Articles »

**Meet the 2016 Committee Cochairs**
By Andre’ Caldwell
MTL Cochairs are excited about their roles in the committee's efforts to further promote diversity and inclusion in the legal profession.

**Fair in Form, But Discriminatory in Operation: Disparate Impact Claims**
By Ruth J. Addison
Background checks and their potential impact on certain protected classes.

**Sexual Orientation and Gender Nonconformity: What Is "Actionable" under Title VII?**
By Sidney O. Minter
Does a litigant have standing to bring a claim based solely on sexual orientation?

**Diversity in the Bar: Where Are We and What’s Keeping Us from Going Further?**
By Hope Thai Cannon
While Lady Justice wears a blindfold, lawyers cannot.

Practice Points »

**New York State Department of Financial Services Proposes Cyber Security Regulations**
By Leonard Wills
The draft sets minimum standards to protect customer information.

**Making the Deposition Work for You**
By Florence M. Johnson
Keep these best practices in mind to protect yourself from future embarrassment.
Meet the 2016 Committee Cochairs

By Andre’ Caldwell – November 28, 2016

With the American Bar Association Section of Litigation’s first exclusively diversity-focused conference having recently taken place, it is no wonder that this year’s Minority Trial Lawyer Committee cochairs—Patricia Astorga, Andre’ Caldwell, and LaKeisha Randall—are excited about their roles in the committee’s efforts to further promote diversity and inclusion in the legal profession. "While diversity and inclusion have always been a focus of the American Bar Association, the Professional Success Summit generated a rejuvenating buzz to those who have championed diversity for so long," says Andre’ Caldwell. All three cochairs are resounding examples of diversity and inclusion within their respective legal communities and within the American Bar Association's leadership.

Patricia Astorga, a 2008 Cornell Law School graduate, is an Assistant U.S. Attorney for the Western District of New York, where she prosecutes narcotics and firearm offenses. Prior to joining the U.S. Attorney's Office, Patricia was an associate at Weil, Gotshal & Manges, LLP, and Milbank, Tweed, Hadley & McCloy, LLP, in New York City, where she practiced complex commercial litigation and white-collar criminal defense. Astorga clerked for the Hon. George B. Daniels in the Southern District of New York. "As a Filipino American female and a first-generation immigrant, I have overcome unique challenges throughout my education and career. I sought mentors in the profession who have encountered similar obstacles and have paved the way for women, immigrants, and minorities. The American Bar Association has been a tremendous resource throughout my career. I have developed a wide network, found lifelong mentors, and formed lasting friendships. In my leadership role, I hope to pay it forward and help future generations reach great heights in their careers," says Astorga.

Astorga’s passion for diversity is evident in her community service and bar association activities. She served as a board member of the Filipino American Legal Defense & Education Fund, which provides pro bono legal services to the immigrant community in the greater New York area. She was a founding member of the Filipino American Lawyers Association of New York and a member of the National Filipino American Lawyers Association’s Advocacy Committee. Astorga has similarly dedicated her leadership talents to the ABA’s Section of Litigation, where she has served as the chair of the Publications Subcommittee of the ABA Section of Litigation’s Corporate Counsel Committee, from August 2012 to 2015, and as a cochair of the Minority Trial Lawyer Committee since January 2013. "I have had the pleasure of working with highly accomplished and dedicated cochairs, subcommittee chairs, and newsletter editors for the Minority Trial Lawyer Committee to ensure that the committee produces fresh, engaging, and current information to our committee members," says Astorga. "I look forward to continuing
Andre' Caldwell, a 2008 graduate of the University of Oklahoma College of Law, is a partner at the Oklahoma City office of Crowe & Dunlevy, where he practices criminal defense and complex commercial litigation. Prior to joining Crowe & Dunlevy, Andre' worked as an Assistant U.S. Attorney for the Western District of Oklahoma, where he also worked on the Organized Crime and Drug Enforcement Task Force team and primarily prosecuted drug and firearm offenses. Growing up in Rock Hill, South Carolina, Andre' recalls that his first exposure to the legal profession came from a high school internship with a well-respected African American solo practitioner. "There weren't many black attorneys in Rock Hill at that time and he represented a glimpse into the future that I hoped to achieve." Currently, as the only African American male partner at his firm, Andre' hopes to provide that same mentorship to current pre-law and law school students in an effort to increase diversity and inclusion in the legal profession. Andre' notes that his success within the firm is significantly attributable to two of his mentors, both of whom are non-diverse attorneys. "While it is important for diverse attorneys to tout the importance of diversity, the role of non-diverse attorneys in championing diversity truly moves the ball down the field," says Caldwell. "This is why I believe the Professional Success Summit is a major accomplishment of the Section of Litigation, because it represents a collaborative effort of diverse and non-diverse attorneys who understand that success cannot be achieved until everyone is on the same page." "I've been very fortunate at my firm to be surrounded by many individuals, both diverse and non-diverse, who recognize the importance of these efforts," says Caldwell. "Recently, my firm appointed me as chair of the Diversity Committee, following on the heels of my two mentors." "Succession planning of that nature is unmatched." Andre', like Patricia, is also not a new face to leadership within the ABA's Section of Litigation. He is a 2014 graduate of the Diverse Leaders Academy Program. "After taking a year off from leadership, I'm excited to collaborate with Patricia and LaKeisha to carry forward the committee's vision and plan."

LaKeisha R. Randall, a 2011 graduate of North Carolina Central University School of Law, is an in-house trial attorney at State Farm Insurance Company in Atlanta, Georgia. Prior to joining State Farm, LaKeisha was the sole senior judicial law clerk for the 10 trial judges of the City of Atlanta Municipal Court. With a BA in sociology and a concentrated focus on African American Studies and Women’s Studies, Randall identifies as a womanist and promotes diversity and inclusion. A leader both locally and nationally, LaKeisha was the inaugural chair of the Young Lawyers Division of the Georgia Association of Black Women Attorneys and has served on its Executive Board since 2015. Nationally, Randall was a 2015 ABA Young Lawyers Division Scholar; accepted
ABA presidential appointments to the Advisory Committee of the Commission on Lawyers Assistance Programs and to the commission itself, which she now serves as a member; and was one of four nationally selected for the Section of Litigation's Young Lawyer Leadership (YLLP) Program. She has also served in leadership of the Young Lawyers Division since 2012 and lead’s the division’s #Fit2Practice wellness initiative. She has published a host of articles regarding civil rights, litigation, and attorney wellness.

LaKeisha became active in the Minority Trial Lawyer Committee as a law student and considers herself honored to now lead the committee. "I am proud that the Section of Litigation chose my culturally rich hometown of Atlanta for its inaugural Professional Success Summit—to many African American women, glass ceilings sometimes feel like concrete, and I’m excited to begin a transparent dialogue...In a similar fashion, I hope to build upon the momentum of PSS and strengthen the network of minority trial attorneys, offer premiere training and resources to our members, and explore the unique concerns of practicing as a person of color."

The cochairs have been working to diligently develop their plans for this leadership year; however, we welcome suggestions and ideas from the bar as a whole. Astorga notes, "We encourage anyone with interest in the committee's work to contact us so that together we can make this year a success."

**Keywords:** litigation, minorities, Minority Trial Lawyer Committee, cochairs

Andre' Caldwell is director at Crowe & Dunlevy in Oklahoma City, Oklahoma.
Fair in Form, But Discriminatory in Operation: Disparate Impact Claims

By Ruth J. Addison – November 28, 2016

Background checks are necessary because most employees have access to sensitive information held by their employers or work in regulated industries or interact with the public. Every employer’s worst nightmare is a bad hire or someone who is incompatible with the employer. A bad hire can negatively influence other employees’ attitudes and office morale. Hence, employers should take precautions to protect themselves, not only from a bad decision but also from future litigation, by providing and requesting certain information during the application process.

One of the primary concerns with background checks is that they may reveal a criminal history that has no bearing on the position for which the applicant applied. Because racially diverse people are arrested and convicted at a higher rate than the majority, background checks may prejudice racially diverse applicants from obtaining gainful employment. If a criminal history is revealed, the employer should be very fair, cautious, and meticulous in its approach. Failure to do so may create a "disparate impact" claim and an Equal Employment Opportunity Commission (EEOC) charge of discrimination. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

This article generally discusses background check requirements and the potential impact of those checks on certain protected classes.

Why Employers Should Use Background Checks
While it is not always practical to conduct background checks, they do help employers (1) verify applicants for employment in sensitive positions; (2) determine whether the applicant is suitable and qualified for the desired position; (3) determine whether it has made the right hiring decision; and (4) help avoid unwanted workplace scenarios, conflict, violence, and negligent hiring claims.

Rules Governing Background Checks
After the employers have decided they want or need to conduct a background check, they must learn the rules. Because background checks may or may not include consumer reports, it is not surprising that the EEOC issued a guide entitled Policy Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions in 1990, which was updated in April 2007. The EEOC urges employers not to base their hiring decisions solely on arrest records. Arrest records are routinely unreliable as they do not prove that the applicant was convicted of a crime. Hence, employers must make an additional inquiry.
For employers that do decide to consider the criminal history of an applicant, the EEOC focuses on the following prongs when reviewing an employer's conduct: (1) national data suggesting the disproportionate arrest and conviction rates of traditional minorities and (2) specific data more closely related to the employer's policy that may result in excluding traditional minorities from employment. This guidance also serves as an authority for enforcement of the Fair Credit Reporting Act (FCRA), governed by the Consumer Financial Protection Bureau. The FCRA outlines a process for conducting appropriate background checks.

The investigative process: four basic steps. The first step relates to what a consumer reporting agency (CRA) can disclose to the employer. Specifically, the CRA may supply a consumer report only if the employer certifies it will use the information only for a "permissible purpose"; it will not use the information in violation of federal or state equal opportunity law; it will notify the applicant that the report is being requested; it will obtain the required consent; it will give required notices if a decision not to hire is made based on the report; and if an "investigative consumer report" is requested, it will give the additional disclosures. The CRA may not report arrests that occurred more than seven years before the date of inquiry.

The second step is to advise the applicant that a consumer report is being requested and to obtain the applicant's written permission that the information being requested may be used for hiring decisions. If requesting an "investigative consumer report," the employer must advise the applicant. The applicant must receive this disclosure within three days after the request, unless it was part of the initial disclosure. The employer must alert the applicant of the right to make a written request for the details of the scope of the investigation as well as provide a copy of the document entitled A Summary of Your Rights Under the Fair Credit Reporting Act.

The third step is triggered if the employer decides to reject the applicant based on the information contained in the report. In that case, the employer must provide the applicant with both a copy of the consumer report and a copy of the summary of rights publication.

The fourth step arises once the applicant is rejected. Once it formally rejects the applicant, the employer must provide the applicant with a Notice of Adverse Action. That notice must provide the contact information for the CRA that supplied the consumer report, a statement that the CRA did not make the decision and cannot give any specific reasons for it, and disclosures about the right to dispute the accuracy or completeness of the report and to get an additional report for free within 60 days upon request.
What employers should not do with the report. Once an employer has had an opportunity to review the consumer report or criminal background check, it must weigh the information, while simultaneously recognizing that the Civil Rights Act makes it unlawful to discriminate based on gender, race, nationality, religion or belief, age, physical or mental disabilities, or genetic background. In short, employers must treat everyone equally and fairly.

Disparate Impact
Pre-employment criminal background checks generally exclude from employment more racially diverse applicants than non-diverse applicants. In many states, African Americans now constitute over 60 percent of incarcerated persons. According to a report by the National Association for the Advancement of Colored People (NAACP), nearly 1 million of the total 2.3 million incarcerated persons are African American. NAACP, Criminal Justice Fact Sheet. In addition, "African Americans are 2.5 times more likely to be arrested than whites." James Hagler, "8 Facts You Should Know about the Criminal Justice System and People of Color," Center for American Progress, May 28, 2015. In fact, "[i]f African American[s] and Hispanics were incarcerated at the same rates of whites, today's prison and jail populations would decline by approximately 50 percent." NAACP Criminal Justice Fact Sheet, supra. Because racial minorities are overrepresented in the criminal justice system, the result is that a staggering number of diverse candidates will not be able to obtain gainful employment. Thus, the EEOC has recognized the discriminatory impact of background checks for diverse applicants.

Disputes arise when an applicant or current employee challenges the employer's employment practices alleging that he or she suffered age, race, ethnicity, or sex discrimination due to disparate impact. "A disparate impact violation is established when an employer is shown to have used a specific employment practice, neutral on its face but causing a substantial adverse impact on a protected group, and which cannot be justified as serving a legitimate business goal of the employer." James S. Urban, Partner, Jones Day, Written Testimony at EEOC Meeting to Examine Treatment of Unemployed Job Seekers (Feb. 16, 2011). In other words, a practice by an employer that is facially neutral or fair in form, but has the effect of harming a protected class, is deemed discrimination. Proof of intentional discrimination is not required.

How to establish a prima facie case.
To maintain a disparate impact claim, an applicant or existing employee must show three things. First, "a specific identifiable employment practice or policy caused a significant disparate impact on a protected group." Voltz v. Coca-Cola Enters. Inc., 91 F. App'x 63, 73 (10th Cir. 2004) (quoting Bullington v. United Airlines, Inc., 186 F.3d 1301, 1312 (10th Cir. 1999)). If shown, then second, "the burden shifts to defendant [employer] to show that the challenged practice is job related and consistent with business necessity." Id. Third, if the employer is successful, "the plaintiff is then required
to suggest an alternative employment practice that serves the employer's legitimate employment goals yet lacks the undesirable discriminatory effect." *Id.*

As stated in the *EEOC Compliance Manual*,

[p]roving unlawful disparate impact under Title VII first requires a statistical demonstration that the employer has an employment policy or practice that causes a significant disparate impact based on race (or another protected trait). The particular policy or practice causing the impact must be identified, unless the elements of the employer's decision-making process cannot be separated for analysis, in which case the decision-making process can be analyzed as one employment practice.

For example, in November 2010, a Chicago janitorial services provider agreed to pay $3 million to approximately 550 rejected black job applicants under a four-year consent decree, settling the EEOC's allegations of race and national origin discrimination in recruitment and hiring. Press Release, EEOC, *Scrub, Inc. to Pay $3 Million to Settle EEOC Racial Discrimination Suit* (Nov. 9, 2010). The EEOC had alleged that the provider had recruited through media directed at Eastern European immigrants and Hispanics and hired people from those groups over African Americans, and that the provider's use of subjective decision making had a disparate impact on African Americans. As part of the decree, the provider also agreed to extensive changes in its employment policies, to engage in "active recruitment" of African American employees, to hire previously rejected black applicants, to implement training on discrimination and retaliation, and to "hire an outside monitor to review its compliance with the decree."

In short, applicants must prove that the challenged employment standard selects employees in a substantially different manner from that of protected classes, using statistical evidence of adverse impact on racially diverse applicants. *Drake v. City of Fort Collins*, 927 F.2d 1156 (10th Cir. 1991).

**How to establish a business necessity.**

Employers must show that the denial was consistent with the standard for "business necessity." This standard is satisfied if the employer can consider and prove that the following factors influence the job position:

1. The nature and gravity of the offense;
2. The bearing, if any, of the offense on any specific responsibilities;
3. The time lapse since the date of the offense;
4. The age of the applicant at the time of the offense; and
5. Evidence of rehabilitation.
For example, an applicant who has a child endangerment conviction for failing to buckle a child in a car seat should not mechanically be barred from obtaining a position that does not put the applicant in a position to involve or engage minor children, like working in a file room, filing or shredding documents, or even stocking supplies.

How Best to Avoid a Disparate Impact Claim
Despite the strict procedural requirements, background checks remain one of the best avenues to preparing a defense to negligent hiring claims. Employers must take great care to be proactive and develop nondiscriminatory and unbiased practices and methods to hire qualified applicants. However, employers need to be cognizant of their industry and the types of applications they may receive. Because it is impossible to know who will apply for a position, employers should not create rules that effectively exclude applicants with criminal histories. Employers should consider each application fairly and without prejudice.

Keywords: litigation, minorities, disparate impact, background check, criminal history, hiring
Sexual Orientation and Gender Nonconformity: What Is “Actionable” under Title VII?

By Sidney O. Minter – November 28, 2016

Title VII of the Civil Rights Act of 1964 was enacted primarily to protect minorities from discrimination in the workplace. Just before its enactment, the U.S. Congress included a provision related to "sex" discrimination. Because it was a last-minute add-on, however, our federal district and appellate courts have traditionally taken a position that "sex" should be applied very narrowly. Over the years, this view has changed as litigants have pushed for a broader interpretation of the term. Concurrently, our courts have been trying to determine the differences, if any, between sexual orientation and gender nonconformity discrimination. This has not proven to be an easy task.

After the landmark case of Obergefell v. Hodges, in which same-sex marriage was legalized in all states, the interpretation of "sex" has been analyzed even further—often leading to confusion among litigants and federal courts. To muddy the waters further, about one month later, the Equal Employment Opportunity Commission (EEOC), in Baldwin v. Department of Transportation, issued an opinion providing that federal employees can bring actionable discrimination claims based solely on sexual orientation. This decision, at least for federal employers, expanded the litigant pool. Following this decision, other federal courts have discussed Baldwin in dicta, but we still do not have a definitive answer for this question: whether a litigant has standing to bring a claim based solely on sexual orientation.

This article provides (1) a brief history of Title VII sex discrimination litigation, (2) a brief discussion of Hively, (3) potential solutions to the issue, and (4) advice for employers in complying with Title VII.

Outside the narrow holding in Baldwin, federal claims based solely on sexual orientation have not been actionable. However, some federal circuits have allowed claims based on allegations of sexual orientation and gender nonconformity. In these cases, courts have generally teased apart the two claims and focused only on gender stereotype allegations. In doing so, courts have still struggled with trying to decide how every sexual orientation claim is not inherently a gender nonconformity claim. The argument is that discrimination against gay, lesbian, and bisexual employees arises because their behavior is seen as falling short of gender stereotypes, such as men should dress like "men" or men should only marry women.

Courts have reasoned that, in maintaining the narrow interpretation of "sex," a person's sexual orientation was not related to his or her biological sex. Therefore, that type of specific claim
was not actionable. In 1989, in *PriceWaterHouseCoopers v. Hopkins*, the Supreme Court of the United States held—for the first time—that gender nonconformity discrimination was actionable as "sex" discrimination under Title VII. This case marked a great victory for the lesbian, gay, bisexual, and transgender (LGBT) community. A few years later, in *Oncale v. Offshore Oil Services*, the Court broadened "sex" litigation to include claims based on same-sex harassment. This again was a win for the LGBT community. Although the Court expanded the scope of the term "sex," it did not discuss whether a claim based *solely* on a person's sexual orientation could be actionable under Title VII. During the next quarter century, our federal district and appellate courts struggled with delineating between sexual orientation claims, which are not actionable, and gender nonconformity claims, which are actionable. As one court put it, a person can legally be married on a Friday but lose his job on a Monday because of his sexual orientation. Most recently, in August 2016, the Seventh Circuit Court of Appeals, in *Hively v. Ivy Tech Community College*, issued an opinion shedding some light on the many different sides of this issue.

In *Hively*, the plaintiff was employed as a part-time adjunct professor at Ivy Tech Community College. She worked for Ivy Tech for 14 years until Ivy Tech did not renew her part-time employment contract. During her career, she applied for six full-time positions with Ivy Tech but was never offered an interview—despite having the necessary qualifications and no negative evaluations in her file. The plaintiff filed a claim alleging discrimination based on her sexual orientation. It failed because claims based *solely* on sexual orientation are not actionable in the Seventh Circuit. The *Hively* court, instead of stopping at that conclusion, went to great lengths to provide a historical context of sexual orientation and gender nonconformity Title VII litigation. The court cited many cases from nearly every federal circuit—noting that claims based *solely* on allegations of sexual orientation were not allowed. It also shed some light on how certain federal circuits disallow claims to which sexual orientation and gender nonconformity claims are "bootstrapped." Ultimately, the lack of consistency on this issue in our federal courts has created a perplexing problem with no immediate solution.

The *Hively* court mentioned two potential solutions. First, the U.S. Congress could introduce legislation to amend Title VII. In doing so, it could either (1) extend Title VII to cover sexual orientation claims for all employers or (2) explicitly exclude sexual orientation claims for all employers. This does not appear to be a likely result, however, considering that Congress has repeatedly rejected legislation that would provide clarity on this point. Second, the U.S. Supreme Court could chime in on this issue as well. With the sheer number of Title VII "sex" cases, the Court has been afforded opportunities to provide a definitive answer but has chosen instead to "punt" on this issue. At some point, the right case, with the right set of facts, will likely force the Court to chime in on this issue once and for all. The *Baldwin* case, which applies to federal employees only, has been cited often as of late. Yet, unless the sexual orientation claim is raised by a federal employee, it is still not actionable in any federal court. Because we
do not have a clear answer, employers and employees have been affected. Even more, the federal courts are coming up short on rational answers to this confounding problem.

Moving forward, we know that discrimination claims based solely on sexual orientation are not actionable, though it appears the tide is turning such that these claims may soon be actionable. Whether this result will be achieved by some act of the U.S. Congress, or by a Supreme Court opinion, we do not know.

Recommendations for Employers

1. Assume that sexual orientation and gender nonconformity claims are actionable.

2. Include training regarding sexual orientation and gender nonconformity in discrimination training.

3. Add "sexual orientation" and "gender nonconformity" to the list of protected classes in employee handbooks.

Keywords: litigation, minorities, discrimination, sexual orientation, gender nonconformity

Diversity in the Bar: Where Are We and What’s Keeping Us from Going Further?

By Hope Thai Cannon – November 28, 2016

Merriam-Webster’s online dictionary defines diversity, simply, as "the quality or state of having many different forms, types, ideas, etc." or "the state of having people who are different races or have different cultures in a group or organization." We all agree that diversity is important (at least I hope that we can all agree on that fact). Diversity is essential to the effective growth and development of schools, neighborhoods, governments, and businesses. Ensuring diversity exists in the workplace is not only the right thing to do; it also increases a business's bottom line. Extensive research shows that companies that are both gender and ethnically diverse are more likely to outperform their peers. One of the most recent research studies in this area was conducted by Bersin by Deloitte in 2015. Press Release, Bersin by Deloitte: Diversity and Inclusion Top the List of Talent Practices Linked to Stronger Financial Outcomes (Nov. 12, 2015). The findings of the Bersin research appear in High-Impact Talent Management: The New Talent Management Maturity Model. According to those findings, organizations that welcome diversity, align their diversity and inclusion strategy with their organizational objectives, and integrate diversity and inclusion with learning, performance management, and succession management, had 2.3 times higher cash flow per employee over a three-year period.

But are law firms convinced by the corporate world's view of diversity? Looking at some statistics over the past 10 years, the answer to that question appears to be "we’re trying, but still have a long way to go." A 2013 study commissioned by Microsoft revealed that the diversity gap in the U.S. legal profession has worsened over the past nine years, lagging behind other professions. "Raising the Bar: Exploring the Diversity Gap Within the Legal Profession," Microsoft Corporate Blogs, Dec. 10, 2013. Moreover, even today, when diversity and inclusion are national buzzwords, there are still some bar organizations that continue to lump minorities, other than African Americans, as, simply, "other."

Data from the American Bar Association (ABA) for 2015 covering 1,300,705 attorneys show 65 percent are male and 35 percent are female. ABA, Lawyer Demographics, Year 2015. The number of female attorneys reported by the ABA has grown 6 percent since 2005. However, at both the national and state levels, the number of female and minority practicing attorneys is well behind the number of female and minority law students enrolled in a JD program nationwide. According to the ABA, in 2013–2014, there were a total of 128,695 JD students, 47.8 percent of which were female and 28.5 percent of which were minorities.
While the number of female and minority attorneys appears to have increased in the past 10 years, recent findings by the National Association for Law Placement (NALP) show that the number of female and minority associates in law firms is actually declining. "Women and Minorities at Law Firms by Race and Ethnicity—New Findings for 2015," NALP Bull., Jan. 2016. For example, "the percentage of women associates has decreased in all but one of the last six years and now is almost one full percentage point lower than in 2009." Similarly, while the number of minority attorneys appears to be increasing, this increase at the associate level appears to be largely attributable to the rise in Asian associates. The number of African American associates, on the other hand, has declined every year since 2010 and now stands at just 4 percent of associates nationwide.

Having a diverse law firm, however, is not limited to the inclusion of women and minority attorneys. Diversity and inclusion also involve recruiting and retaining attorneys with disabilities as well as lesbian, gay, bisexual, and transgender (LGBT) attorneys. According to the NALP, however, information and statistics for these two categories of attorneys are less readily available than race and gender information. In 2005 the NALP reported the number of openly gay and disabled attorneys across all firms to be 504 for partners and 869 for associates, which constituted .91 percent of partners and 1.44 percent of associates. "Still Relatively Few Openly GLBT or Disabled Lawyers Reported," NALP Bull., Dec. 2005. For 2015, the NALP reported 785 partners as LGBT, or 1.80 percent, and 1,244 associates as openly LGBT, or 3.08 percent. "LGBT Representation among Lawyers in 2015," NALP Bull., Dec. 2015. The number of reportedly open LGBT attorneys has, thus, nearly doubled in the past 10 years.

The Minority Corporate Counsel Association (MCCA) also conducts an annual survey of law firms. The data collected by the MCCA for 2015 included 250 law firms representing all of the AmLaw 100 firms. Vault/MCCA Law Firm Diversity Survey Report (2016). All but three of those law firms provided a response to the survey. The findings by the MCCA show more favorable results for minorities and females. According to the MCCA survey, minorities made up 22.75 percent of associates, 7.53 percent of equity partners, 10.21 percent of nonequity partners, and 14.99 percent of all attorneys at year end 2014. Women made up 45.04 percent of associates, 18.79 percent of equity partners, and 39.32 percent of nonequity partners for that same period. The survey conducted by the MCCA also identified attorneys with a disability and those who are openly LGBT. According to the MCCA, openly LGBT lawyers made up 2.75 percent of associates, 1.65 percent of equity partners, 1.55 percent of nonequity partners, and 2.12 percent of all attorneys. The number of individuals with disabilities made up .23 percent of associates, .29 percent of equity partners, .21 percent of nonequity partners, and .26 percent of attorneys overall.

What is most interesting about the MCCA survey, however, is the analysis of the data as to the three largest minority groups: African American/Black, Hispanic/Latino, and Asian. Based on the
information the MCCA collected in prior years, the survey—like the NALP study discussed above—found that the number of African American associates is actually declining. In 2007, African Americans made up 5.11 percent of associates, but by 2014, the number had dropped to 4.19 percent. The number of African American partners, however, has increased since 2007 (although very slightly), with most of the advances made by women. Another astounding statistic for African American attorneys is that the attrition rate for African American attorneys is higher than that of any other race group.

Like the NALP’s 2015 study, the MCCA survey attributes the increase in minority attorneys, in large part, to the increase in Asian attorneys. In addition, the percentage of Asian attorneys (6 percent) is higher than the percentage of total Asians in the United States (5 percent). However, the MCCA also concluded that Asian attorneys are less represented in the partnership ranks as compared with other racial groups. Similarly, the number of Asian attorneys serving in management positions at firms is also less than those in other racial groups in comparison with the total number of Asian attorneys represented.

The MCCA concluded that while Hispanics represent the largest minority group in the United States, they are the smallest minority group represented in law firms, in contrast to Asian attorneys. The number of Hispanic attorneys overall, however, is steadily growing, and the attrition rate for Hispanic attorneys (in contrast to the attrition rate for African American attorneys) is less than that of other minority groups as well.

While the specific numbers in each of the surveys discussed may vary, the walk-away information is the same: While the legal profession appears to have acknowledged the importance and need for diverse attorneys, improvements are needed to recruit, retain, and promote diverse attorneys. For example, the statistics on partner demographics, while showing a growth in the number of females and minorities, still continue to lag behind the total number of female and minority attorneys as well as female and minority law students. According to the NALP, in 2015, 21.46 percent of partners were female, 7.52 percent were minority, and only 2.55 percent of those were minority women. Furthermore, according to the NALP, the number of female partners has grown by only about 4 percent since 2004 and the number of minority partners has grown by only about 3 percent. See "Women and Attorneys of Color at Law Firms—2004," NALP Bull., Feb. 2005.

One of the barriers to the recruitment, retention, and promotion of women and minorities in the legal profession is implicit bias. Deborah L. Rhode, the Ernest W. McFarland Professor of Law at Stanford University, published an article in the Washington Post last year, entitled "Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That" (May 27, 2015). Professor Rhode discusses unconscious or implicit biases resulting in the exclusion of minorities and females from informal networks of support and client development.
Minority Trial Lawyer
Fall 2016, Vol. 15, Issue 1

As another example of implicit bias, Professor Rhode cites a study in which a legal memo was given to law firm partners to review. Half of the partners were told the memo was written by a white associate and the other half were told the memo was written by an African American associate. The study showed that the white associate's memo was rated 4.1 on a scale of 5 and that he received praise for his potential and analytical skills, while the African American associate's memo was rated a 3.2 and said to be average and in need of work.

Most people may not even know that they have such biases or, more importantly, that they behave in a way that reflects an implicit bias. For example, if those same partners in the study discussed by Professor Rhode were asked before they began the study whether they would believe that a white associate turns in better work quality than an African American associate, the majority would have said no. However, if those same partners had taken the Implicit Association Test (IAT) provided by Harvard's Project Implicit, the results may have told a different story.

The IAT measures attitudes and beliefs that people may be unwilling or unable to report by determining "the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)." For example, one test measures whether you are more or less likely to associate weapons with African Americans and harmless objects with whites. As the Project Implicit website states,

[t]he IAT may be especially interesting if it shows that you have an implicit attitude that you did not know about. For example, you may believe that women and men should be equally associated with science, but your automatic associations could show that you (like many others) associate men with science more than you associate women with science.

Another example of implicit bias at play is the lack of Asian attorneys in management and leadership positions in law firms. While Asians are often associated with being hard workers, Asians are also often associated with docility, passivity, and rigidity. These are qualities that are not associated with leadership. Similarly, "most Americans are more likely to associate women with family life than with professional careers." Nicole E. Negowetti, "Implicit Bias and the Legal Profession's 'Diversity Crisis': A Call for Self-Reflection," 15 Nev. L.J. 930 (2015).

Possessing an implicit bias, however, does not make you a racist or a bad person. In fact, as Project Implicit points out, people may have an implicit bias that they are not aware of or do not want to have. The first step to combatting implicit biases starts with the acknowledgment that they exist. The second step is to take affirmative steps to overcome those biases. Russell G. Pearce et al., "Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships," 83 Fordham L. Rev. 2407 (2015).
Another potential barrier to increased diversity in law firms is simply the demands of the profession and the view that anything less than 100 percent dedication means you cannot be successful. These demands take a toll on work-life balance, particularly for women. For example, while the ability to work remotely, thanks in large part to better technology, has freed us from being in the office, it has done so at the price of being handcuffed to our phones, tablets, and laptops. Such demands and pressures may be an explanation for why only 6 percent of attorneys are on a part-time or flexible work schedule, even though 90 percent of all firms offer such schedules. Thus, as Professor Rhode states in her article, it is not enough to simply create policies or programs that, by their appearance, facilitate diversity and inclusion; rather, law firm leaders must be attuned to how policies that affect inclusiveness actually play out in practice.

Therefore, while Lady Justice wears a blindfold, lawyers cannot. The legal profession has indeed made significant strides in increasing diversity, but challenges continue to exist particularly as the profession changes. The profession needs to continue not only to talk about diversity and inclusion but also to make individual and organizational efforts to overcome biases and to promote diversity so that we can all look forward to the next 10 years.

**Keywords:** litigation, minorities, diversity, implicit bias, Implicit Association Test

Hope Thai Cannon is a partner at Bradley Arant Boult Cummings LLP in its Birmingham, Alabama, office.
New York State Department of Financial Services Proposes Cyber Security Regulations
By Leonard Wills – November 7, 2016

On November 13, 2016, the 45-day notice period will end on a set of regulations described as the “first in the nation.” The New York State Department of Financial Services (DFS) published draft regulations on cybersecurity for the financial sector on September 13, 2016. The draft regulations propose regulatory minimum standards to protect customer information and the covered entities’ information technology systems from a cybersecurity event (defined as “any act or attempt, successful or unsuccessful to gain unauthorized access to disrupt or misuse an Information System or information stored on such Information System”).

These draft regulations will affect “covered entities,” such as New York state chartered banks, New York licensed branches and agencies of foreign banks, insurance companies, money transmitters, licensed lenders, mortgage lenders, and servers. Certain small businesses, however are exempt from these draft regulations. Each covered entity must “establish and maintain” a cybersecurity program that ensures the confidentiality, integrity, and availability of the entity’s information systems. Under the new regulations, cybersecurity programs will have to perform the following functions:

1. Identify internal and external cyber risks;
2. Leverage defensive infrastructure, policies, and procedures to protect the entity’s information systems;
3. Detect cybersecurity events;
4. Respond to and mitigate any potential cybersecurity events;
5. Recover and restore normal operations after a cybersecurity event; and
6. Follow all regulatory reporting obligations.

Furthermore, the regulations require each covered entity to designate a Chief Information Security Officer (CISO) “responsible for overseeing and implementing a company’s cybersecurity program and enforcing its policies.” The CISO is further required to report bi-annually to the entity’s board, and the contents of each cybersecurity report must be available upon request to the superintendent of financial services.

Any written cybersecurity policies and procedures under the new regulations must secure “information systems and nonpublic information accessible to, or held by third parties that engage in business with the covered entity.” All policies and procedures will be required to
identify and assess the risk of third parties, and ensure that third parties meet minimum cybersecurity practices—among other minimums requirements—to protect their information systems.

Governmental entities, like DFS, that draft and propose cybersecurity regulations face numerous challenges. Regulations drafted today may become obsolete tomorrow because of technological innovations and transformations. Government officials and industry must work together to create regulations fair to industry and to protect consumers.


*This article neither reflects the official views of the United States government nor does the United States government endorse this article.
Making the Deposition Work for You

By Florence M. Johnson – October 31, 2016

Depositions are one of the most valuable tools in the discovery phase of litigation. An attorney has the opportunity to ask just about any question within reason, and the witness is compelled to answer that question.

The deposition process is a formal one, just like in a courtroom, and you should assume that the deposition will be used in a formal setting in the future. Will it be used to defend summary judgment? Will it be used in a trial when a witness becomes unavailable? You never know. It behooves you to behave as though any deposition will be heard before the Supreme Court. Unprofessional behavior can come back to haunt you when you least expect it.

Keep the following best practices in mind as you take your next deposition, and protect yourself from embarrassment—or worse—in the future.

• It should go without saying, but we’re saying it: The penalties for telling untruths in a deposition are the same as those for doing so in trial.
• Courtroom rules apply. Back up any objections with concise reasoning. Always stipulate to the reading and signing of the deposition at the start of the deposition.
• The conduct of counsel on both sides should be formal. Casual conversation, inarticulate questioning and failure to prepare not only waste the lawyers’ and court reporter’s time; more importantly, it wastes the client’s money.

The following are suggestions for producing useful and useable content through deposition testimony:

• Clearly identify the purpose of the deposition, including the specific information you hope to gain from the witness.
• Prepare your exhibits ahead of time and know how the documents fit into the narrative of your case.
• Prepare your client for the arena. If you’re the defending attorney, advise your client of your expectations and your goals. If you’re the attorney who noticed the deposition, prepare your client to be deposed. There’s nothing worse than a client stating on the record that they fail to recognize documents that you know they have seen.
• Avoid any casual conduct or comments that you would not be proud of when the transcript is produced. Resist the urge to crack wise, discuss the latest game or engage in other chitchat with your client or your colleague across the table.

© 2016 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
• Know what to do when you run into differences in opinion on objections with opposing counsel. Do not be afraid to call the court with discovery disputes that arise; however, do not be that lawyer who continually threatens to call the Court over disagreements.
• Videotaping is a must. Witnesses do forget the camera is there, often uttering interesting things or making admissions that you cannot anticipate. You do not want to regret not having it on tape to play back to the jury, nor do you want the jury to witness unprofessional behavior. Remember any admission by a party opponent permitted by Rule 21(A)(2) of the Federal Rules of Civil Procedure is able to be offered in court.
• Keep in mind that if any witness becomes unavailable, you will have that evidentiary record. Federal Rule of Evidence 801(d)(2) allows you to use that deposition for any purpose, and is integral to offer on witnesses who will not be available for trial.

In summary, the deposition is not the place to let your hair down. To make the most of the deposition process, you must be attentive, prepared and focused.

Keywords: minority trial lawyer, litigation, deposition, FRE 801, FRCP 32(A)(2), admission and videotape

Florence M. Johnson is the principal attorney at Johnson and Johnson, PLLC, in Memphis, Tennessee, and the chair of the Practice Points Subcommittee for the Section of Litigation’s Minority Trial Lawyers Committee.
The views expressed herein are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association, the Section of Litigation, this committee, or the employer(s) of the author(s).

ABA Section of Litigation Minority Trial Lawyer Committee
http://www.americanbar.org/publications/litigation-committees/minority-trial-lawyer