomas. President Bush nominated Justice Brown to the U.S. Court of Appeals for the District of Columbia Circuit last year, but Senate Democrats, through filibuster, blocked her confirmation vote last November. Rumor has it that President Bush is undaunted about that failed nomination, however, and may be considering nominating Justice Brown yet again, this time to the High Court.

Justice Brown’s nomination to the D.C. Court of Appeals was vehemently opposed by a coalition of civil rights and liberal groups. For example, the NAACP and People for the American Way jointly released a scathing analysis of her record entitled “Loose Cannon.” Furthermore, leaders of the two organizations publicly attacked her record. “Janice Rogers Brown has a record of hostility to fundamental civil and constitutional rights principles, and she is committed to using her power as a judge to twist the law in ways that undermine those principles,” said Hilary Shelton, director of the NAACP’s Washington Bureau. Ralph Neas, president of People for the American Way, added, “Janice Rogers Brown is the far right’s dream judge. She embodies Clarence Thomas’s ideological extremism and Antonin Scalia’s abrasiveness and right-wing activism.”

Similarly, all 39 members of the Congressional Black Caucus opposed the previous nomination of Justice Brown. Comments from three of the organization’s members were particularly revealing. CBC Chairman Rep. Elijah Cummings (D-Maryland), in a letter to the Senate Judiciary Committee, described her as a “notoriously conservative lawyer and jurist” who will not make sound judicial judgments that rely “on a fair and precedent-based interpretation of the law and the Constitution.” Rep. Diane Watson (D-California) commented, “This Bush nominee has such an atrocious civil rights record Continued on page 4
The Future Is Now: CD-ROM Briefs Persuade at Court

BY RAYMOND B. KIM

I nnovative computer technologies that have left their mark on almost all other aspects of litigation also are helping shape the future of appellate practice. Increasingly, appellate courts throughout the country are accepting CD-ROM briefs as an adjunct to traditional paper briefs filed by parties to an appeal. This growing acceptance of CD-ROM briefs by the courts is likely to continue as further advances in technology make CD-ROM briefs even easier and more economical to prepare, and as their benefits become more widely known and appreciated. As a result, appellate counsel should seriously consider whether to prepare a CD-ROM brief to supplement paper briefs in appropriate cases.

CD-ROM briefs (also called “electronic briefs,” “hypertext briefs,” or “hyperlinked briefs”) are simply electronic versions of paper briefs, stored on a compact disc. In addition to the brief itself, the CD-ROM also contains the text of authorities cited in the brief and the record on appeal. These authorities and records are hyperlinked to citations contained in the briefs. Thus, a simple click of the mouse allows readers to jump from a brief citation to the actual legal authority or relevant portion of the record, creating quick and easy access to reference material.

CD-ROM briefs first gained national attention in 1997 when the U.S. Supreme Court accepted submission of a CD-ROM amicus curiae brief in Reno v. ACLU. In Reno, the Supreme Court found that certain provisions of the Communications Decency Act of 1996 (CDA) criminalizing “indecent” and “patently offensive” communications on the Internet unconstitutionally abridged free speech protections afforded under the First Amendment. The CD-ROM brief filed on behalf of a group of Internet content providers made creative use of electronic media technology by including images of works by Michelangelo and other artists that would violate the CDA. The CD-ROM brief also provided links to actual materials available online, such as video and music clips, that would be prohibited under the Act.

Later that year, the U.S. Court of Appeals for the Federal Circuit issued an opinion discussing CD-ROM briefs. In Yukiyo v. Watanabe, the Federal Circuit granted a motion to strike an electronic brief that had been unilaterally filed by the plaintiff-appellant without leave of court, because they thought such a filing would prejudice the opposing party. The court noted however that its ruling was not meant to discourage future efforts to file CD-ROM briefs and enunciated general guidelines for such filings. First, the Yukiyo court stated, a party wishing to file a CD-ROM brief as a counterpart to the official paper brief must seek consent of the other parties prior to submitting the CD-ROM brief with the court. Second, such consent would be a substantial factor favoring acceptance of the brief, and prejudice to another party could be an important factor favoring rejection. Finally, a party seeking to file a CD-ROM brief must seek leave of court and provide information about the computer equipment necessary to view the CD-ROM brief to ensure compatibility. The court directed the moving party to file 12 CD-ROM brief copies, along with the motion for leave.

Among the federal courts of appeals, the First, Seventh, Eleventh, and Federal Circuits have adopted local rules governing the submission of CD-ROM briefs, and the Second and Ninth Circuits have issued orders permitting CD-ROM briefs to be filed. Among state appellate courts, the New York Court of Appeals and Washington Supreme Court and Court of Appeals have adopted rules permitting CD-ROM briefs. Appellate courts in California, Delaware, Florida, Texas, and Wisconsin have allowed parties to file CD-ROM briefs (although those courts do not yet have formal rules governing such briefs).

As noted by the Yukiyo court, one of the principle benefits that CD-ROM briefs provide is the ability to “allow the reader to view the text of the brief and hypertext almost simultaneously, obviating the need for the reader to refer to the paper brief and appendix or to engage in viewing videotapes through the usual means.” Although such convenient access to the relevant authorities and records is extremely helpful in all appeals, CD-ROM briefs may be especially effective when an appeal requires the court to review lengthy trial proceedings or voluminous records.

Moreover, as shown in Reno, cases involving new technologies or visual and/or audio components such as charts, graphs, videotapes, and recordings also lend themselves particularly well to the user-friendly integration of materials that CD-ROM briefs offers. Among other capabilities, CD-ROM briefs can provide links to specific portions of audio or video testimony. Thus, instead of merely reading the cold print of testimony, the reviewing court can use the CD-ROM brief to see and hear for itself the full flavor of such testimony. CD-ROM briefs also may allow for more effective and convenient presentation of diagrams, charts, or photographs that cannot be readily formatted in the dimensions of a paper brief.

In addition to assisting the court, CD-ROM briefs and records also can help appellate counsel save time and effort preparing their briefs. Once the appellate record is stored electronically in a searchable format prior to briefing, electronic search tools make locating necessary record citations far less cumbersome than thumbing through volumes of paper transcripts and exhibits. As a consequence, countless hours of searching for the damning letter written by the defendant that you know you saw but can’t remember where, or that devastating admission made at some point during cross-examination at trial (or was it during a deposition?), can be avoided via a simple and easy-to-use electronic search.

Furthermore, the costs of preparing CD-ROM briefs continue to decrease as technological advances make CD-ROM briefs easier to prepare. The vast majority of CD-ROM briefs are prepared by professional CD-ROM brief companies. The fees charged by these companies cover the costs of the work needed to dig-
Although oral argument remains an important aspect of appellate practice, appellate experts note that written briefs are usually the focal point of appeals and are the lawyer's best opportunity to persuade the appellate court that it should decide the case in his or her favor. Creative use of electronic briefs is one more way to maximize that opportunity and ensure that your arguments are presented in a clear and compelling manner.

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Notes
1. 520 U.S. 1102 (1997).
2. 111 F.3d 883 (Fed. Cir. 1997).
3. See 111 F.3d at 885.

Chairs' Column

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that Clarence Thomas would look like Thurgood Marshall in comparison.” Rep. Maxine Waters (D-California) said, “She’s a poster woman for the far right wing. Judge Brown’s legal record and her views on civil rights and constitutional issues place her so far outside the legal mainstream.”

NAACP Chairman Julian Bond also criticized the president for the nomination: “The president’s penchant for choosing extremist minority judicial candidates is an exercise in cynicism of the worst kind. Clothing extreme views in color is designed to make them more difficult to oppose, but judicial selections should be based in principle, not pigment.”

Justice Brown was born into a poor sharecropping family in segregated Alabama. She made her way through law school as a single mother. After serving in former California Governor Pete Wilson’s administration, Governor Wilson named her to the California Third District Court of Appeal in 1994 and, later, to the California Supreme Court in 1996. In other words, she is cut from a similar cloth as Justice Thomas.

If President Bush does indeed nominate Justice Brown to the High Court, it is likely that Senate Democrats would employ tactics similar to those they used during her consideration for the D.C. Court of Appeals.

The future of the minority trial lawyer is likely to expand rapidly, and there are already a number of companies providing such services.
Careers in Intellectual Property Law

BY J. MICHAEL MARTINEZ DE ANDINO

A college education has become a prerequisite to nearly every career, even those that historically could be pursued without one. Although college often has been considered a way to broaden intellectual horizons, most college graduates still follow conventional routes of employment, seeking careers “traditionally” associated with their major without considering alternative possibilities. By considering alternative career paths, individuals can enter nontraditional careers, creating their own niche market by bringing skills that most others in that field do not have. One such alternative career path is intellectual property (IP) law.

IP law generally refers to the law that deals with intangible assets such as patents, trademarks, copyrights (including software), and trade secrets. More and more companies are beginning to appreciate the value of intangible assets in a digitized world. Consequently, IP law is growing at a rapid pace.

IP attorneys may be responsible for many different matters related to intangible assets. Tasks may include procuring rights through federal registration of patents, trademarks, and copyrights; asserting rights against infringers; and licensing technology to others. One important responsibility of the IP attorney is to help eliminate the chicken/egg problem faced by many would-be entrepreneurs: a desire to keep an idea or invention secret so that no one steals it versus a desire to tell as many people as possible so the idea makes the inventor lots of money. The IP attorney often assists in drafting agreements so the inventor can share new technology without fear of its being stolen. This way, business decisions can be made about investing in new developments and ideas, and the inventor’s ownership rights can be protected.

Many IP issues cannot be thoroughly appreciated or resolved without an attorney who understands the underlying technology, often to a very high degree. In fact, the U.S. Patent and Trademark Office (USPTO), which oversees the examination and issuance of patents, has its own set of requirements for practicing before it. The USPTO requires individuals to pass an exam, the patent bar, before taking part in the patent process. This is an all-day, multiple-choice exam. The qualifications to sit for the patent bar are such that, generally, only persons with engineering or other technical degrees even are eligible to take the exam. A technical undergraduate or graduate degree usually is needed for the USPTO to qualify to take the patent bar, but an exception exists for candidates with a non-technical four-year degree who have worked in certain technical fields.

Interestingly, having a law degree is not a requirement to take the patent bar. Those who pass the patent bar but do not have a law degree are called “patent agents.” A patent agent can assist with the preparation, filing, and prosecution of patent applications. However, a patent agent cannot provide legal advice, counseling, or assistance such as preparing contracts or other legal documents. By comparison, a patent attorney is a lawyer, has passed the patent bar, and can provide legal counseling and assistance with a patent application.

An attorney interested in practicing trademark law or areas of IP law other than patent law need pass only the state bar exam required to practice law generally. These individuals are not required to have a technical degree or experience to practice IP law, although possession of either can be helpful in many cases. For example, the licensing of software and other computer-related technology might depend upon how a particular piece of information is stored or transmitted, and the ability at least to recognize and appreciate the technology, if not fully understand it at your client’s level, would be an important tool in drafting an agreement for the client. A contract that precisely and accurately sets out what the parties actually agreed to license helps decrease the chances that an opposing party will later attempt to expand its rights without offering additional compensation to the client.

The technical skills and background useful for practicing IP law, and particularly those needed to be a patent attorney, automatically result in a relatively small pool of eligible participants. Most attorneys do not have a technical degree. People with technical degrees are not always interested in a career in law. Additionally, the numbers of minority students who attend law school are limited. This generally keeps intellectual property attorneys in high demand and minority intellectual property attorneys in even higher demand. High demand, of course, means job security and the ability to render services at a premium. Starting salaries for IP attorneys in metropolitan areas like Washington, D.C., often reach $125,000 a year or more. This likely exceeds salaries that most graduating scientists and engineers, even with advanced degrees, can expect within their own discipline.

A career in IP law has other advantages as well. An IP attorney is often one of the first to know about new, sometimes revolutionary, technology. Of course, the duty of confidentiality prevents sharing such exciting information with others, but it is always nice to be “in the know.” Working daily with new technologies and improvements to old technologies is intellectually stimulating and offers opportunities to engage in creative thinking.

Practicing IP law offers many exciting opportunities and is well worth consideration by both newcomers to law and those looking for a new direction. Although entry requirements may be slightly higher than for other areas of law, the extra rewards are almost always worth the work.

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Opportunity Knocks for Chicago JIOP Recipient

BY DAINA SAIB

For first- and second-year law students, obtaining a summer internship, particularly a clerkship with a state or federal judge, is an important stepping stone to advancing their careers. Competition is stiff. For minority law students or those who are financially disadvantaged, finding these opportunities can be especially difficult, since many of them do not come from a background with a built-in network of contacts within the legal profession.

The Section of Litigation’s Judicial Intern Opportunity Program (JIOP) creates internship opportunities for minority and financially disadvantaged law students. The program’s goal is to make more opportunities available to minorities who are under-represented in the legal profession. In previous years, students were placed in judicial internships with judges in the U.S. District Court for the Northern District of Illinois, the U.S. Bankruptcy Court for the Northern District of Illinois, and the Circuit Courts of Cook and Lake counties, as well as in the U.S. District Courts for the Southern District of Texas, and Texas Civil Courts. This year, the program is expanding to include internship opportunities in Miami. The anticipated number of applicants this year is expected to exceed last year’s total of more than 325—87 of whom were placed with judicial internships.

Since its inception, JIOP has been successful in placing students deserving of this opportunity, and past participant Sean Herring’s story exemplifies the type of experience the program strives to offer these students.

Herring, 25, grew up on the South Side of Chicago. Since the age of 10 when he participated in a debate in grammar school, Herring has dreamed of becoming a lawyer. He says that the experience of standing before his classmates and presenting an argument was a challenge he enjoyed. Thereafter, it became his passion.

Despite encouragement he received from his family, particularly from his mother, who early on believed that he could achieve any goal he set for himself, the road to law school was far from easy for Herring. As the first person from his family to attend college, he had no professional mentors available to him while growing up. He was forced to find a way to fulfill his dream on his own. “I didn’t have a leg up or any connections, and I knew that I needed to work harder to be able to achieve my goals,” he says.

Herring received a bachelor of arts degree from the University of Michigan in Ann Arbor, with a dual major in English and psychology. He then went on to attend Loyola University’s School of Law, where he is currently a third-year student. When Herring started law school, he knew that it wasn’t easy to get an internship as a first-year student, but, because he had no contacts in the legal profession before beginning law school, he was very eager to gain some experience.

Herring heard about the JIOP from a fellow member of Loyola’s Black Law Student Association and decided to apply for the program, hoping for the best.

As part of the selection process, volunteers from the Section of Litigation’s leadership initially interview students applying to the program. John Mathias, a member of the Judicial Intern Opportunity Program’s working group and a partner at Jenner & Block, LLP, interviewed Herring.

Mathias says that Herring was a candidate who had all the characteristics the program was looking for. “His determination was extraordinary,” he says. “Sean was mature beyond his years. He was thinking about how to get himself to the next level and it was so impressive and refreshing to see that.”

Mathias gave Herring a recommendation to participate in the program. “I detected in him a drive and determination to succeed that was in search of an opportunity which, in this case, was presented by the JIOP to clerk for a federal judge for the summer.”

As a result of the impression he made on Mathias, Herring was offered an internship to clerk for U.S. District Court Judge for the Northern District of Illinois, the Honorable Sydney I. Schenker. Herring clerked for Judge Schenker in the summer of 2003 after completing his first year in law school.

Herring says that clerking for Judge Schenker allowed him to gain knowledge of the opportunities available to him within the legal profession. “It’s important to get internships during law school because you have the opportunity to gain experience in different areas of the law,” he says. “Before I began my clerkship, I wasn’t sure if I wanted to do litigation or corporate transactions.”

Herring believes that the experience was invaluable, not just from a learning standpoint, but also because the experience gave him the confidence to hold his own with others at a higher level in such a competitive field. He says that going to court offered him the opportunity to see the legal system in action.

“During my clerkship I got to sit in on negotiations between lawyers and their clients and see both sides of an argument and see what worked and what didn’t,” he says. “When you’re a law student, you read about court cases, but you don’t get to
As a result of the work he did during his clerkship that summer, Judge Schenkier wrote Herring a good recommendation. Because the clerkship with Judge Schenkier enhanced his résumé, Herring was offered employment with Jenner & Block for its summer program after his second and third year of law school. Mathias says that during that summer, Herring impressed many people at the firm. Jenner & Block extended Herring an offer of permanent employment after his graduation from law school in May 2005. Herring will be an associate attorney in the litigation department, the firm’s largest department.

“I don’t think I’ve ever really met a young man who appreciated his situation better than Sean,” says Mathias. “He was in a position where he could have worked for other law firms as well. I know he’s very grateful for the opportunity that he received from the JIOP.”

Mathias says, “The real value of our program is that we can make a difference in the life of some young person who has not had the same level playing field as everyone else and is a product of an environment that is not advantaged in ways that others have been advantaged. Our approach is to try to identify those who need a boost, and more importantly, deserve one. That’s the niche I know we filled with Sean Herring.”

“I would absolutely recommend the program to others,” says Herring. “Working with brilliant people who will take the time to show you how it’s done at a level of excellence is important to have on your résumé because other people can see you’ve worked with the best.” Herring believes that minorities in general are not aware of the benefits of clerking for a federal judge. “That experience stays with you throughout your career,” he says.

Herring sees no limit to the possibilities that lie ahead. “Being the first person to do this in my family and having had people go before me who have allowed me to have the opportunities I’ve had, I feel like I have a responsibility to keep that going,” he says. “I’ve been really fortunate to have met some great people who have taken an interest in my career and have been willing to share their knowledge with me. It inspires me to get to the point where I can give the opportunities I’ve had to someone else.”

Herring believes that the opportunities he has today are because of his participation in the JIOP. “It helped me to stand out and got me started in the direction I wanted to go in,” he says. Mathias has no doubt that Herring will go far in his career. “Today, Sean Herring is a real success story,” he says. “And that story is just beginning."

Daina Saib works for the Section of Litigation’s Judicial Intern Opportunity Program. She is studying journalism at DePaul University and hopes to become a travel writer.

Section Chair Meets HNBA Officers

At the ABA Annual Meeting in Atlanta, the co-chairs of the Diversity Plan Implementation Committee presented an update to the Section’s Council on continued efforts toward implementing the Section’s Diversity Plan online at www.abanet.org/litigation/diversity/home.html. This was the first exhaustive update given to the Council since the Plan’s inception in 2001.

The committee recommended a renewed outreach effort to the major national minority bars—the Hispanic National Bar (HNBA), National Asian Pacific American Bar Association (NAPABA), National Native American Bar Association, and the National Bar Association (NBA). The Committee’s recommendation is to meet with the president, president-elect, and/or executive director from these organizations at their national conferences and discuss ways for our groups to better work together.

In October, Section Chair Dennis Drasco and committees and diversity initiatives manager met with the Hispanic National Bar Association’s Immediate Past President, Carlos Singh and its Executive Director, Carmen M. Feliciano, Esq. The meeting was productive, with both entities agreeing to work on possible future collaboration, including co-sponsoring programs, attending each other’s conferences, and better networking opportunities. For openers, Ms. Feliciano identified two solo practitioners who are members of HNBA to take part in a Section teleconference on courtroom technology for solo and small firm lawyers to be hosted by the Section’s Solo and Small Firm Committee in January 2005. The Section looks forward to many future collaborative efforts as outreach to the national minority bars continues throughout the year.

Calling All Writers!

Would you like to contribute an article to Minority Trial Lawyer? We are always looking for articles that cover the many areas of interest to our readers, including trends that affect lawyers of color; cases and case law affecting the minority community; challenges faced by lawyers of color in the practice; and stories of opportunities and inspiration.

Send your article or query to buckleym@staff.abanet.org., or call Monica Buckley with your idea at 312/988-6097.
Undercover Ethics

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deceit or misrepresentation.” It is important to note that although Model Rule 4.1(a) and DR 7-102(A)(5) are limited to actions taken in the course of representing a client, Model Rule 8.4(c) is not. Add into the mix DR 7-102(A)(5) of the Model Code, which provides that a lawyer shall not “in his representation of a client . . . [k]nowingly make a false statement of law or fact.”

Communication by a Private Investigator

Attorneys are presumed to know and abide by the ethical rules. Under Rule 5.3 of the Model Rules, a lawyer also is ethically responsible for the misconduct of a nonlawyer employed or retained by or associated with the attorney if the attorney orders or, with knowledge of the specific conduct, ratifies that misconduct. Consequently, communication that violates the rules prohibiting contact with represented persons, misrepresentation, fraud, and deceit that is undertaken by a retained private investigator can result in evidentiary sanctions against the defendant and/or civil or disciplinary action against the attorney.1

Midwest Motor Sports v. Arctic Cat Sales, Inc.,2 illustrates the consequences suffered when a private investigator posing as a customer acts contrary to the rules of ethics. In Midwest Motor Sports, the Eighth Circuit Court of Appeals affirmed a South Dakota district court’s ruling imposing evidentiary sanctions against the defendant manufacturer for the surreptitious taping of conversations by the investigator. The Eighth Circuit found that the secretly audio-taped conversations made in anticipation of trial violated several ethical provisions.

Snowmobile dealer Midwest Motor Sports, d/b/a Elliott Power Sports (Elliott), filed a lawsuit in federal court against snowmobile manufacturer Arctic Cat Sales, Inc. (Arctic Cat) for wrongful termination of Elliott’s dealership franchise. A-Tech Cycle Service (A-Tech), another snowmobile dealer that carried only the Arctic Cat snowmobile line, was neither a named party nor an intervenor in the lawsuit between Elliott and Arctic Cat. However, A-Tech’s owner and principal was considered a “critical non-party witness” in the case.3 (Later, A-Tech also filed suit against Arctic Cat.)

During the course of the litigation against Elliott, Arctic Cat hired a private investigator to help gather information for trial. Arctic Cat’s attorneys directed the investigator—a 30-year veteran of the Federal Bureau of Investigation—to visit Elliott’s showroom to observe the products on display and to talk to a salesperson to “see what the salesman represented in the way of the products that they were promoting.” Arctic Cat’s attorneys also asked the investigator to visit the Elliott dealership “to find out which snowmobiles they were recommending and why.” Both Arctic Cat’s attorneys and the investigator knew that Elliott, A-Tech, and A-Tech’s principal were each represented by counsel.

Arctic Cat’s attorneys did not provide a script to the investigator. Instead, they informed him of the particular subject matter to be discussed, including comparisons of particular competitors’ products. Arctic Cat’s attorneys also directed the investigator to see whether Elliott would make negative comments about A-Tech. The investigator was also given the name of Elliott’s sales manager and told to ask him whether Arctic Cat products could be serviced elsewhere. The investigator informed Arctic Cat’s attorneys that he would wear a hidden recording device to tape the conversations. Arctic Cat’s attorneys correctly advised the investigator that the tape recording was legal under the laws of South Dakota.

Subsequently, the investigator and his wife, posing as customers, visited A-Tech’s showroom. A-Tech’s owner immediately introduced himself to the couple. A-Tech’s owner said nothing negative about Elliott. The next day, the investigator and his wife, again posing as customers, visited Elliott’s showroom. During the taped conversation with an Elliott salesman, the couple asked questions “designed to allow [the sales-

Arctic Cat was sanctioned for evidentiary abuses, and the recordings were excluded from evidence.

Cat’s attorneys also directed the investigator to extol the qualities of the competitor’s snowmobiles.” During a second trip to Elliott, the investigator and his daughter posed as customers while talking to the same salesman about the reasons Elliott sells the Arctic Cat’s competitors’ snowmobiles. After each of these visits, the investigator gave the recorded tape to Arctic Cat’s attorneys and discussed impending visits.

Danger of Sanctions

During the course of the litigation, Arctic Cat was sanctioned for evidentiary abuses. The district court excluded from trial the tape recordings and any testimony by the investigator and his wife or daughter and any other evidence obtained by the defense as a result of the taped conversations. Although both the Elliott/Arctic Cat and A-Tech/Arctic Cat lawsuits eventually settled out of court, the district court reserved the question of whether Arctic Cat’s attorneys should suffer additional sanctions.

In ruling on the reserved issue of additional sanctions, the court found that the interviews with Elliott’s salesman constituted improper contact intended to elicit admissions to be used against Bill’s employer, Elliott, in violation of Rule 4.2. Thus, it was the type of information sought that caused the communication to violate the rule.

The Eighth Circuit affirmed the district court’s finding that, by using the investigator to contact A-Tech’s owner, Arctic Cat’s counsel had violated Model Rule 4.2. Even though a nonparty to the litigation, A-Tech nonetheless had retained counsel in the matter and the “subject of the representation was the Arctic Cat/Elliott litigation.” Moreover, A-Tech’s owner was a “critical nonparty witness with ultimate managerial responsibility for A-Tech.”4

Arctic Cat’s attorneys argued that they had not directed the investigator to communicate with a represented person but rather had directed him “to speak only to low-level salespeople for the purpose of becoming familiar with the Arctic Cat line.” At his deposition, however, the investigator testified that he recorded the conversation to see whether A-Tech’s salesperson would “say anything about the lawsuit, other than memorializing the information on the product that they were selling, too.”5 Indeed, the Eighth Circuit concluded that the investigator’s purpose in visiting A-Tech was “to
eliciting specific admissions from A-Tech’s employees about A-Tech’s sales of Arctic Cat snowmobiles because Elliott’s damages were impacted by A-Tech’s sales and service of the Arctic Cat line.9 Formal discovery techniques could have yielded this information, and the record revealed that Arctic Cat’s attorneys had in fact asked to inspect Elliott’s and A-Tech’s premises pursuant to Rule 34 of the Federal Rules of Civil Procedure. The court found that because the attorneys were prohibited from contacting A-Tech’s owner without the consent of A-Tech’s attorney, the investigator who was acting as Arctic Cat’s attorney’s agent was likewise prohibited.7

The record also showed that three days after the investigator’s first visit to Elliott’s showroom, he provided to Arctic Cat’s attorneys tape recordings containing the conversations with Bill, the salesman. Arctic Cat’s attorney therefore knew that the investigator’s questions were designed “to allow Bill to extol the qualities of competitors’ snowmobiles.”9 More than a month later, the investigator and the attorney discussed a return visit to Elliott to determine the status of a new shipment of snowmobiles. Consequently, the court reasoned that even if the attorneys originally directed the investigator to ask more benign questions, in light of the recordings they received in between visits, they must have known that the investigator was deviating from those initial instructions.9

Consequences Not Always Uniform

The Midwest Motor Sports court noted that even though the laws of South Dakota permit surreptitious taping, ABA Formal Opinion 01-422 would nonetheless authorize sanctions.10 In the opinion, the ABA Standing Committee on Ethics and Professional Responsibility (Committee) suggests that a lawyer does not violate the Model Rules by electronically recording a conversation without consent of the other party to the conversation unless the law of the jurisdiction forbids such conduct. The ABA thus withdrew Formal Opinion 337, published in 1974, which stated that “no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.” The Committee suggested however that where the law of the jurisdiction forbids surreptitious taping, an attorney would be in violation of Model Rule 4.4. Recognizing the legality of surreptitious taping in South Dakota, the district court in Midwest Motor Sports had nonetheless condemned the “undisclosed use of a recording device [as] an element of deception.”11

In contrast to Midwest Motor Sports, at least one court has found, based on policy reasons, that “hiring investigators to pose as consumers is an accepted investigatory technique, not a misrepresentation.”12 In Gidatex, S.R.L. v. Campaniello Imports, Ltd., the issue for trial was whether the defendant furniture distributor was engaging in bait-and-switch tactics after luring customers into the store with the plaintiff furniture manufacturer’s trademark. The plaintiff’s counsel hired two detectives to pose as typical interior decorator customers and secretly tape-record conversations with the defendant’s sales clerks. The court there found that the undercover investigation technically satisfied the elements of DR 7-104(A)(1), in that the sales clerks were “parties,” counsel knew they were represented by a lawyer, and the plaintiff’s counsel had “caused” the communication to occur. Nevertheless, the court found no violation because

([the] use of private investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of the litigation, does not constitute an end-run around the attorney/client privilege. [Plaintiff’s] investigators did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine in [defendant’s] showroom and warehouse.13

Likewise, in Apple Corps Ltd. v. International Collectors Society,14 the court held that the rule prohibiting contact with represented persons did not bar an investigator’s undercover operation. In Apple Corps, the plaintiff owned the rights to images of the Beatles. To determine whether the defendant direct marketer was violating a consent order by selling stamps bearing the Beatles’ likenesses, the plaintiff’s attorney directed a secretary and a private investigator to call the defendant and try to order stamps. The New Jersey district court found that an attorney is not prohibited under Rule 4.2 from seeking to uncover corporate misconduct by posing as a member of the general public, either directly or via an investigator, and engaging in ordinary business transactions with low-level employees of a represented corporation. The court relied in large part on language peculiar to New Jersey’s rules of conduct that limit the meaning of “represented party” under Rule 4.2 to members of the corporation’s “litigation control group.”15 The court also reasoned that the purpose of Rule 4.2 is to protect laypersons from manipulation by opposing counsel; not from the revelation of prejudicial facts.16

As these cases demonstrate, several ethical concerns may be implicated when a private investigator ventures beyond mere observation as a member of the general public in order to engage in business transactions and conversations with represented persons or employees of a represented corporation. However, the consequences attending the use of private investigators by attorneys are not uniform. To guard against the possibility of evidentiary sanctions and/or disciplinary action, the attorney who employs a private investigator should be vigilant and provide direction to the investigator consistent with the ethical rules.

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Notes
1. See, e.g., ABA Formal Op. 95-396 (lawyer may not direct investigative agent to communicate with represented person in circumstances where lawyer would be prohibited from doing so).
2. 347 F.3d 693 (8th Cir. 2003)
4. 347 F.2d at 697.
5. 144 F. Supp. 3d at 1151.
6. 347 F.3d at 700.
7. 347 F.3d at 698.
8. 144 F. Supp.2d at 1152.
9. See 347 F.3d at 698.
10. See 347 F.3d at 699.
11. 144 F. Supp. 2d at 1159.
13. 82 F. Supp.2d at 126.
15. 15 F. Supp.2d at 473; see also Fair Automotive v. Car-X Service Systems, 471 N.E.2d 554 (Ill. App. 1984) (Plaintiff did not violate no-contact rule by having investigators go to several shops owned by defendants and, posing as customers, ascertain whether employees made disparaging remarks; under “control group” test, the employees were not the represented party).
Turning Celebrated Principles into Reality

BY STEPHEN B. BRIGHT

The right to counsel is the most fundamental constitutional right. An attorney’s role in protecting the client’s rights and marshaling the evidence necessary for a fair and reliable outcome cannot be underestimated. But who asserts the right to counsel for a defendant who cannot afford counsel and has no knowledge of the legal system?

In courts where lawyers are appointed by judges, it is no secret that judges do not always assign the best and brightest to defend the poor. In part this occurs because judges do not want to impose on those members of the profession who have more lucrative cases. Many judges, in order to move their overcrowded dockets, also appoint lawyers who try cases rapidly instead of zealously.

Where assignments are done by bid, county jurisdictions for example, the lawyer who submits the lowest bid for indigent defense business is not necessarily capable of defending criminal cases. The indigent defendant represented by an incapable lawyer may not even know he has a right to something better than the lowest bidder; or the lawyer who takes the “greased lightning” approach to closing cases; or a lawyer who is so underpaid, overworked, or incompetent that adequate representation cannot be provided. Even those who recognize that their lawyers are not adequate may not complain, out of fear that the quality of the representation will deteriorate even further if they voice a complaint. And there is the equally valid fear that the next lawyer appointed by the same judge may be even worse.

**Fighting for His Life**

The difficulty of enforcing the right to counsel is illustrated by the plight of Gregory Wilson, an African-American who faced the death penalty in Covington, Kentucky. The presiding judge had difficulty finding a lawyer for Wilson because a Kentucky statute limited compensation for defense counsel in capital cases to $2,500. When the head of the local indigent defense program suggested to the judge that higher compensation was necessary to obtain a lawyer qualified for such a serious case, the judge suggested that the indigent defense program rent a river boat and sponsor a cruise down the Ohio River to raise money for the defense.

The judge eventually obtained counsel by posting a notice in the courthouse that asked any member of the bar to take the case. It included the plea “Please Help. Desperate.” The notice said nothing about qualifications to handle a capital case. The judge eventually appointed two lawyers who responded.

This method of selecting counsel did not produce a “dream team.” The lead counsel could charitably be described as well past his prime and no longer had an office, practicing from his home, where a Budweiser beer sign was visible. The police recently had pried up boards in his living room floor and recovered stolen property. The telephone number he gave his client was for a bar called Kelly’s Keg.

The other lawyer, who had volunteered to assist lead counsel, had no felony trial experience.

Wilson, realizing that the lawyers were not up to the task of defending a capital murder case, repeatedly objected to being represented by the lawyers and continued to ask the judge to provide a lawyer who was capable of defending a capital case. The judge refused and proceeded to conduct a trial that was a mockery of justice. Lead counsel was not even present for much of the trial and, when he was, cross-examined only a few witnesses—including one whose direct testimony he missed because he was out of the courtroom.

Wilson was sentenced to death.

What more could Gregory Wilson have done to enforce his Sixth Amendment right to counsel? He objected. He complained about the lawyers appointed by the judge, who were clearly incapable of defending a capital case. He asked for a “real” lawyer.

But even these efforts were insufficient to enforce his right to counsel.

**Catch-22 for the Poor**

By law, the right to counsel can be protected after the defendant has received ineffective assistance and been convicted. The defendant, perhaps an innocent person whose life may have been destroyed by the ordeal of trial and jail, can assert a claim of ineffective assistance of counsel. But the Catch-22 for most poor people is that they cannot prove an ineffectiveness claim without a competent lawyer’s help.

The U.S. Supreme Court has held that indigents are not entitled to a lawyer for state post-conviction proceedings, where the claims of ineffective assistance often are raised. Even if a lawyer is provided to raise the defendant’s claim of ineffectiveness, the court that failed to provide competent counsel at trial is unlikely to provide additional counsel—competent or not—for post-conviction proceedings.

Exzavious Gibson, a man with an I.Q. of less than 80 who was condemned to die by the state of Georgia, had no lawyer in the state post-conviction proceedings and was unable on his own to challenge the effectiveness of his court-appointed lawyer. Gibson’s evidentiary hearing started as follows:

**Court:** Okay. Mr. Gibson, do you want to proceed?

**Gibson:** I don’t have an attorney.
the representation they received. For them, petitions challenging the effectiveness of access to lawyers to file post-conviction in many state criminal courts lack any gram. But poor people convicted of crimes or counsel funded by a public interest pro-
capable lawyers represent them pro bono Constitutional does not require them to do

Nevertheless, the court went ahead with the hearing. The state was represented by an assistant attorney general who specialized in capital habeas corpus cases. After Gibson’s former attorney had been called as a witness against him, Gibson was asked if he wanted to conduct the cross-examination:

**Court:** I understand that. **Gibson:** I am not waiving my rights. **Court:** I understand that. Do you have any evidence you want to put up? **Gibson:** I don’t know what to plead. **Court:** Huh? **Gibson:** I don’t know what to plead. **Court:** I am not asking you to plead anything. I am just asking you if you have anything you want to put up, anything you want to introduce to this Court. **Gibson:** But I don’t have an attorney.2

Gibson tendered no evidence, examined no witnesses, and made no objections. The judge denied Gibson relief, signing an order prepared by the attorney general’s office without making a single change. **Court:** Mr. Gibson, would you like to ask Mr. Mullis any questions? **Gibson:** I don’t have any counsel. **Court:** I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not? **Gibson:** I’m not my own counsel. **Court:** I’m sorry, sir, I didn’t understand you. **Gibson:** I’m not my own counsel. **Court:** I understand, but do you want, do you, individually, want to ask him anything? **Gibson:** I don’t know. **Court:** Okay, sir. Okay, thank you, Mr. Mullis, you can go down. **Gibson:** I don’t know what to plead. **Court:** Huh? **Gibson:** I am not waiving my rights. **Court:** I understand that. Do you have any evidence you want to put up? **Gibson:** I don’t know what to plead. **Court:** I am not asking you to plead anything. I am just asking you if you have anything you want to put up, anything you want to introduce to this Court.

**Gibson:** I don’t have an attorney.2

Many state legislatures are still unwilling to pay the price for adequate representation. Supreme Court justices have expressed concern about the adequacy of representation in capital cases and noted the relationship between the adequacy of representation and the risk of unreliable verdicts and sentences. Justice Ruth Bader Ginsburg has said that she has “yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial,” and that “[p]eople who are well represented at trial do not get the death penalty.”

Yet, the Court has refused to adopt minimum standards or even to explain how the Constitution permits the current unequal, unfair, arbitrary, and discriminatory state of affairs to continue. This is unwise in a nation increasingly concerned about the conviction of innocent people and the poor quality of legal representation in criminal cases in general and capital cases in particular. The Court has denied scores of petitions for people who received deplorable representation, and upheld the death sentence in one case in which the lawyer had represented the victim of the murder that his client had been convicted of committing. In another affirmed case, the lawyer had not given a closing argument at the penalty phase.

The Dream of Equal Justice

Forty years after *Gideon*, many state legislatures are still unwilling to create the structure and pay the price for adequate representation. The Supreme Court is unwilling to enforce the right to counsel by adopting a standard of competence; and many of those responsible for the justice system resist implementing *Gideon*, regarding it an unfounded mandate from the federal government, and maintain their indifference to the scandalous quality of legal representation provided to those who cannot afford more.

There is a temptation to give up hope that many poor people who face the loss of life or liberty ever will receive adequate representation. Perhaps the time has come to sandblast the words “Equal Justice Under Law” from the Supreme Court building and acknowledge that we have country-club justice for the wealthy and plantation justice for the poor.

Even though equal justice has never been achieved, it is the most fundamental aspiration of our legal system. It represents the kind of legal system we would like to have and the kind of society we aspire to be. On the 40th anniversary of *Gideon*, lawyers should question whether we have done enough to keep alive the promise of equal justice, and what more we can do.

We can bring lawsuits. Many states comply with the U.S. Constitution only when ordered to do so by federal courts. It

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**Notice:** The text above is a natural-language summary of the original text. It does not include all the details and context of the original text. The summary is intended to provide an overview of the main points discussed in the original text. The original text contains detailed legal arguments, case citations, and references that are not included in this summary. It is important to refer to the original text for a complete understanding of the content.
was only through federal court orders that schools were desegregated, prisons were made slightly less brutal, and mental health institutions improved a bit. It is clear that litigation in both state and federal courts and perseverance over many years will be required to implement Gideon in many jurisdictions. The great Georgia lawyer Edward T.M. Garland, after bringing one such suit, promised that another would be “coming soon to a courthouse near you.”

Among the contributions of Garland and others is a suit that resulted in the creation of a public defender office in Coweta County, Georgia. In the two years prior to the creation of a public defender office in Coweta County, which includes Atlanta, resulted in rules for continuous representation of people from arrest to indictment, reduction in the time between arrest and court appearances for people accused of misdemeanors, and the provision of public defenders to people facing misdemeanor charges.

Improvements in indigent defense programs in Connecticut and other states were achieved through litigation. In Mississippi, several counties are suing the state to require it to fund indigent defense.

A single public defender, Rick Teissier, challenged the excessive caseloads and lack of investigative assistance in his office in New Orleans. The Louisiana Supreme Court found that caseloads were so excessive and investigative resources so limited that clients were “not provided with the effective assistance of counsel the Constitution requires.” The court required pretrial hearings on whether lawyers could effectively handle the number of cases assigned to them and prohibited prosecutions from going forward in cases where effective assistance was not provided because of a lawyer’s workload and lack of resources.12

**Lawyers Must Bear Witness**

Lawyers must also speak out. We must not be silent about the failure to provide equal justice, or apologize for a system that fails to provide competent representation. We must bear witness to the deficiencies of the system, in hope of prompting state legislatures and courts to take their eyes off our present mediocrity and take aim instead at a full measure of justice for all citizens. We must be at the legislature, representing those who do not have a constituency and arguing for the structure, funding, and independence that is necessary for the adversary system to work.

More law schools must follow the example of Harvard, New York University, Georgetown, and others that have outstanding clinical programs, educating students and serving the poor in many areas. These programs teach students how to defend people accused of crimes and also inform students about the desperate need for legal services for those whose lives and liberty are at stake in the legal system.

Individual lawyers must provide zealous representation to poor people even if the government fails in its larger responsibility of providing legal services to everyone. As a result of efforts by dedicated lawyers, innocent people will avoid wrongful conviction; troubled youths will be diverted to drug, alcohol, mental health, job training, and other programs instead of prisons; prisoners will live instead of being put to death by the government; and others inside the criminal justice system will receive professional advice and zealous advocacy through what is to them a strange and foreign land.

These efforts demonstrate recognition of the preciousness of life, liberty, fairness, and adherence to the Bill of Rights in a time and a culture of misplaced values and indifference to injustice. They set an example that reminds us that achieving equal justice for all is not beyond the grasp of this wealthy society. Defendants who are fortunate enough to be represented by lawyers who aspire to such goals, will be realized the promise of Gideon.

*Stephen B. Bright is director of the Southern Center for Human Rights in Atlanta, Georgia. This is the second of two articles adapted from “Right to Counsel, Gideon v. Wainright at 40,” originally published in The Champion (March 2003); the first part appeared in the Spring/Summer 2004 issue of Minority Trial Lawyer.*

**Notes**


5. See Jeffrey L. Kirshmeier, Drink, Drugs, and Drowsiness, *3. 466 U.S. 668 (1984).*


Legal Workplace

Continued from page 1

There have been material increases between 1982 and 2002 in the percentage of legal degrees received by women and people of color, as the U.S. Equal Employment Opportunity Commission (EEOC) detailed in a 2003 report (See chart below).1

The report draws the following conclusion from these figures:

<table>
<thead>
<tr>
<th></th>
<th>1982</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>African Americans</td>
<td>4.2%</td>
<td>7.2%</td>
</tr>
<tr>
<td>Asian Americans</td>
<td>1.3%</td>
<td>6.5%</td>
</tr>
<tr>
<td>Hispanics</td>
<td>2.3%</td>
<td>5.7%</td>
</tr>
<tr>
<td>Women</td>
<td>33.0%</td>
<td>48.3%</td>
</tr>
</tbody>
</table>

In large, national law firms, the most pressing issues have probably shifted from hiring and initial access to problems concerning the terms and conditions of employment, especially promotion to partnership. In small, regional, and local law firms, questions about fairness and openness of hiring practices probably still remain, particularly for minority lawyers.

Disparities between hiring and promotion rates for both attorneys of color and women support this conclusion.

Retention

The retention of attorneys of color and women remains a challenge. Research from the National Association for Law Placement (NALP) showed the following disparities:2

- Male attorneys of color are more likely to have left their employers within 55 months of their start date than male attorneys overall, with 68 percent of male attorneys of color leaving as compared with 52.3 percent of male attorneys overall.
- Female attorneys of color are also more likely to have left their employers within 55 months of their start date, 64.4 percent, than female attorneys overall, 54.9 percent.
- Gender disparities in retention are also material.

Promotion

Whereas the recruitment of associates of color increased materially during the last 11 years, the promotion of attorneys of color into leadership ranks in law firms does not reflect this increase. In addition, the percentage of associates of color has not kept pace with the percentage of attorneys of color graduating from law schools, as can be seen by comparing the 19.4% of JD degrees received by people of color in 2002 (See chart below) with the 14.27% of associates of color in law firms (See chart, top of page 14).3

The progress of women into law firm partnership ranks is similarly disproportionate to the rates at which they have populated law firm associate ranks during the past 11 years4 (See chart, bottom of page 14).

Organizational barriers still exist. The legal profession is mistaken if it presumes otherwise; the facts refute the presumption.5

Organizations must continue to focus attention on eliminating gender and race disparities in access to high-visibility assignments; to formal and informal mentoring; and to leadership opportunities, evaluation, and compensation systems, and other key factors in promotion decisions.

The EEOC examined the likelihood that attorneys of color and women would make partner in large law firms, defined as those with 100 or more employees. The EEOC found that Asian Americans had the lowest probability of making partner, and African-American attorneys had the second lowest. The least likely to make partner were women. Hispanics were the most likely to make partner among attorneys of color and women but were materially less likely to make partner than white male associates.6

The Business Case

The business case for diversity is well established and directly relates to any legal organization’s ability to compete for clients and the best talent. Abundant research, practical experience, and media stories support the business case for diversity. Ensuring that the goal is met requires committed leadership and rigorous assessment so that change is both measurable and sustainable into the future.

Clients and diversity. In recent years, many corporate clients have encouraged law firms to evaluate their diversity efforts. To date, more than 500 chief legal officers in corporations have signed a form letter entitled Diversity in the Workplace: A Statement of Principle. The statement reads, in part, “We expect the law firms which represent our companies to work actively to promote diversity within their workplace. In making our respective decisions concerning selection of outside counsel, we will give significant weight to a firm’s commitment and progress in this area.”

In 2004, Roderick Palmore, general counsel of Sara Lee, issued A Call to Action: Diversity in the Legal Profession, a statement pledging the support of corporate chief legal officers in holding their outside law firms accountable for hiring, retaining, and promoting diverse lawyers. As of November 2004, it has been signed by 65 general counsel who pledged to “make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms.”

Clients use a variety of mechanisms to focus the attention of law firm management on diversity:

- Retain firms with a strong performance in diversity and restrict relationships with firms lacking that track record.
- Hold regular meetings with firm management and billing partners to discuss diversity best practices.
- Require annual reports on diversity statistics and measured progress from the baseline.
- Award annual bonuses based in part on achieving diversity objectives.
- Expect legal service providers to have...
legal staffs that mirror the significant diversity within the in-house legal department.

Law firms are getting a clear and consistent message: If they successfully increase their diversity at all levels, they will get more work from important clients; if not, they will lose work from long-term clients.

As we reach the beginning of the fifth year of the new century, law firms must assume their clients will have women and attorneys of color among their legal and business decision makers. In 2004, general counsels of the Fortune 500 companies were 15 percent women and 7 percent attorneys of color. Clients of attorneys in other types of legal organizations are similarly diverse, if not even more so.

Law firms have not kept pace with these changing demographics, and, consequently, the firms now look considerably different from their clients, especially in leadership ranks. Many corporations hold their employees accountable on diversity issues, setting goals for both internal diversity measures and external measures on the diversity of outside vendors, and compensating employees for achieving those goals. When law firms fail to meet requested diversity goals, compensation for their clients can be adversely affected. When this occurs, there is a noticeable impact on hiring decisions for new matters. Who would blame general counsel—especially after losing 10 percent of their incentive compensation when chosen vendors did not meet the published vendor diversity guidelines of the company—for choosing to do business with outside counsel who already meet these requirements?

Business development. Tremendous business development opportunities are available to legal organizations that achieve meaningful and sustained diversity within their leadership ranks. One of the most obvious comes from corporations that sever their longstanding relationships with law firms that fail to demonstrate a commitment to diversity. In addition, because many law firms have not demonstrated significant progress in this area, firms that achieve diversity will have a competitive advantage in obtaining significant new engagements.

Attorneys of color and women attorneys bring valuable attributes to their organizations and may open unique marketing opportunities. For example, E. I. du Pont de Nemours and Co. (DuPont) established networks for women lawyers and attorneys of color within its legal department and at the firms and companies it uses for outside legal assistance. Women lawyers and attorneys of color who are part of the network send business to other members in DuPont’s legal service provider network, and outside counsel form stronger relationships with in-house attorneys.

There is also research demonstrating that strong female leadership in workplaces may contribute positively to an organization’s financial performance. Recent studies demonstrate that Fortune 500 companies with the largest percentage of women among their executive officer ranks significantly outperformed on key financial indicators the companies with few women officers.7

Maintaining talent and increasing revenue. Organizations are hurt financially when talented professionals leave for the wrong reasons. As demonstrated early-
er in this article, attorneys of color and women depart at a higher rate than do similarly situated white men. Legal organizations that do not create an environment in which attorneys of color and women succeed lose valuable personnel and the associated financial investment in their training and recruitment. This loss requires additional expenses for hiring and training, costs clients or firms additional fees to bring attorneys up to speed on matters, and risks client goodwill. The firm or company also may lose key people essential to their leadership succession ranks.

It is critical that professional services organizations attract the most talented professionals. The foundation for an organization’s reputation, and its key assets, are its attorneys; therefore, hiring the “best and brightest” lawyers is the mantra for most organizations. Law students and practicing lawyers today gather information in two main ways: through the Internet and through hearing the experiences of their peers. An organization perceived as inhospitable to attorneys of color and/or women will be hindered in its efforts to hire both the new attorneys and the laterals it needs to be competitive.

Reducing legal risk. High turnover and increased recruiting expenses are not the only increased expenses of non-inclusive organizations. There are legal implications to failing on the diversity issue; indeed, the list of organizations that have ended up in lawsuits are embarrassing; damage the organization’s reputation; detrimentally impact the organization’s ability to recruit; use critical attorney time in non-revenue-producing ways; and cost the organization money for legal fees, settlements, judgments, training, and lost opportunities.

The employment practices of law firms have come to the attention of the federal government. In late 2003, the EEOC issued its report Diversity in Law Firms, which analyzes trends, sets baselines, and categorizes issues. This governmental review puts law firms on notice that they must have solid policies to implement and follow. There is no excuse for legal organizations, with all of their internal expertise on legal issues, to become defendants in employment lawsuits. It is time for leaders of these organizations to have a zero-tolerance policy on those who step over the line. Whether the error is discrimination, harassment, or ignorance, it is no longer acceptable.

Enhanced reputation. As mentioned above, a legal organization’s reputation is critical to every aspect of its business: client demands, business development opportunities, the talent pipeline, and retention and promotion of attorneys. Through its reputation, an inclusive organization creates a competitive advantage in maintaining client relationships, attracting new clients, recruiting talented lawyers, and increasing financial performance.

The legal profession’s progress on creating and retaining leaders who are also female and of color has been slow. Material progress is lacking in the percentages of equity partners, office heads, and managing partners who are female and of color. Consequently, performing at the same level as peer institutions is not acceptable and should not be the goal. On the other hand, the low level at which most legal organizations perform provides an opportunity for attentive organizations to gain a competitive advantage by positively differentiating themselves.

Conclusion

The decision to diversify and be inclusive does not require long debate. There is a clear best solution: Leaders of legal organizations must create and implement a strategic plan that ensures that attorneys of color and women attorneys are recruited, trained, retained, and promoted at the same rate as their white male colleagues. Resources must be put behind implementation, and progress should be tracked. It is time for all organizations to reap the benefits for measured and sustained successes in creating and maintaining an inclusive workplace.

Part II of this article will set forth best practices and practical tips for legal organizations in the pursuit, maintenance, and marketing of inclusive workplaces. Watch for it in the Spring 2005 issue of MTL.

**Notes**

6. Diversity in Law Firms, supra note 1.
8. See supra.
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