



807 Elimination of Bias

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Faculty Biographies

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Jeffrey Frost

Jeffrey Frost is risk services counsel for Sutter Health's employers' risk department. Mr. Frost assists Sutter Health affiliate's human resource directors and managers with a variety of employment issues including, but not limited to, conducting workplace investigations, responding to administrative charges, management training on federal and state employment laws and managing litigation matters.

Before joining Sutter Health, Mr. Frost served as vice president of Legal Affairs and chief compliance officer for U.S. Physical Therapy, Inc., a publicly traded company that operates over 200 outpatient physical and occupational therapy clinics in 35 states.

Mr. Frost currently serves as president of ACC's Sacramento chapter; chairman of the national meeting program committee of ACC's Employment Law and Labor law; and as an advisory board member of Sacramento voluntary legal services program.

He is a graduate of the University of Texas, and received his J.D., magna cum laude from St. Mary's University.

Michael J. Lotito

Michael J. Lotito is a partner at Jackson Lewis located in San Francisco. Jackson Lewis is a law firm that specializes in preventive labor, employment, immigration, and benefits law representing management.

Mr. Lotito has been serving the legal and human resource needs of companies across the U.S. for many years. He has devoted his entire professional career to representing management interests in employment law. He has worked tirelessly to counsel management on understanding and adhering to the law and in resolving employment issues quickly and fairly.

A top-rated speaker and presenter, Mr. Lotito has keynoted many conferences throughout the world. Most recently he was honored as a member of TEC 200, a designation that places him among the top 1% of all TEC presenters. Mr. Lotito has coauthored several books on the ADA including *The Americans with Disabilities Act: A Comprehensive Guide to Title I*. Additionally, he sits on the board for Sterling Testing Systems, a nationwide pre-employment screening company based in New York. He chaired the Society of Human Resource Management (SHRM) in 2000. Earlier he was chair of SHRM's national legislative affairs committee. He has testified before the U.S. Senate and House of Representatives. He is a member of the California Bar Association and has been elected as a fellow to the ABA.

Mr. Lotito graduated from Villanova University and Villanova Law School.



ELIMINATION OF BIAS IN THE LEGAL PROFESSION

The Importance of Recognizing and Avoiding Discrimination
and Promoting Diversity
in the Legal and Corporate Environment

Presented by:

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DIVERSITY STATEMENTS OF FORTUNE 500 COMPANIES

At ExxonMobil, we're all about people – all kinds of people – and the power of their ideas. We cover the globe in search of talented men and women from diverse backgrounds in order to build a workforce that's as diversified as our customer base.

At Microsoft, we promote diversity at every level within our organization and strive for inclusiveness in everything we do. We believe that employing the world's top talent from all groups within our communities helps us to better serve our customers and gives us a competitive advantage in the global marketplace.

Diversity at General Motors is defined as the collective mix of peoples' differences in the workplace, society, families and communities. Through a well-defined strategy, tactics, tools and resources, our Diversity Initiatives division helps raise awareness and recognize and overcome the barriers that get in the way of work and positive relationships. It also helps to leverage differences as a competitive advantage for better problem-solving, more innovation and creativity, better products and services and, ultimately, meeting customer needs.



COMMON GOAL: ELIMINATING BIAS IN THE LEGAL PROFESSION



"What are you – some kind of justice freak?"



AMERICAN BAR ASSOCIATION GOAL IX

"To promote the full and equal participation in the legal profession by minorities, women and persons with disabilities."

American Bar Association
Goal IX



STATES TAKE ACTION WITH CLE!



- ✓ California: 25 hours over 3-years – 1 hour of elimination of bias
- ✓ Minnesota: 45 hours over 3-years – 2 hours of elimination of bias
- ✓ Washington: 45 hours over 3-years - 6 hours of ethics, professional responsibility, anti-bias, and diversity
- ✓ Illinois: 20-24 hours over a 2-years – 4 hours of professionalism, diversity, mental illness/addiction issues, civility, or ethics



BIAS IN THE LEGAL PROFESSION: WHAT IS IT AND DOES IT REALLY EXIST?



"It doesn't scream 'Girlie Lawyer?'"

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BRADWELL v. STATE 83 U.S. 130 (1872)

- ✓ Plaintiff, a woman, was denied entrance into the Illinois state bar
- ✓ "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."
- ✓ ". . . it belong[s] to men to make, apply, and execute the laws . . ."

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LEGAL PROFESSION DEMOGRAPHICS

- ✓ 53% of the state is made up of people of color – only 17% of lawyers are people of color
- ✓ In Los Angeles County, Hispanics make up 45% of the population – only 6.6% of lawyers are Hispanic
- ✓ In San Francisco, whites make up 81% of the legal force while they are just 44% of the population
- ✓ In Fresno County, the largest ethnic population is Hispanic, at 44% – but Hispanics comprise only 7.4% of the lawyers in the county

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LEGAL PROFESSION DEMOGRAPHICS

- ✓ In Kern County, 51% of ethnic minorities make up the population – only 3% of judges are ethnic minorities
- ✓ 18 counties (Contra Costa, Fresno, Kern, Los Angeles, Monterey, Orange, Riverside, San Bernardino, San Diego, San Francisco, San Joaquin, San Mateo, Santa Barbara, Santa Clara, Solano, Stanislaus, Tulare and Ventura) had a difference of more than 25% between total ethnic population and total number of ethnic judges in counties with more than 10 judges

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POSITIVE DEMOGRAPHIC CHANGES

- ✓ In 1970 less than 5% of the nation's attorneys were women – today women comprise nearly 1/3 of the profession
- ✓ In 1970 less than 2% of the nation's lawyers were minority – today, of the top 250 national law firms, 10% of associates and 3% of partners are minority

* According to the American Bar Association

** According to *The National Law Journal*

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WHERE MAY BIAS BE FOUND IN THE LEGAL PROFESSION?

- ✓ Protected characteristics
- ✓ Language and terminology
- ✓ Gender and family-roles
- ✓ Culture
- ✓ Dress
- ✓ Appearance
- ✓ Social status
- ✓ Anywhere and everywhere!

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WHAT ABOUT IMAGE DISCRIMINATION: CAN YOU JUDGE A BOOK BY ITS COVER?

- ✓ Image is defined by Webster's New World dictionary as "the visual impression of something [or] the concept of a person . . . held by the general public"
- ✓ May be persuaded by culture, religion, social status, size, weight, etc.
- ✓ Image-based discrimination is one of the most common forms of discrimination



BIAS IN THE LEGAL PROFESSION: WHAT ARE THE CONSEQUENCES?



"A word to the wise, counselor: Anymore of these tiresome displays of ethics, and I'll have you jailed for contempt."



BIAS IS COSTLY AND COUNTERPRODUCTIVE

- ✓ Decreases productivity and morale
- ✓ Increases absenteeism, medical bills, and stress
- ✓ Wastes recruitment and results in unnecessary training and replacement costs
- ✓ Lawsuits (damages and/or fines)!!!

Bias, Prejudice, and Related Unprofessionalism
In the Legal Profession
Professor David Hricik
2004 Mercer University School of Law



IN THE MATTER OF FRANK SWAN 833 F. Supp. 794 (C.D. Cal. 1993)

- ✓ Frank Swan sent a letter to the Assistant U.S. Attorney that included the following:

"Male lawyers play by the rules, discover truth and restore order. Female lawyers are outside the law, cloud truth and destroy order"

- ✓ Notably, the judge presiding over the case was a woman and the court imposed sanctions against Swan




PLESSINGER v. CASTLEMAN & HASKELL
838 F. Supp. 448 (N.D. Cal. 1993)

- ✓ An attorney alleged his employer law firm reduced his salary and requested his resignation because a major client, wanted its files to be handled by younger attorneys in the firm
- ✓ The attorney sued the firm for age discrimination, and sued the client for interference with business relations




EEOC v. SIDLEY AUSTIN LLP
437 F.3d 695 (7th Cir. 2006)

- ✓ The EEOC filed suit under the ADEA seeking damages on behalf of 34 former partners who claim they were either demoted or forced to leave the firm once they reached a certain age
- ✓ Sidley was ordered to provide the EEOC with a definitive set of reasons for each decision to expel or downgrade partners on or before September 14, 2006



CAIN v. HYATT
734 F. Supp. 671 (E.D. Pa. 1990)

- ✓ Two partners of a law firm fired an attorney diagnosed with AIDS fearing employment of a person with AIDS would damage staff "morale"
- ✓ The court awarded \$157,000 in damages to the fired attorney



GRANT v. COMM'R SOC. SEC. ADMIN.
111 F. SUPP. 2D 556 (M.D. PENN. 2000)

- ✓ Plaintiffs were disabled individuals who were denied social security benefits by the same administrative law judge
- ✓ The judge was highly critical of individuals who were allegedly mentally impaired, workers' compensation claimants, or an accident victims
- ✓ The court found the judge harbored biases which rendered him unable to decide cases fairly



JENSEN v. SUPER. CT.
154 Cal. App. 3d 533 (1984)

- ✓ A judge refused to let an attorney wear a turban in court unless for religious, cosmetic, or other legitimate purposes and, absent an explanation for the turban, the judge banned the attorney from court
- ✓ The attorney sued, accusing the judge of bias and prejudice and the court held the judge must allow the wearing of attire unless it interferes with or impedes the functioning of the court



HOPKINS v. PRICE WATERHOUSE
920 F.2d 967 (D.C. Cir. 1990)

- ✓ Woman employee received very positive comments about her competence, work ethic and ability to secure new business contracts, but was denied partnership due to her lack of femininity
- ✓ The woman employee was awarded \$371,000 in back pay and the court ordered the employer to admit her into the firm's partnership




MOST IMPORTANTLY BIAS PREVENTS THE BENEFITS OF DIVERSITY

- ✓ Global economy
- ✓ Cultural diversity meets needs of a global workforce
- ✓ Different perspectives bring all viewpoints to the table
- ✓ Enhances decision making
- ✓ Diverse attorneys provide a broader range of experience

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BIAS IN THE LEGAL PROFESSION: IS THERE A SOLUTION AND, IF SO, WHAT IS IT?

"Impartiality becomes you."

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IF YOU TALK THE TALK, YOU MUST WALK THE WALK

A profession that prides itself on promoting equal opportunity under the law must adhere to its own standards.



CLIENT-DRIVEN INITIATIVES

- ✓ Law firms will diversify if clients demand it!
- ✓ Clients/corporate counsel may request outside counsel to staff minority attorneys on their matters and to encourage the hiring and promotion of minorities
- ✓ Federal, state, and local government initiatives and quotas



WAL-MART REQUIRES DIVERSITY DECEMBER 2005 STATEMENT

"At Wal-Mart, we believe we're in the unique position to be not just a leader for change, but a driver of change. . . . We are committed to promoting minority and female involvement in all facets of our business, including our in-house legal department. Currently, 26% of the attorneys in our U.S. legal department are minorities and 42% are women. We have worked hard to ensure that minorities and women hold key leadership positions – placing them in line for promotions. We expect nothing less from the firms we chose to represent us. And that's why we require greater minority and female representation among our outside counsel. Holding our law firms accountable for meeting diversity goals is just one more way we are continuing our commitment to providing more and better opportunities for women and minorities."

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LAW FIRM INITIATIVES

- ✓ Set hiring goals
- ✓ Enhance recruitment efforts
- ✓ Improve interviewing techniques
- ✓ Improve retention and promotion after hiring
- ✓ Diversity through pro bono or other initiatives
- ✓ Diversity programs

Bias, Prejudice, and Related Unprofessionalism In the Legal Profession
Professor David Hricik, 2004 Mercer University School of Law

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STATE BAR INITIATIVES

- ✓ Disciplinary rules which prohibit lawyers from making statement or engaging in conduct which constitutes discrimination (problem: how to enforce without infringing on free speech rights?)
- ✓ Mandatory continuing legal education (legal ethics, substance abuse, elimination of bias, etc.)
- ✓ California State Bar initiative – “Dream Deferred No Longer: Achieving Diversity In The Legal Profession”

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CALIFORNIA STATE BAR INITIATIVE - “DREAM DEFERRED NO LONGER: ACHIEVING DIVERSITY IN THE LEGAL PROFESSION”

- ✓ Four different Diversity Pipeline Task Force working groups representing (1) education, (2) bar associations and law firms, (3) courts and government, and (4) corporate counsel offered a preliminary agenda designed to ensure more underrepresented minorities become part of the legal profession
- ✓ Final list of proven programs will be rolled out at the bar’s annual meeting in October

California State Bar 2006 Spring Summit

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CALIFORNIA STATE BAR INITIATIVE - "DREAM DEFERRED NO LONGER: ACHIEVING DIVERSITY IN THE LEGAL PROFESSION"

- ✓ Approved programs, which start in pre-school and continue into retention and advancement in practice must meet the following standards:
 - ✓ Continuity
 - ✓ Sustainability
 - ✓ Impact
 - ✓ Replicability

California State Bar 2006 Spring Summit

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INITIATIVES TO ELIMINATE BIAS IN THE JUDICIARY

- ✓ Continuing legal education
- ✓ Judicial evaluations/questionnaires
- ✓ Guidelines regarding appropriate courtroom conduct, language, wording
- ✓ Broadest possible recruitment efforts

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BIAS IN THE LEGAL PROFESSION: BOTTOM LINE

- ✓ Personal initiatives – what can you do?
- ✓ What can your organizations do to eliminate bias and promote diversity in the workplace?



PROFESSIONAL RESPONSIBILITY

“[T]rends show the changing face of our society and our profession. It is our responsibility as lawyers and judges to ensure that justice is indeed blind – color blind and blind to any other differences that make us the unique individuals we are.”

D. Larkin Chenault
Fostering Diversity in the Legal Profession
79 Mich. B.J. 18, 18 (Jan. 2000)

A GOAL FOR ELIMINATION OF BIAS
IN THE LEGAL PROFESSION
TEN ELEMENTS OF A MODEL DIVERSITY PROGRAM

1. Statement the corporation/firm values diversity
2. Listing of support/networking programs for women, various ethnic/minority groups, gay/lesbians, and all new hires
3. Awards for employees who have successfully implemented inclusionary practices
4. A formal partner/associate mentoring and career development program
5. Listing of work-life initiatives such as alternative work arrangements, stress-management programs, eldercare and childcare accommodations, telecommuting, maternity/paternity leaves, etc.
6. Volunteerism, listing a variety of community groups that serve various constituents such as women, handicapped, children, ethnic/minority and gay/lesbian groups
7. The minority and women-owned vendor program
8. Listing of training programs including technology, time management, diversity training
9. Domestic partner health benefits, adoption benefits, dependent care referrals
10. List of diverse charities supported by the organization

A GOAL FOR ELIMINATION OF BIAS
IN THE LEGAL PROFESSION
A CHECKLIST OF PERSONAL AND PROFESSIONAL INITIATES

- Identify your own stereotypes and assumptions
- Be aware of your words and actions
- Lead by example and insist others also treat everyone with courtesy and dignity regardless of sex, race, or any other characteristic
- In speech and writing, use consistent and respectful forms of address and refrain from designation of gender or race
- Observe and respect others' comfort zones, personal distance, and tenor of their language, and match it as much as possible
- Watch others' reactions – note how they treat you as a clue to how they want to be treated
- Take anger and upsets seriously, and apologize if you unintentionally offend someone
- Respect others' differences and wishes
- Be flexible
- Speak up when others exhibit bias
- Hold a "diversity potluck" lunch – invite co-workers to bring dishes that reflect their cultural heritage
- Arrange a "box-lunch forum" on topics of diverse cultural and social interest
- Cast a wide net when recruiting new employees
- Give everyone a chance for promotion – post all job openings
- Fight against the "just like me" bias – the tendency to favor those who are similar to ourselves
- Value the input of every employee – reward managers who do
- Vary your lunch partners – seek out co-workers of different backgrounds, from different departments, and at different levels in the company/firm
- Start a mentoring program that pairs veteran employees with newcomers
- Establish an internal procedure for employees to report incidents of harassment or discrimination and publicize the policy widely
- Ensure that your workplace complies with the accessibility requirements of the ADA
- Push for equitable leave policies – comply with paid maternity/paternity leave laws
- Don't close your door – foster an open working environment
- Advocate for domestic partnership benefits
- Provide employees with paid leave to participate in volunteer projects
- Publicize corporate giving widely, and challenge other companies to match or exceed your efforts