



Diversity at Work: Fortifying Your Inclusion Efforts in the Current Climate

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Littler[®]

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Agenda

- Introductory Comments & The Current Landscape
- Diversity by the Numbers: A General Overview
- Identifying the Challenges to Creating a Culture of Inclusion
- Addressing Bias
- The Impact of Protests and Social Activism
- Strategies for Moving Forward

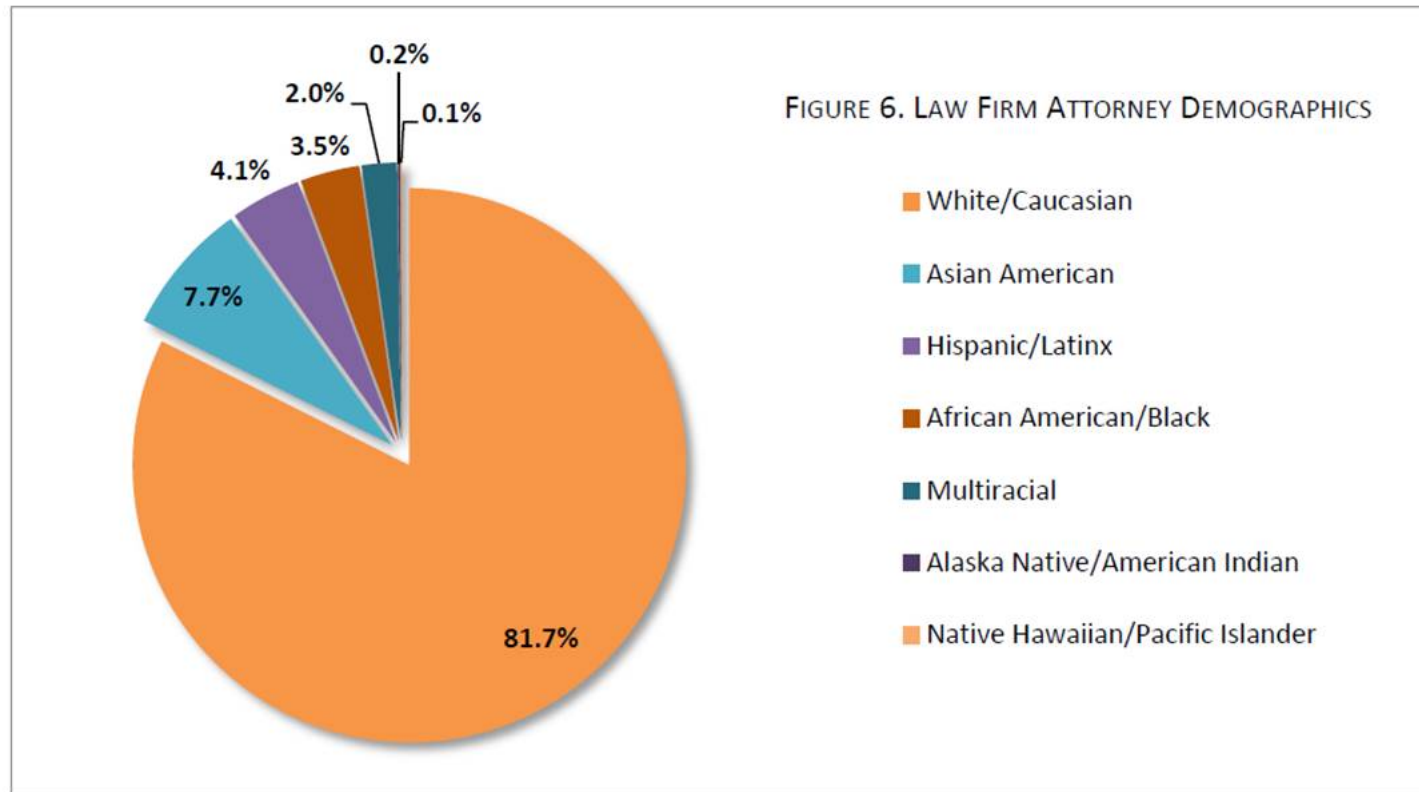




2020: A New Call For Action

Diversity In the Profession: A General Overview

Big Law Attorney Population By Color



Women and People of Color at Law Firms

Table 6. Women and People of Color at Law Firms — Partners and Associates — 2019

	Partners				Associates				# of Offices
	Total #	% Women	% People of Color*	% Women of Color*	Total #	% Women	% People of Color*	% Women of Color*	
Total	46,830	24.17%	9.55%	3.45%	45,927	46.77%	25.44%	14.48%	979
By # of Lawyers Firm-wide:									
100 or fewer lawyers	2,298	22.67	7.18	2.44	1,218	40.39	18.39	9.93	77
101-250 lawyers	8,359	24.05	7.26	2.61	4,536	47.53	19.51	11.42	119
251-500 lawyers	8,326	24.08	9.01	3.23	5,971	46.21	24.38	13.67	160
501-700 lawyers	5,080	24.45	8.03	2.91	4,217	47.00	24.57	14.32	121
701+ lawyers	22,767	24.33	11.16	4.06	29,985	46.99	26.95	15.31	502

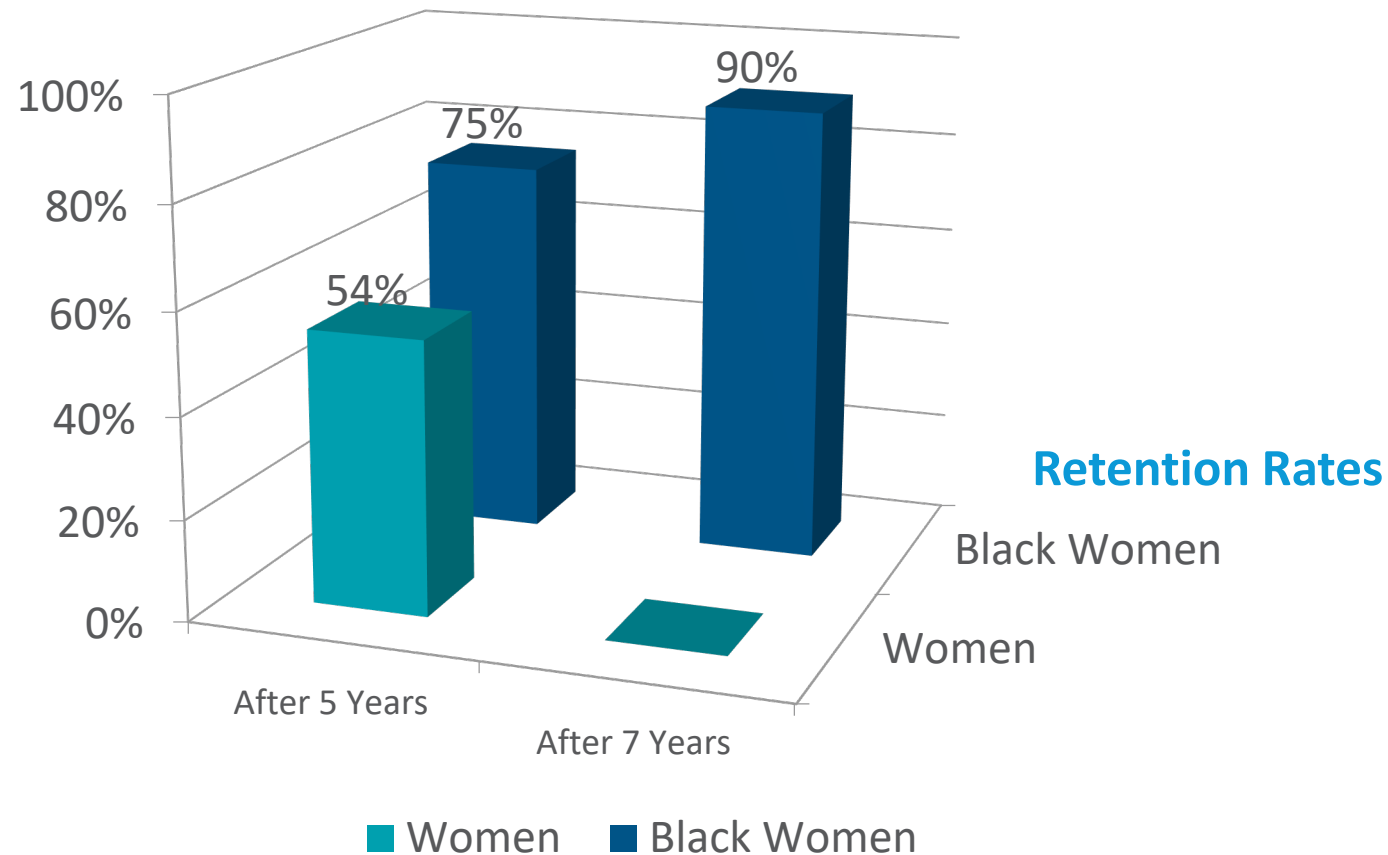
Minority Attorney Departure Realities

Attorneys of color are over-represented among lawyer departures

TABLE 3. ATTORNEY DEPARTURES AMONG LARGEST RACIAL/ETHNIC GROUPS IN 2018 AS PERCENTAGE OF THEIR OVERALL LAW FIRM POPULATION				
	African American/ Black	Asian American	Hispanic/Latinx	White/Caucasian
All Attorneys	16.7%	14.3%	12.1%	10.6%
Men	16.0%	13.9%	11.3%	10.0%
Women	17.3%	14.7%	13.0%	11.9%

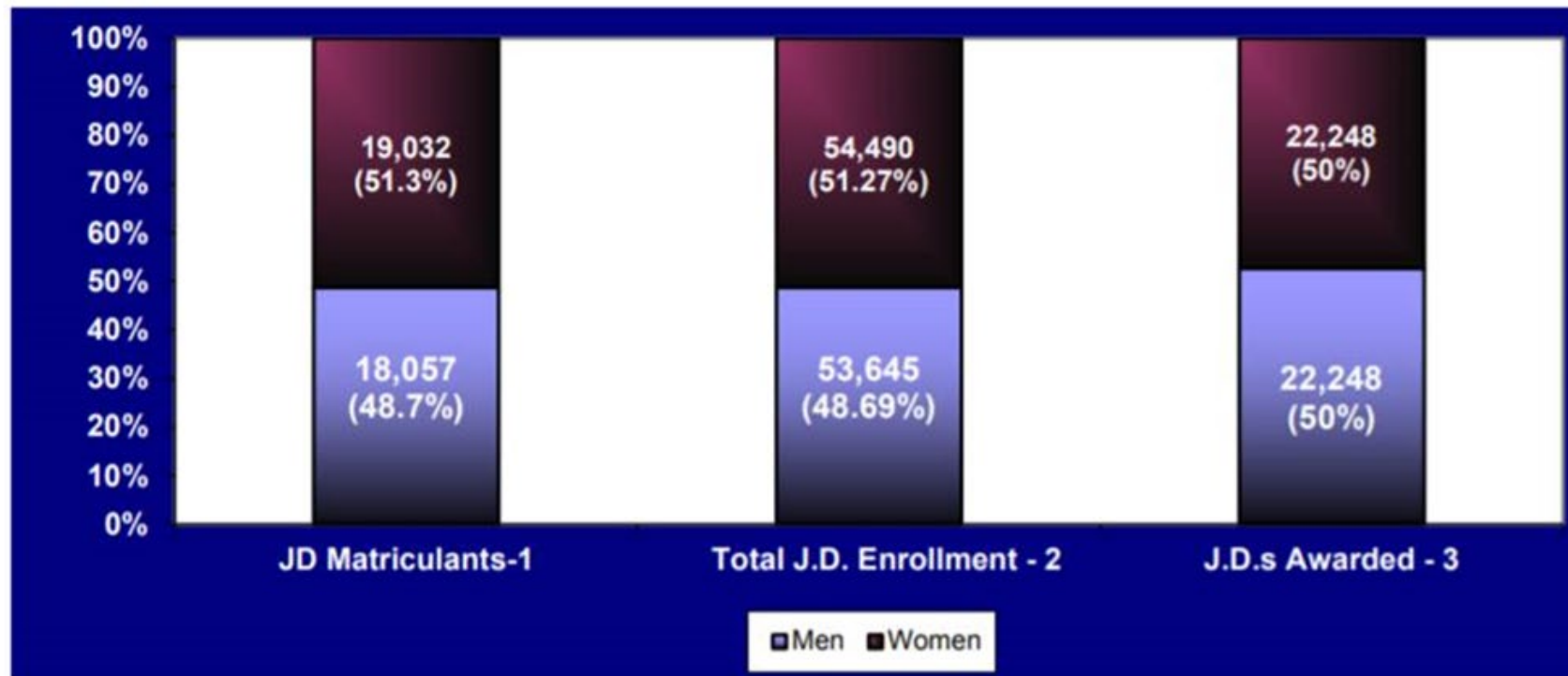
Race & Gender: A Double-Whammy

Female attorneys of color are over-represented among lawyer departures



Law Student Breakdown by Gender

Women in Law Schools

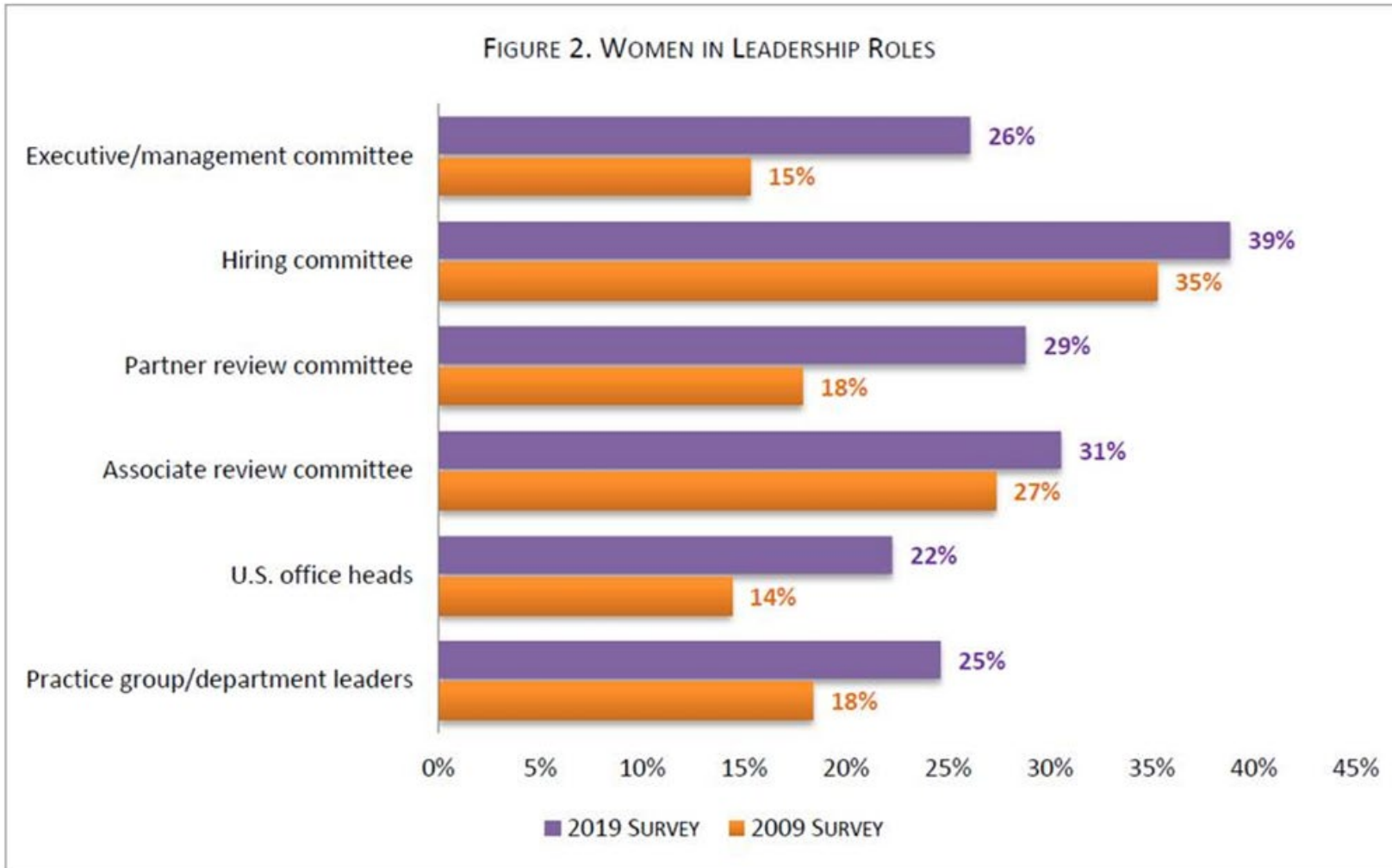


Women and the Bar

- **38%** of all attorneys in law firms are women
- **1 in 5** equity partners is a woman
- Women represent **22%** of leadership/executive roles
- **41%** of law firm departures are women
- Female outside counsel earn **18%** less than male counterparts
- **1/3** of federal and state appellate judges are women



Athena Rising?





To enable diversity to thrive, firms will need to adapt their business models and change their internal cultures. The firms who take this seriously and make radical changes will move ahead in their chosen markets.

— Acritas CEO Lisa Hart Shepherd



Restating the Case for Diversity & Inclusion

Diversity Dividends: Statistics of Interest

- Gender diverse companies are **15%** more likely to outperform their respective national industry medians.
- Corporate clients tend to spend **25%** more money with diverse teams
- Inclusive teams make better decisions **87%** of the time and do so faster, and with fewer meetings.
- Companies with diversity are **70%** more likely to capture a new market.





“Diversity” & “Inclusion”



DIVERSITY

The collective mixture.

INCLUSION

Welcoming & leveraging the strengths of our mixtures.

Problem #1: Focusing on the Wrong Thing

You Can “Shop ‘Till You Drop” for Diversity



Don't Blame Recruitment

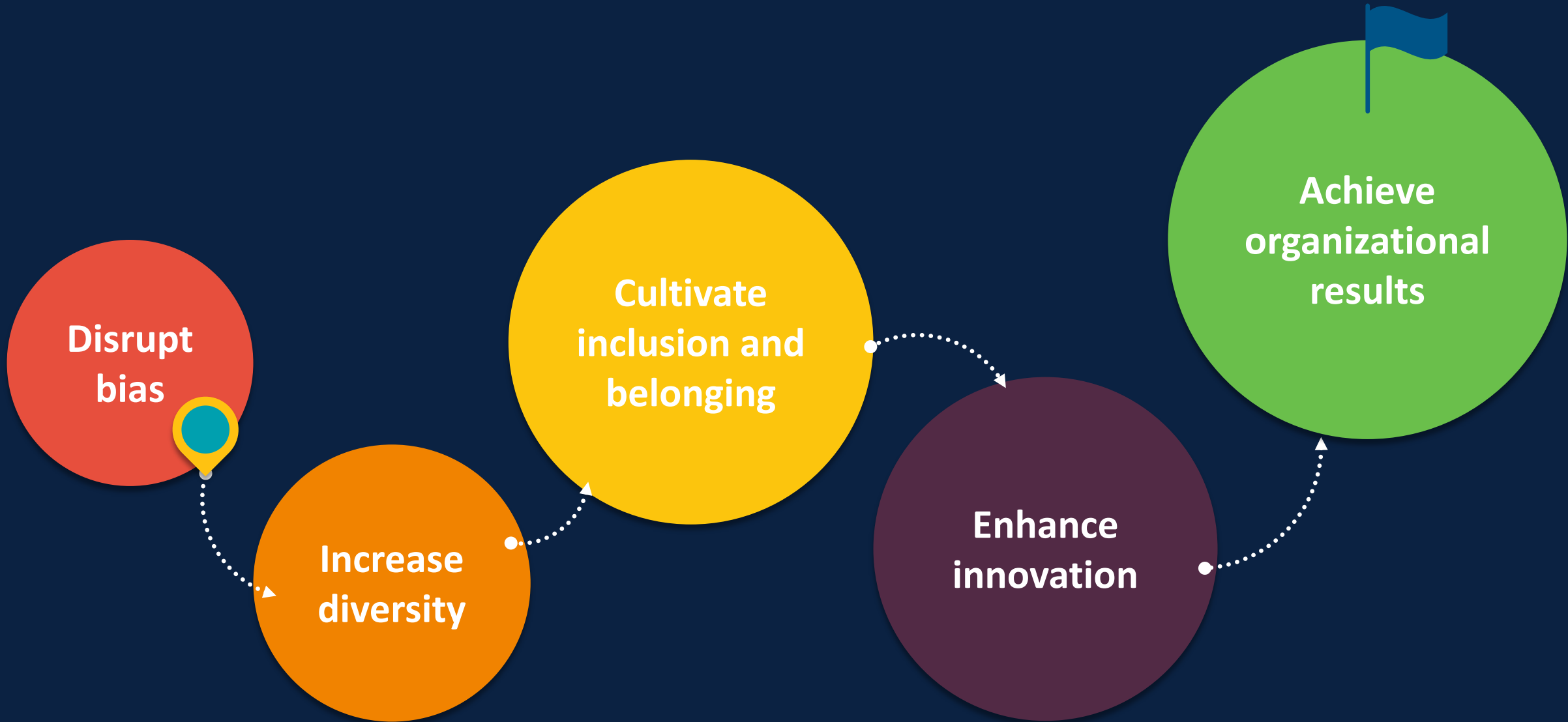
Law firms and corporate law departments spend time and resources aggressively recruiting and training, then their targeted hires leave and organizations wonder “Why?” They think: “Our diversity recruitment and training programs are failing.”





The Frustrating Cycle of “Diversity Shopping”





**Diversity without
inclusion does not work**

Identifying the Challenges to Creating a Culture of Inclusion

Our “Baggage”

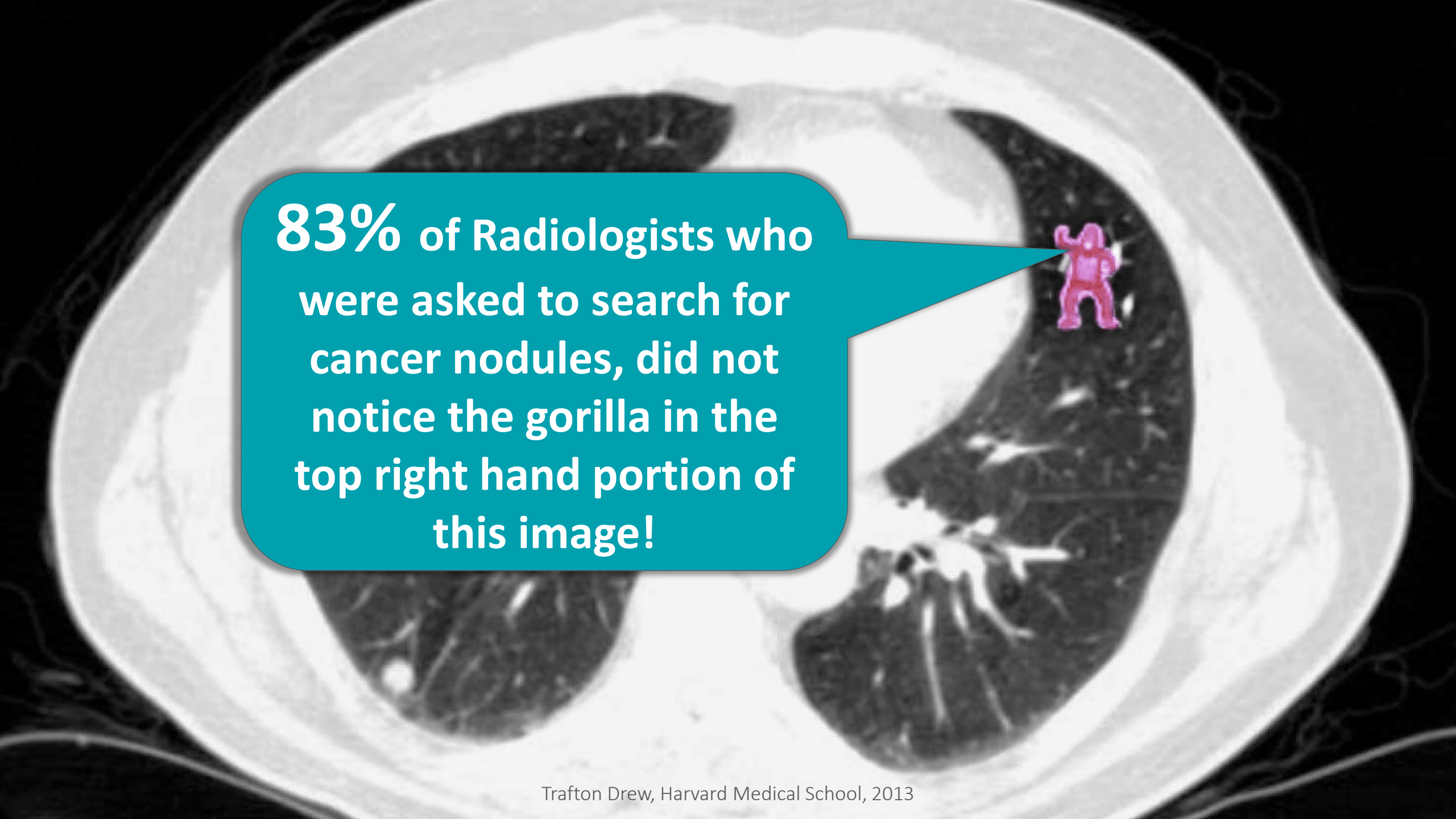
- Tradition-bound Profession
- Stereotypes
- Micro-aggressions
- Family Influences
- Personal Experiences
- Educational/Peer Influences
- Media Influences
- Lack of Knowledge
- Favoritism/Preferences
- Bias



Focus: Implicit Bias

What is Bias?

A tendency or inclination that results in judgment without question.



83% of Radiologists who were asked to search for cancer nodules, did not notice the gorilla in the top right hand portion of this image!

What Implicit Bias and What It *Isn't*:

IS:

- Pervasive
- Predictive of behavior in the real world
- Distinct from conscious stereotyping or prejudice
- Expressed indirectly
- Related but distinct from each other (some reinforce each other)
- Malleable – can be unlearned
- Hard to teach

IS NOT:

- Activated voluntarily or intentionally
- Always consistent or aligned with our declared beliefs
- Always consistent with our own ingroups
- Mutually exclusive
- Something you should feel guilty about
- Always negative



What the Research Shows



Race



RESUME

EXECUTIVE SUMMARY

123-456-7890
no_reply@example.com

1234 Main Street
Anytown, State
ZIP

Profile

Lorem ipsum dolor sit amet, ligula suspendisse nulla pretium, rhoncus fermentum, enim integer ad vestibulum volutpat. Nisi rhoncus turpis est, congue wisi enim nunc ultricies sit, magna fincidunt. Maecenas aliquam maecenas ligula nostra, accumsan taceri.

Experience

Job Title, Company Name, City, State - 2012-Present
Sociis mauris in integer a dolor netus non du aliquet, sagittis feis sociabiles, dolor purus pede portitor class, ut adipiscing aliquet sed accuri, imperdiet area per temporibus scelerisque nec.

Job Title, Company Name, City, State - 2008-2011
Ac dolor a ac adipiscing amet blandum nullam, lacus mollis ut libero net, diam et pharetra sodales, laugiat ullamcorper id tempor id vite. Mauris pretium aliquet lectus tritidant.

Education

University of State, City, State - Degree Year

Skills

Vivamus natoque turpis elementum est. Duis massa, velis tortoribus nec eros et, in vitae vel, wisi et, id present ibberium liber buccibus praeparante, quoque present ipsum fermentum tempus.

References

60 law firm partners were sent a brief from “Thomas Meyer” with 22 spelling, grammar, technical, and analytic errors...



4.1/5

10.2 Errors Found

“HAS POTENTIAL”

“GOOD ANALYTICAL
SKILLS”

“GENERALLY GOOD
WRITER BUT NEEDS TO
WORK ON...”



3.2/5

14.6 Errors Found

“NEEDS A LOT OF WORK”

“AVERAGE AT BEST”

“CAN'T BELIEVE HE
WENT TO NYU...”

Implicit Bias

- Bias at work is our brains on “cruise control”
- We all have implicit biases.
- This does not necessarily mean that we will act in an inappropriate or discriminatory manner - only that our first “blink” sends us certain information.
- Acknowledging and understanding this implicit response and its value and role is critical to informed decision-making.
- Particularly critical to legal professionals – we are in a sector that is seen to embody fairness and justice.





As lawyers, we have a responsibility to recognize and eliminate bias where we may not now see it, to uphold principles of justice and equality, and to ensure that our workplaces and institutions reflect those principles.

— Statement of NYC Bar Ass'n in support of ABA Resolution 107 calling for mandatory D&I CLE (February 2016)





Only 15% of male counsel-nominated firm “stars” were women.



The percentage of female firm stars almost doubled – 29% - when nominated by other outside female counsel



The effect of this bias is multiplied when you consider that 4 out 5 senior in-house counsel are male.

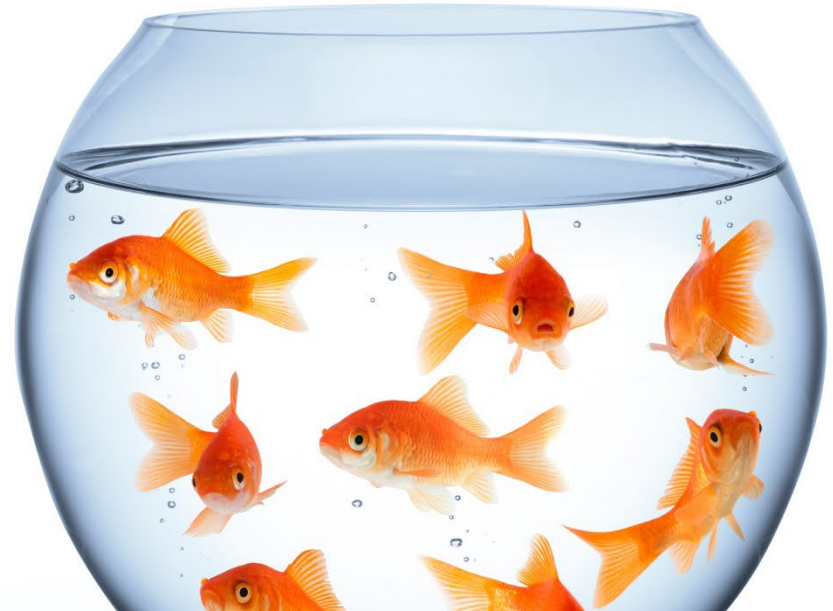


76% of first chair counsel in civil trials are men

Additional Contributions to the Gender Bias Challenge

What is the Cost of Unchecked Bias?

- Lowered confidence/self-esteem
- Lowered effectiveness/productivity
- Distrust
- Client dissatisfaction/departure
- Absenteeism
- Increased turnover
- Reputation/Brand
- Stagnant growth
- Legal costs



Sources for Change





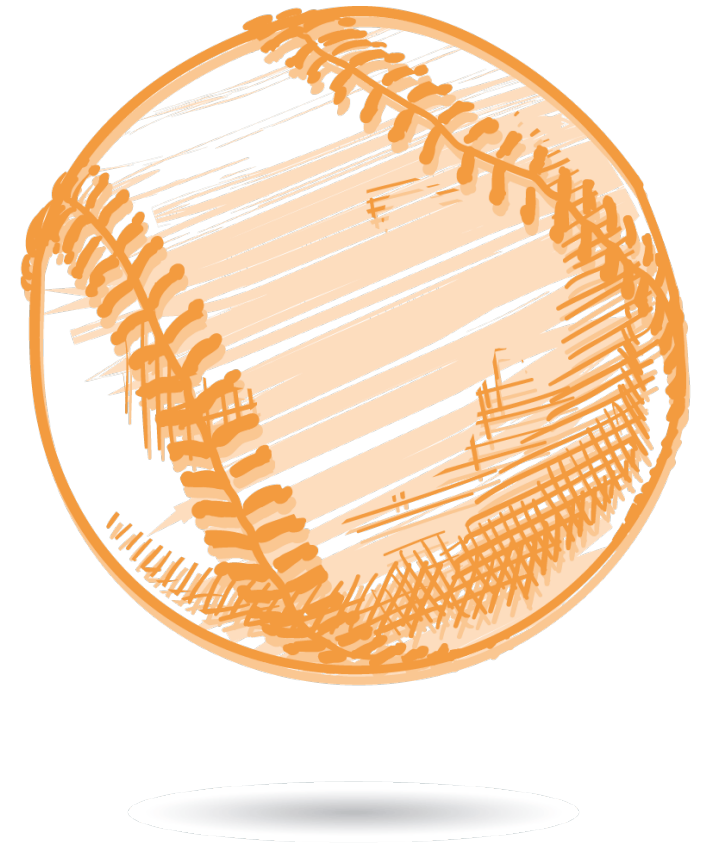
The Spike in Social Activism and Effects on “Free Speech” at Work



How to Address Racist Speech In and Outside of the Workplace

In the Workplace (the softballs)

- Racist/racially inappropriate comments in the workplace: Address under EEO/anti-harassment policies.
- What if it's on break?
- What about employee-to-employee comments on Slack?
- What about an employee playing a YouTube video containing racist invectives on work computer in open floor plan?
- What about an employee wearing an offensive t-shirt?





Private

What about Freedom

**employers
are not state**

actors

Not so fast.....

Jurisdictions Where “Political Ideology” Is a Protected Category or Where Employers Cannot Terminate Employees for Political Activity/Affiliation

- **California.** Employers cannot control the political affiliation or activities of workers. Employers cannot threaten to terminate workers for refusing to engage in specific political activity.
- **Colorado.** Employers may not prevent employees from engaging in political activities. An employer may not terminate an individual because of political affiliation.
- **District of Columbia.** Employers cannot discriminate against employees based on political affiliation.
- **Louisiana.** Employers cannot threatening or intimidate individuals due to political party affiliation.
- **Minnesota.** Employers cannot financially retaliate against, or threaten to fire, an individual based on their political activities.
- **Montana.** Employees may only be terminated for “good cause” related to work performance. Termination based on political activity/affiliation is prohibited.
- **Nebraska.** Employers may not threaten to terminate individuals based on their political activities.
- **New Jersey.** Employers may not require employees to take part in employer-sponsored meetings about the employer’s political opinions or positions.
- **New York.** Employers cannot discriminate against employees based on their off-duty, off-premises political activities.
- **South Carolina.** Employers may not terminate a citizen from employment because of that person’s political opinions or activities.
- **Wisconsin.** Wisconsin law also prohibits employers from threatening to terminate employees based on political activity.
- **Seattle.** Employees cannot be discriminated against or harassed because of their political ideology.

How to Address?

Racism ≠ a political ideology

Protections under the NLRA

- **All employers** (not just unionized workforces) are forbidden from taking adverse action against an employee for engaging in “protected concerted activity.”
- What is concerted activity?
 - Discussing terms and conditions of employment with coworkers.
 - E.g., complaints about wages, workplace rights, discipline, requiring employees to engage in activities they oppose.
- Political activity is included within protected employee communications so long as there is a sufficient connection to the workplace or to employee terms and conditions of employment.
- *Eastex, Inc. v. NLRB*: certain political activity to be protected as sufficiently employment-related (such as lobbying to reduce immigration and protect U.S. jobs), while finding that certain other activity is not (such as protesting health care staffing levels to improve patient safety).

What About Wearing BLM Supportive Clothing/Masks in the Workplace?

- What does your dress code say?
- Is this political speech/political ideology?
- Is this protected “mutual aid or protection” under §7?
- What about the employees who now want to wear “Blue Lives Matter” or “All Lives Matter” masks?





Outside of the Workplace...

Why is this such a big issue?

- Conduct outside the walls of your business can:
 - Impact the company's reputation with customers / competitors;
 - Create workplace tension; and
 - Lead to legal liability for the company



Time to play: Let's Get A Racist Fired! >

PRIVATE GROUP • 3.6K MEMBERS

Join Group

About

A group for people to interact and gather as an online community to expose racist individuals and their actions, with the sole intent being to impart a positiv... [See More](#)



Private

Only members can see who's in the group and what they post



Visible

Anyone can find this group

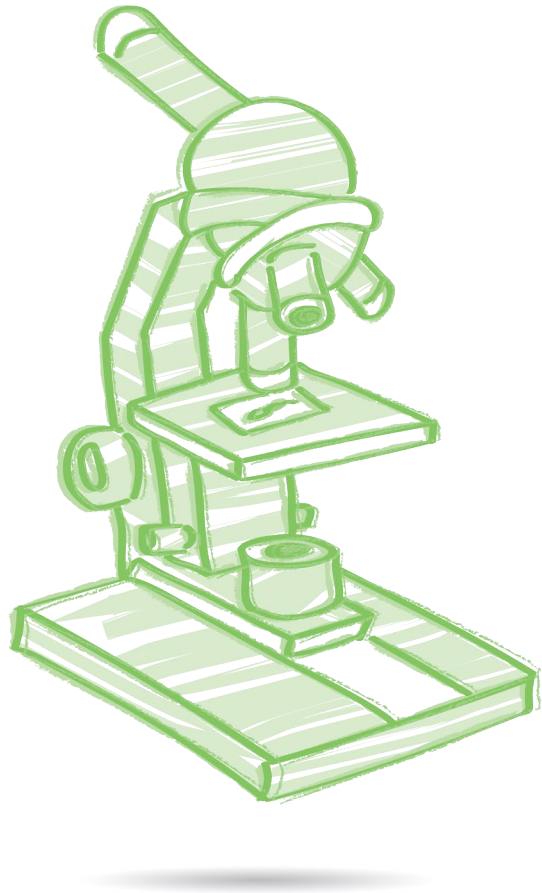


View Group History

Group created on June 1, 2020. Name recently changed from

Outside of the
Workplace -
Social Media

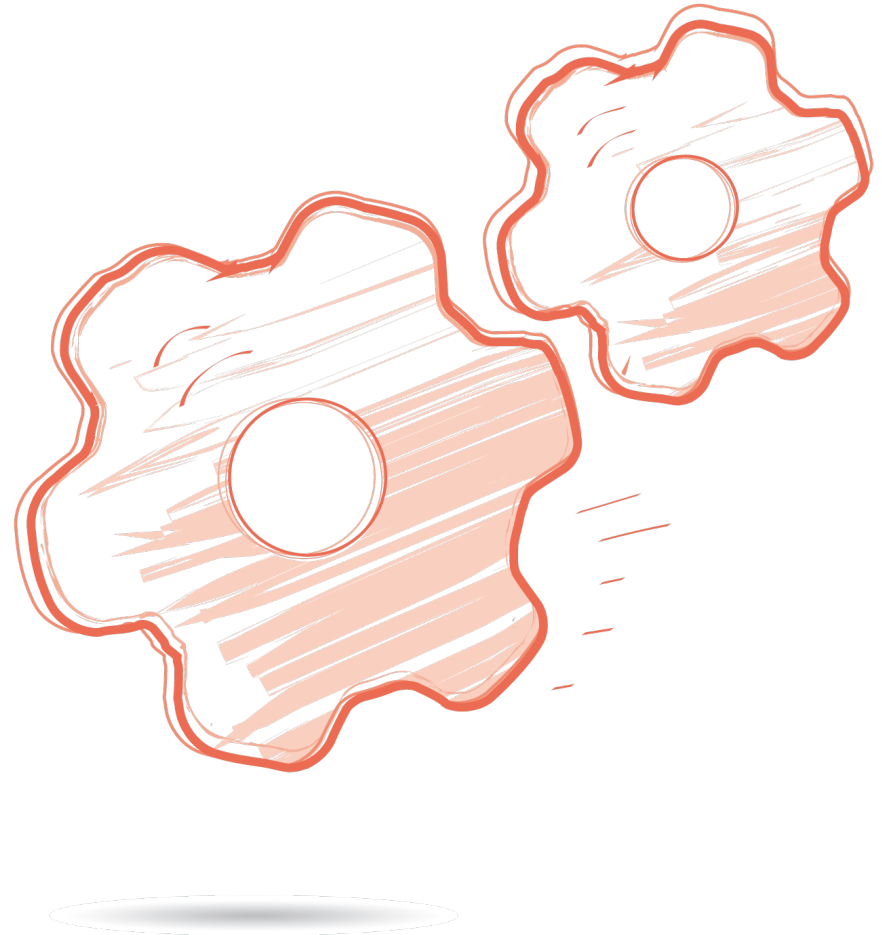
Potential Issues with Terminating Employees for Conduct Outside of the Workplace



- Termination based on political activity/affiliation
- NLRA concerted activity
- Lawful, off-duty conduct statutes
- Employer access to social media laws
- Communications/posts made on company devices

NLRA Concerted Activity

- All employers:
 - Prohibition against taking adverse action against an employee for engaging in “protected concerted activity” This prohibition has been interpreted to protect employees’ social media posts.
- Unionized employers should:
 - Follow CBA’s termination procedures
 - Be prepared for employee to grieve the termination.
 - Be prepared for an arbitrator to bring the employee back to work.



Lawful, Off-Duty Conduct Statutes



- Many states protect employees against adverse action based on some form of lawful conduct
 - Consumption Of Lawful Products: IL, MN, MT, NC, NV, NY, WI
 - Smoking/Tobacco Use: CT, DC, IN, KY, LA, ME, MS, NH, NJ, NM, OK, OR, RI, SC, SD, TN, WV, WY
 - Lawful Off-Duty Conduct: CA, CO, ND, NY
 - First Amendment: CT

Employer Access to Social Media Laws

- Nearly half the states have laws restricting an employer's ability to access or request information about employees' and applicants' social media accounts.
- Generally, do not prohibit an employer from viewing publicly available content.
- Be careful not to ask the employee (or complaining coworker) to disclose information prohibited by law.

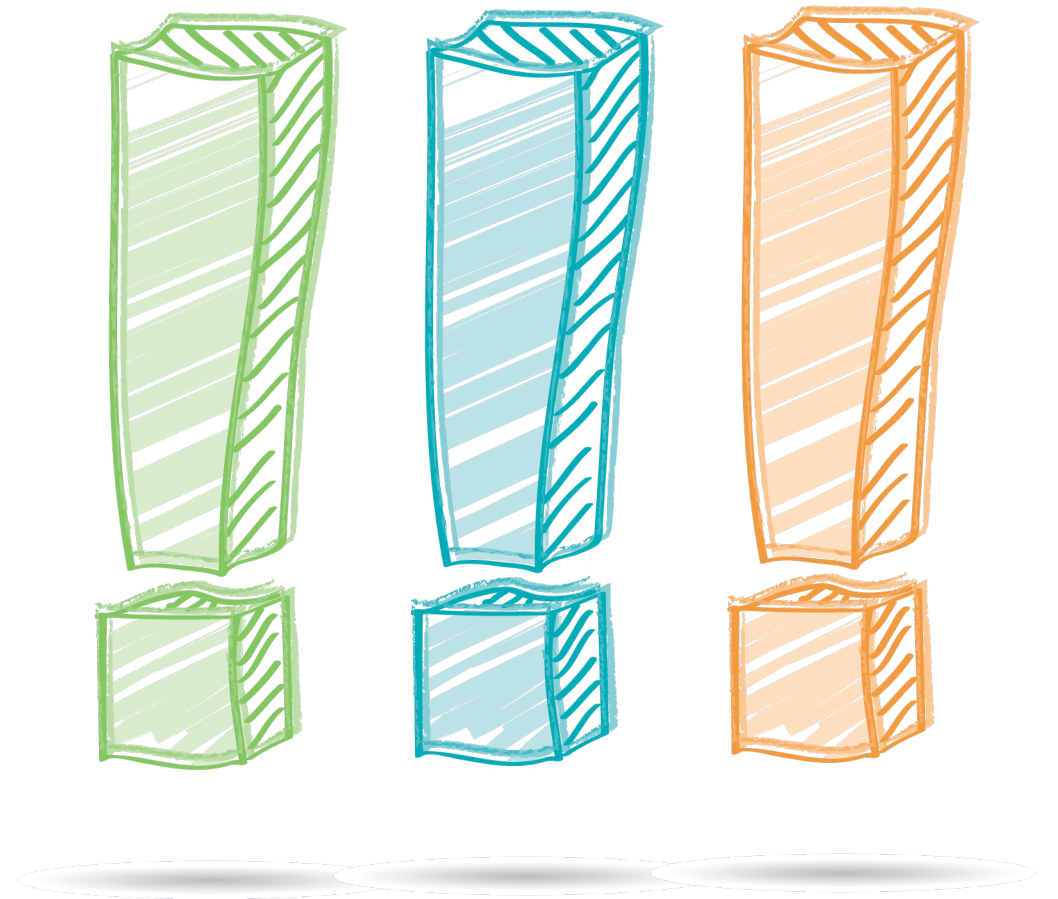


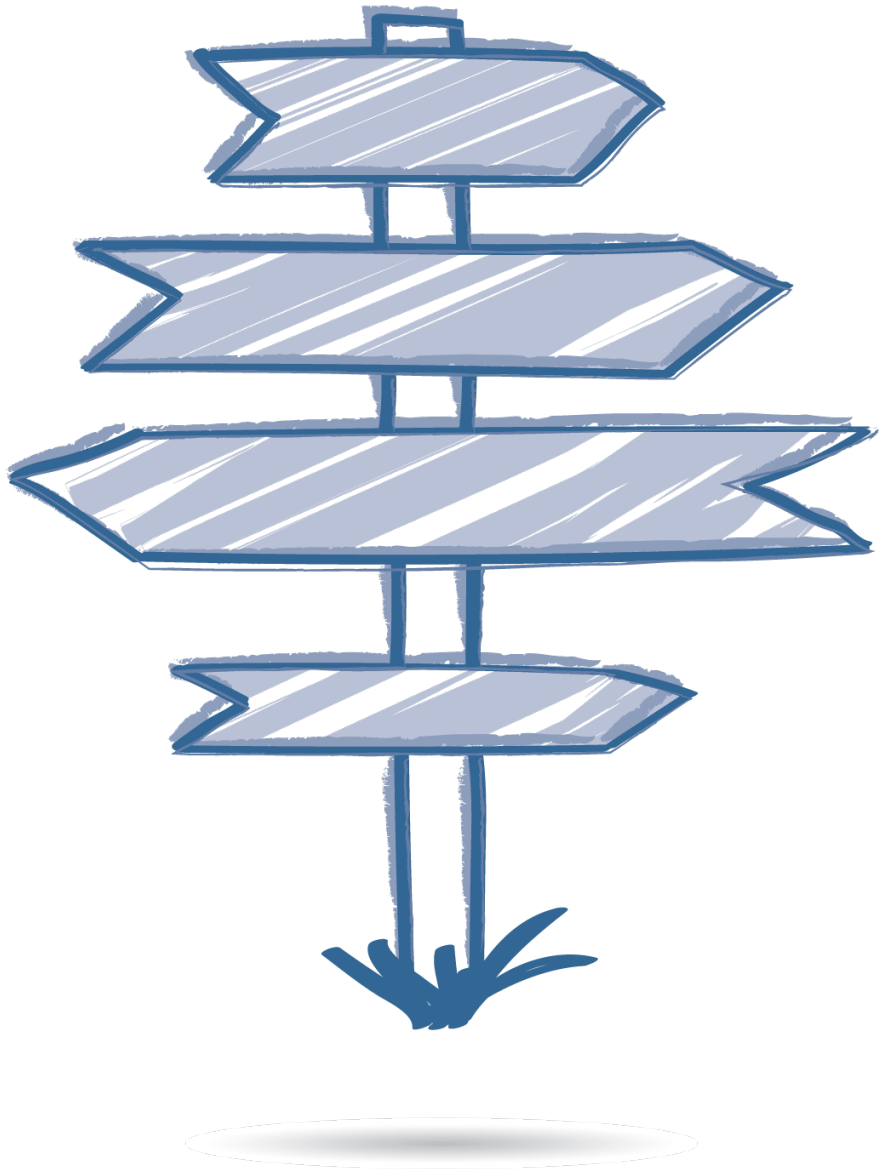
Off-Duty but ON Company Devices

- Anti-harassment/EEO policies may still apply.
- **When Bloggers Harass:** In *Espinoza v. Cty. of Orange*, the court upheld a \$1.6 million verdict in favor of an employee with a disability who was harassed by co-workers on a blog outside the workplace. The employee reported the harassment, but the employer failed to take action. The court held the employer liable because it was aware, but didn't take any action to stop the harassment.
- **Practice note:** Make sure your anti-harassment policies cover all conduct that occurs on Company systems or devices, whether on the clock or not.

The Bottom Line

- Whether on-duty or off, the biggest risk in terminating an employee for anti-BLM comments or apparel are state laws prohibiting termination for political activities/affiliation.
- You may (reasonably) want to take the position that racism is not political, and proceed.
- Tread carefully in CA, CO, CT, MT, ND, NY, or SC.





**Where Do
We Go From
Here?**

**What can we do to fortify
our commitment to greater
inclusion in our workplaces?**

4 Steps to Leveraging Key Differences

1. See Difference

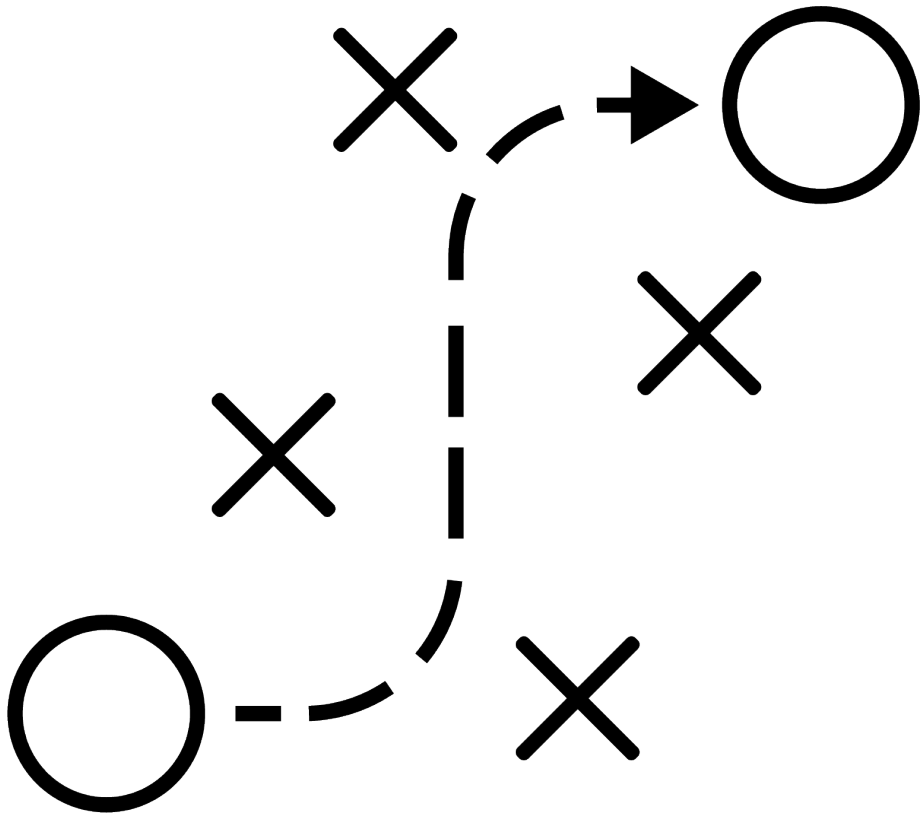
2. Understand Difference

3. Engage Difference

4. Leverage Difference



Individual Strategies for Countering Bias



- Increase **self-awareness** and pay attention to the issue of **perspectives**
- Get **additional information**/use questions to **clarify assumptions**
- Be a better ally
- Disapprove of and **hold colleagues/clients accountable**
- Use of **conscious thought processes** to make decisions
- **Redefine assumptions** with **new thoughts and experiences**
- **Increase opportunities** for contact

Additional Strategies for Countering Bias – By Outside Counsel

- Communicate the importance of diversity to your organization
- If you believe a diverse attorney has performed well, **communicate that information to her/her supervising attorney**
- Consider using employing “carrot” and/or “stick” incentives – accountability is a critical form of currency





The Accountability Factor

Create a “No-Pass” Culture



- Hold your **“star players” and rainmakers accountable** regardless of how powerful or lucrative they are regarded
- **Discourage permissiveness**
 - “That’s Mark being Mark”
- **Be transparent** when taking action against wrongdoers **to send a message** throughout the firm or department

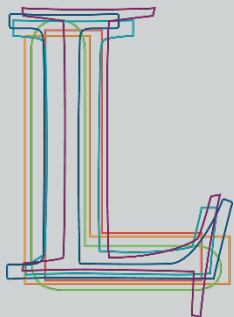


“

*Not everything that is
faced can be changed,
but nothing can be
changed until it is
faced.*

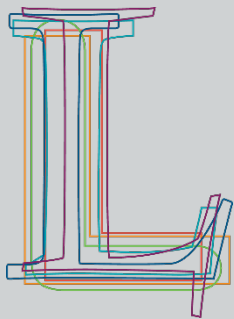
”

James Baldwin



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



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