

BIAS, PREJUDICE, AND RELATED UNPROFESSIONALISM
IN THE LEGAL PROFESSION

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BIAS, PREJUDICE, AND RELATED UNPROFESSIONALISM IN THE LEGAL PROFESSION[♦]

I. Introduction

Human beings have devised myriad ways to differentiate and discriminate against their fellows -- by gender, race, culture, nationality, religion, age, socio-economic status, sexual orientation, physical differences, or mental disabilities. Virtually every person in this country has, at some time or another, belonged to a group or class that has been the subject of discrimination, whether subtle or overt. Even those who are in the “majority” – white males – have perhaps felt the impact of discrimination. Thus, prejudice is a problem that directly affects a lot of us, and indirectly affects every single person.

This program and these materials will explore bias in the legal profession. We will look at how the numbers of lawyers with diverse backgrounds are growing rapidly. Yet, growing numbers has not translated into a commensurate increase in power and influence. Additionally, we will explore bias as a business issue. We will examine the costs of discrimination and look at how we can reap the bottom line benefits of diversity.

This program will suggest specific ideas regarding the hiring, retention and promotion of women and minority lawyers so as to maximize their contribution to the individual employer and the legal profession as a whole. And, finally, this program will present strategies to employ on a personal level, both from the “minority” and the “majority” viewpoints, to combat bias in the workplace. While this discussion will focus primarily on bias against women and minorities in the legal profession, it also will include other groups, such as gay and lesbian attorneys, or lawyers with disabilities, which face similar bias, and where the strategies to combat it are virtually the same. Throughout this program most of the statistics refer to the large law firm environment since those firms have been the primary focus of study and coverage in the legal press.

Our goal in examining these issues is to become more aware of the problem and potential solutions, and to learn not only to tolerate but also to value our differences. At the same time, however, a section addressing the controversial aspects of anti-bias “education” is included, and the question of whether you can, or should, be reading these materials is, therefore, a pertinent and critical question. I intentionally included that

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I truly appreciate her permission to use her prior materials, which were superb.

section at the end, however, so that perhaps once arriving there, your answer may be different than you think it might at the outset of these materials and this program.

II. A Preliminary Note About Language, Terminology, and Political Correctness.

Language is [a] most powerful tool. . . . The words we use have meanings beyond the obvious--they influence attitudes, behavior and perceptions. . . . [B]iased words and phrases dehumanize and demean . . . , make unwarranted and incorrect assumptions, perpetuate harmful stereotypes and lead to unequal treatment.

1996 Guidelines for Judicial Officers, California Judicial Council.

In these “politically correct” times, most of us are conscious of the language we use and its potential to offend. We know better than to use derogatory terms, but sometimes the preferred terminology is a moving target. For example, in the forties, persons of African American descent were properly referred to as “colored”; in the fifties, the term became “Negro;” and in the sixties, “Black” was beautiful. Today, “Negro” seems out of style, “Black” is frowned on by some; and “African-American” likely is the preferred term.

In a related vein, confusion exists regarding the precise meaning of the terms “Hispanic”, “Chicano”, “Latino”, etc. The United States Supreme Court, in *Hernandez v New York*, 111 S.Ct. 1859, 1862 (1991), confronted disagreement even among those parties particularly interested in the issue, explaining:

Petitioner and respondent both use the term "Latino" in their briefs to this Court. The *amicus* brief employs instead the term "Hispanic," and the parties referred to the excluded jurors by that term in the trial court. Both words appear in the state-court opinions. No attempt has been made at a distinction by the parties and we make no attempt to distinguish the terms in this opinion. We will refer to the excluded venirepersons as Latinos in deference to the terminology preferred by the parties before the Court.

Id.

Those seeking to be sensitive to the use of terms, myself included, therefore are often left with conflicting, changing or at least evolving social conventions concerning the “best” or most acceptable term. The important point regarding language is to be aware, and use tact, sensitivity, and common sense.

In this light, and recognizing that the terms may be viewed as inaccurate or dated to some, for this program, the terms “black” and “African American” will be used interchangeably, as will “Latino” and “Hispanic.” “Asian Americans” will refer to all persons with Chinese, Japanese, Korean, Southeast Asian, and Pacific Islander ancestry.

In addition, in this program, “minority” will refer to persons of color. The fact is, however, that the term “minority” may itself be inaccurate because, at least in California, the Census Bureau reported in August 2000 that this state’s population is comprised of minorities and there is no real majority. Whites now are less than 50% of California’s population statewide, and they lost their majority status in Los Angeles and San Francisco counties by 1990.

III. The Disparities Between General and Lawyer Demographics.

One would have to be color blind – literally -- to not recognize the changing demographics of this country:

According to demographic trends compiled by the American Bar Association, by 2005, the workforce will be 73 percent white, 12 percent black, 11 percent Hispanic, 4 percent Asian and other minorities, and women will make up 34.8 percent. By the year 2020, minorities will comprise 36 percent of all Americans. The future population will be composed of more older whites and younger minorities, and nontraditional families will proliferate.

All of these trends 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).

However, the demographics of the legal profession – particularly in large, prestigious law firms, and even more particularly at the top tiers of those firms – does not reflect the general demographics of the country. See Alex M. Johnson, *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist’s Perspective*, 95 Mich. L. Rev. 1005 (Feb. 1997). As Professor Johnson explains:

Id.

a. Women

More than a century ago, the courts routinely upheld state laws barring women from the practice of law. Several of these learned judges, no doubt reflecting the mores of their times, believed that they had discerned that it was God’s intention that women stay at home, bear children, and take care of their husbands. A law that furthered God’s purpose obviously could not run afoul of the United States Constitution, or so the reasoning went.

Obviously, these opinions – though they seem colloquial and perhaps quaint – were viewed as the correct and logical result of their time. Virtually everyone is thankful that these views are, however, no longer the law of the land. Though discarded as law, it was not until the latter third of the 20th Century that women began entering the legal profession in significant numbers. In 1970, less than 5% of the nation's attorneys were female, and now, at the beginning of the 21st Century, they comprise approximately 1/3 of the profession. Between 1971 and 1991, while the number of male lawyers doubled, the number of women increased sixteen fold nationally. Throughout the 1990's, female associates in law firms have held steady at approximately 40%.

In 2000, for the first time, women outnumbered men in the entering class of law schools nationwide. However, at Boalt Hall, UC Berkeley's law school, female students outnumbered male students for five years in a row at the turn of the century.

Demographics have changed, and continue to do so at an ever-increasing pace. See generally, Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 Ind. L. Rev. 1167 (1999).

b. Minorities

Historically, the door to the legal profession was also closed to minorities. Whether by law or through the practical exclusion by white men, minority attorneys were scarce.

In recent years, the increasing globalization of business in general, which has been mirrored by the legal profession, has drawn attorneys with knowledge of other languages and cultures into the mainstream. For example, various economic and social changes – including perhaps the expansion of technology and Pacific Rim business, as well as the large Asian immigration to United States and the subsequent growth in persons of Asian descent born in the United States -- has made Asian-American attorneys the largest and fastest growing minority in the profession.

Nationally, in 1970, less than 2% of the lawyers were minority; now, of the top 250 law firms as listed by *The National Law Journal*, 10% of associates and 3% of partners are minority. The 1999 National Association of Law Placement (NALP) report showed that the number of minority associates in law firms more than doubled from 7.4% in 1991 to 15.2% in 1998. It is evident that persons of color are still dramatically under represented in the legal profession when these statistics are compared with the fact that that African Americans and Hispanics together make up 24% of the US population, without counting any other minority group.

The trend toward increasing non-white representation in the profession may be reversing, however. Last year, for the first time in 20 years, fewer minority law students graduated from law school than in the preceding year. The California Minority Counsel Program attributes this to anti-affirmative action measures over the past four years,

especially in California, Texas, and Washington, which have created a chilling effect on potential minority law students.

The 1993-94 State Bar of California “Year in Review” brochure states:

The face of the legal profession in CA remains stubbornly and persistently white. . . . Attorneys of color report that many law firms continue to view diversity not as a means of strengthening their institutions and improving their ability to serve clients, but rather as a matter of political correctness. Recent studies also reflect that large segments of the public perceive that whites receive better treatment in our courts than do people of color.

No doubt as a result of these statistics, on July 20, 1999, President Clinton and Attorney General Janet Reno made a call to action “to ensure that the legal profession reflect the diversity of the society at large, so that all communities can enjoy equal access to our system of justice.”

IV. The Continued Unequal Distribution of Power and Influence.

The dramatic increases in the sheer number of women and minorities entering the legal profession have not translated into commensurate increases in power and influence. Female and minority attorneys do not make partner or reach the higher echelons of the professions in proportionate numbers as compared to their white male counterparts.

As next shown, each group has faced different challenges. Although women have specific issues related to their gender, on the whole, they have fared better than attorneys of color.

a. Women

Today, over 85% of law firm partners nationally are male, and the number of female partners is increasing at the rate of only 1% per year. A 1995 New York City Bar Association study showed that men are three times more likely to make partner than are women. In October 1999, *The National Law Journal* reported that while three quarters of the male associates at large law firms said that partnership was an incentive, less than half of the female associates did so. Similarly, in 1996, *The National Law Journal* reported that three quarters of the male partners had equity in their firms, while just over half of the female partners held equity.

A recent article in the *Los Angeles Lawyer*, Karina Bess Sterman, *The Challenge of Being a Female Associate*, 22-Feb. L.A. Law. 12 (Feb. 2000) provides some illustration as to why women may leave before partnership:

As associates, you are at the bottom of many totem poles. You frequently get assigned uninspiring work and usually too much of it. You are expected to drop weekend plans when some stacks of discovery demand the yellow highlighter treatment today for a case that may not be tried for years. You hear the accounts of legal journals and personal contacts about the mass flight of associates from their firms and even from the law. If you are a female attorney, however, your experience is further marked by daily doses of sexism.

Id.

A positive trend is that more women are being named as managing partners of their offices or firms, but not in proportion to the number of women in the profession. In the article, "Women Lonely at the Top", *The National Law Journal*, July 1, 1999, several factors were noted for this discrepancy: women still are relative newcomers to the legal profession, and it takes time to get the necessary leadership skills, experience, and visibility to be considered for the top slots; the internal challenge of lining up sufficient male partner votes; lack of "big rainmakers" in the female attorney ranks; the reality that some women choose to focus their time and energy on their family rather than their firm; and the added challenge of balancing not only home and work, but significant management responsibilities, as well.

b. Minorities

Minority lawyers lag even farther behind than do women achieving status and power in the profession. According to *The National Law Journal*, of the largest 250 US law firms, approximately one-third have no African-American partners; eighty-nine have just one; and ten percent have no non-white partners at all. The 1999 NALP Report showed an increase of minority partners from just 2.4% to 4% of all partners from 1991 to 1998.

Further analysis of even those small increases reveals additional facts. Specifically, almost half of all minority partners were non-equity; while less than a third of white partners were non-equity. Furthermore, an ABA study released in July 2000 showed that minorities are less likely to enter private practice than their white counterparts. Instead, they are clustered in the lower-paying arenas of government service and public interest work.

When they do enter private practice, they are largely found in smaller and solo practices. As one African-American lawyer explained in an interview published in a bar journal:

Are small law offices more attractive to African-American lawyers than large firms? Do they hold certain advantages or disadvantages?

I don't know if they're more attractive, but in many instances, small

firms are forced upon African-American lawyers. Many find themselves in private practice by default because they were unable to get into a large law firm and they simply hung out their shingle and went for it. I've been practicing in a small law office for 98 percent of my career, and it provides advantages to me--as an entrepreneur whose undergraduate degree is in business administration--that would not be available in another setting.

But some lawyers of color desire to participate in other fields of practice, and they need the support of large law firms. You can't just throw out your shingle and say, I'm going to do mergers and acquisitions. You have to be in a certain type of environment to attract that kind of business and have the wherewithal to deal with it.

African-American lawyers are interested in all areas of law. If they want to do certain types of commercial transaction work or intellectual property work, they need to be affiliated with large firms. To the extent they cannot participate in that arena, it impedes their ability to be successful.

Barriers at the Bar, 38-Aug. Trial 38, 38 (Aug. 2002).

Opportunities for minority lawyers in large firms are not only not getting better, they may be getting worse. A significant barrier is the issue of "personality fit" or comfort level, and the sense of not being "one of us". An equally important roadblock to partnership is lack of rainmaking opportunities and connections. Firms may have put an emphasis on minority hiring, but not on advancement or partnership.

In this regard, Professor Johnson addressed the fact that, even among those who are hired, fewer minorities are made partner relative to whites, and noted and responded to several "explanations" for this fact:

[I]nitial entry barrier requirements, however rigorously employed by elite law firms, cannot explain fully the paucity of minorities in elite firms, especially at the partnership level. Any complaint about hiring standards addresses only the entry barrier to being hired at a particular firm. It does not address the more problematic phenomenon of why minority attorneys hired as associates are not promoted to partner at the same rate as their white counterparts. It cannot adequately explain what is happening to minority attorneys once they have crossed the threshold and entered the world of the elite firm.

Any theory that attempts to explain the reasons for the underrepresentation of minorities in elite firms must address not only entry barriers, but what happens to minorities who successfully enter the profession at the elite level but do not make it through the pipeline to the

rank of equity partner. This lacuna is especially troubling given the assumption that partners and others are not consciously acting in a racist or discriminatory fashion in their promotion decisions.

Another alleged cause of the underrepresentation of minorities in private or elite law firms is the history of discrimination that these groups have received in the legal profession. The theory is that the lingering effects of past racism creates the underrepresentation that persists in the elite firms today. Once again, although this theory has merit, it cannot explain satisfactorily why minorities are, to a certain degree, hired at a disproportionately high rate--overrepresented at the point of entry into elite firms --but nevertheless are severely underrepresented when the promotion to partnership decision is made. One would assume that the effects of racism, whatever their present impact, would be constant at the point of entry as well as at the time for promotion. Indeed, common sense leads me to assert that once the entry barrier is overcome, as it has been, the historical legacy of racism also has been overcome to a large degree and should not reappear at some subsequent point unless there are other unique factors at work in the legal profession that would explain why firms can hire but not promote these same minorities proportionately.

Others have advanced the counterintuitive argument that the environment at corporate law firms is not conducive to the promotion of minorities because affirmative action has resulted in the abandonment of objective standards. The thesis is that affirmative action has resulted in the hiring of minority candidates who are not as well-qualified as their white peers. The corollary argument is that even those minority hires who are as well qualified as their white peers are penalized through the operation of affirmative action because those whites in power positions assume that any minority hired is an affirmative action product.

One can challenge the assumption that there is indeed a meritocracy at work in the hiring and promotion of minorities. More importantly, this argument must be rejected because even though it does provide a rationale for why minorities are hired--affirmative action--but then not promoted-- affirmative action once again--the argument is seriously flawed in that it ultimately rejects the very notion of meritocracy that it attempts to embrace. It assumes that in a world without affirmative action, firms can make unbiased hiring decisions based on the qualifications of those in the pool. However, the argument assumes that the same merit-driven standard cannot be employed at the time of promotion to differentiate between those whose performance merits promotion and those whose performance does not merit promotion. The argument also suffers because it assumes that race affects decisions only at the time of promotion and not at the time of hire

and thereafter.

Another recent theory put forth to explain underrepresentation in partnership is that minorities and women, since they were the most recent to break the ranks of large law firms, are natural (and nondiscriminatory) targets for layoffs and terminations when the legal economy sours. This sort of "last-hired, first-fired" theory would have merit if those employed were engaged in an occupation in which seniority rules were adhered to formally or as a matter of custom or practice. Unfortunately, no evidence supports that view, and the empirical evidence, that minorities are hired at a rate that exceeds their percentage in the appropriate eligible population, belies the theory that the economy has resulted in the deflation of minority attorneys since the workforce is neither shrinking nor remaining constant.

A related argument is that the recent innovation of nonequity partners has had a disproportionate effect on minorities because of their relatively recent entry into the profession. Although there has been no empirical evidence to prove or disprove this thesis, anecdotal evidence does not support it. Furthermore, the empirical data assembled and addressed herein, which was collected for the time period preceding the adoption of two-tiered partnerships tracks, similarly provides no support.

Another economic argument for the underrepresentation of minorities in elite firms, especially at the partnership level, is the assertion that an essential part of the partner's job description is to be a "rainmaker," that is, to attract paying clients who can provide enough work for the partner and the associates necessary to support the partner's salary. The claim is that minorities have a harder time attracting clients because of their minority status and the majority (white racial) status of most of the sought- after clientele.

Some literature suggests that Hispanics also face greater difficulty getting clients. Bringing in business may be harder for Hispanics for several reasons. Clients generally make contact with lawyers in social circles, and because Hispanics are often excluded from these circles, they have fewer opportunities to make the contacts. Also, some lawyers feel that because they are Hispanic, the general public questions their legal skills and qualifications and, therefore, fails to seek them out as legal counselors when the need arises.

This assertion ignores two facts. First, many elite firms have institutional clients whose interests are served by partners selected by the firm. Although at one point some "rainmaker" partner may have generated the association with the firm, that rainmaker may be retired or deceased. However, the client remains with the firm and the firm selects

the attorneys, including the partner, who will work with the institutional client. Hence, many firms are selecting which partners work with which clients and the firms are failing to assign these clients to minorities.

More importantly, the assertion that minorities are unable to act as successful rainmakers ignores the increasing diversity of American society which will produce a minority-majority workforce within the next century. Indeed, the pressure is on in the legal profession in general, and elite law firms in particular, by governmental and private entities to increase their hiring of minority lawyers in order to retain the business they have.

Another alleged reason for underrepresentation--especially in nonentry-level positions--is said to be minority attorneys' lack of comfort in these firms as a result of a hostile environment created by, among other things, a lack of mentors. It is quite plausible that the lack of minority role models has a negative impact on minorities' progress within elite firms. But there are three problems with this theory. First, white women, who were once as excluded from these firms as minorities, have made significant progress in achieving partnership rank within these firms even though they faced the same lack of mentoring.

Second, assuming that the argument has merit, it is unclear what can be done to resolve the problem short of simply promoting or hiring minorities as partners to serve as role models for those young associates who are entering practice in these elite firms. The problem, of course, is that if these lawyers are promoted or hired as partners without the requisite experience, they cannot truly serve as role models since they would have no base of information or experiences upon which to draw to advise their younger peers. Hence the role model argument fails to answer the question of what can be done to increase the number of minorities within these elite firms.

Third, there is something slightly odious about the claim that only minority attorneys can mentor other minority attorneys or that, similarly, only women can mentor other women. That sort of stereotyping, although consistent with human proclivities and current patterns of behavior, may be unproductive in the long run because instead of promoting equality and harmonious race relations, it assumes whites remain with whites and blacks with blacks. One theme of this article is that lessons imparted from Critical Race Theory demonstrate how to break down these racial barriers in order to eliminate racism and the subjugation of minorities.

One interesting claim that has been made recently is that minorities may not be proportionately represented at elite law firms,

either in entry-level or nonentry-level positions, because they choose not to work for predominantly white firms. Commentators have characterized this phenomenon as "mutual deselection" in that the firms do not choose minority attorneys and qualified minority attorneys choose not to work for elite firms.

This assertion is as yet unsupported by empirical evidence. Furthermore, the thesis has explanatory power only if it is assumed that minorities have the option, the choice to go or not to go to these elite firms. That assumption, however, is contradicted by some of the earlier theories which place the blame for the underrepresentation of minorities in elite firms squarely on the shoulders of the firms. Nevertheless if the thesis is correct, even only in part, it raises questions about why ethnic or racial status is perceived as a barrier at white firms--why minorities choose not to work at these firms, and what can be done to eliminate that deselection in order to increase that representation. More particularly, it is unclear how attorneys, white and black, can maintain the desire to work in environments in which the other attorneys look like themselves, even though they truthfully believe in their roles as protectors and guarantors of equal opportunity and individual social liberties in American society.

Another theory used to explain the underrepresentation of minorities in elite firms at the partnership level relies on the notion of unconscious racism. This theory, although no doubt true, is a rather broad, catch-all argument, in which minority attorneys are allegedly at a disadvantage when compared to their white counterparts due to the omnipresent effects of racism. Hence, unconscious racism is usually cited when the allegation is made that white lawyers do not socialize with minority attorneys or expose them in social settings to their white clients. Once again, however, the problem with relying on covert or subconscious racism as the explanatory cause of the underrepresentation of minorities is that although it makes perfectly legitimate sense to assume that attorneys, like other members of society, may act in a racist fashion due to either conscious or subconscious motivations, it fails to explain the dissonance that results when it is assumed that lawyers, unlike other citizens, are committed to the eradication of racism and the establishment of true equality in American society in which race is as irrelevant as eye color.

Moreover, a failure to comprehend how this discordant situation could arise and be maintained is ultimately destructive of any attempt to remedy the problem. It is only when the cause of the problem is identified that a solution can be proposed. The dissonance between the ideals espoused and, I am willing to concede, actually and truly believed by lawyers, and the reality of the manner in which they recruit and

promote their younger colleagues, must be traced to the one fact that is implicit in all of the above explanations for the underrepresentation of minorities in elite firms: the lawyer is not only a member of a learned profession, the lawyer is also a member of larger society. Until that nested relationship is exposed and explored, little can be done to achieve proportional representation of minority lawyers within the elite law firms in our society both at the time of hire and at the time of promotion.

Johnson, *supra* 95 Mich. L. Rev. at 1014 (footnotes omitted).

V. Gender and Family-Role Issues

As the saying goes, "Law is a jealous mistress."¹ The profession is demanding on all of its participants, but the burden seems especially heavy for female attorneys. In 1989, for the first time, the plight of women lawyers was examined. Both the State Bar of California Women in Law Committee and *The National Law Journal* conducted groundbreaking studies. Not surprisingly, the State Bar of California Women in Law Committee found that 88% of the respondents reported a "subtle, pervasive gender bias in the profession" and 2/3 believed they did not have as much opportunity for advancement as did male lawyers. *The National Law Journal*, in its December 11, 1989 issue, reported that huge percentages of women attorneys sacrificed time with friends and family, gave up their outside interests, and delayed marriage and children. This is corroborated by the fact that more female attorneys in California are childless, single, or divorced than their male counterparts. A 1995 Harvard Women's Law Association survey, Presumed Equal: What America's Top Women Lawyers Really Think About Their Firms revealed a double standard: the respondents in that study believed that the only way a woman can succeed in the legal profession is to remain unmarried and certainly childless.

As women found law firm environments inhospitable, they flocked to in-house law departments. Statistics show that there are significant numbers of women moving up the corporate law department ladder. Forty-three of the General Counsels in the Fortune 500 companies are female, and half of those have been hired since 1996. However, a PricewaterhouseCoopers survey found that men out-earned women in-house at almost every seniority level.

a. Family Friendly Firms?

¹ This metaphor can be traced to Supreme Court Justice Joseph Story, who wrote that the law "is a jealous mistress and requires a long and constant courtship. It is not to be won by trifling favors but by lavish homage." Joseph Story, Inaugural Address as Dane Professor of Law at Harvard University, on the subject of the Value and Importance of Legal Studies (Aug. 5, 1829), in JOHN BAROTLETT, *FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE* 447 (Emily Morison Beck ed., Little Brown & Co.1980).

Professor Deborah Rhode addressed the issues that female attorneys, especially those in large firms face:

Women's choices also figure prominently in a second common explanation for persistent gender inequalities. Many lawyers assume that women have different family priorities than men and that these personal commitments exact a professional price.

There is some truth to this view, but it provides neither a complete explanation nor an adequate justification for prevailing gender inequalities. As a descriptive matter, women's different 'lifestyle' preferences cannot account for the extent of their underrepresentation in law firm partnerships or corporate counsel positions. Only about four percent of female associates have part-time or flexible schedules, and recent studies find substantial gender disparities among lawyers in similar full-time positions.

It is, of course, true that women express greater dissatisfaction with current workplace structures than men, and are disproportionately likely to opt out of positions with the greatest demands on time, travel, and unpredictable schedules. Yet such patterns are not simply a function of 'natural' preferences. Women's career sacrifices are attributable not just to women's choices but to men's choices as well. Male spouses' failure to shoulder equal family responsibilities and male colleagues' failure to support alternative working arrangements are also responsible. Employed women spend about twice as much time on domestic chores as do employed men, and not always by choice. Part of the problem is that female attorneys with significant family commitments tend to have partners, husbands, or former husbands with equally demanding careers. These men frequently view their own professional obligations as fixed and women's as negotiable. Rather than accept an equal division of household tasks, many husbands define their share as unnecessary; they do not mind living with a little mess, or adding to their infant's time among 'friends' at daycare. Divorced fathers often end up as 'Disney Dads,' who leave day-to-day childrearing obligations to stressed-out single moms. Other men manage not to notice when their household tasks need to be done, or mismanage key parts of the job. To avoid a 'culture of complaint' on family obligations, professional women often pick up the pieces that their partners do not even realize have been dropped.

Deborah L. Rhode, *Myths of Meritocracy*, 65 Fordham L. Rev. 585, 591-92 (1996) (footnotes omitted).

Women still shoulder the primary responsibility for the home and children, while being hindered by limited professional choices. For those pursuing a career in the traditional law firm, they often must choose between the fast track to partnership--which

only women with no "encumbrances" can handle--or the "Mommy Track" which in many cases translates as second class citizenship.²

Even where parenting policies such as maternity/ paternity leaves, job sharing, part-time, flex-time, telecommuting, and the like are offered, taking advantage of those policies may permanently stigmatize an attorney so that meaningful career advancement is no longer an option. A 1995 NALP study showed that nearly 90% of the nation's law firms had part-time policies, but few people took advantage of them. The study found that only 1.3% of partners and 4.3% of the associates had availed themselves of such family-friendly policies. Indeed, there have been several lawsuits by female attorneys who were fired shortly after returning from maternity leave. In October 1996, the 100-attorney New York firm of Parker Chapin settled a case just before closing arguments for a confidential amount, and in the summer of 1996, a similar case against Coudert Brothers settled for \$500,000-750,000, also before closing arguments.

To keep their women attorneys, law firms must find a middle ground between the fast track and the mommy track. This will entail modifying existing organizational structures, re-examining outdated attitudes, creating more flexible models for career development, and accepting those alternatives as being viable and valuable blueprints for

² The bias impacts men, as well:

The problem is not only that many men are reluctant to make career sacrifices, but also that those who attempt to do so encounter too much resistance. Colleagues who are reluctant to accommodate mothers often have even less tolerance for fathers. A common attitude among surveyed New York lawyers was, 'I have a family. I didn't get time off to do that. Why should you?' In one particularly striking instance of the puritan ethic run amok, litigators assigned a new father to work on an out-of-town trial two days after his wife gave birth, and gave him time for only one brief trip home during the next two weeks.

Ironically enough, managing attorneys sometimes invoke these refusals to accommodate male lawyers' family commitments as evidence that gender bias is not a problem in their workplaces. After all, women are more likely than men to receive 'special' treatment concerning family leaves and reduced schedules. But that response misses a central part of the problem at issue. Discrimination against men with family commitments also discriminates against women. It discourages male attorneys from assuming an equal division of household responsibilities and requires their spouses or partners, who may also be lawyers, to pay a professional price. As long as work and family conflicts remain primarily 'women's issues,' they are unlikely to receive adequate attention in decision-making structures dominated by men.

career success. According to Nancy Sher Cohen, former managing partner of Heller Ehrman's Los Angeles office, law firms need to take a long view and look at the contribution of women over the span of twenty-to-thirty-year career, rather than focusing on the short term during the childbearing years.

In July of 2000, New York-based Catalyst released the results of its 11-year study of working mothers in major corporations, banks and law firms. All of the women in the study attributed their success to maintaining a part-time schedule while their children were young. Half of the women returned to full-time work, and all of the women now hold mid-to-senior level positions in their companies. The study shows that career success does not need to be sidelined for working mothers, and presents the business case for flexible work schedules. Similarly, just over a decade ago, in response to their study, the State Bar of California Women in Law Committee stated, "Making legal careers compatible with family life is a problem of the most profound importance that must be solved if women are to gain equality in the legal profession. It should be of the highest priority for the State Bar."

Making the legal profession more family-friendly would benefit not only women attorneys and their families, but also all attorneys by creating a more humane work environment with the possibility of pursuing a more balanced life. Furthermore, such examination of the basic structures of the profession may lead to other changes that would enhance the ability of all attorneys, regardless of gender, race, ethnicity, sexual orientation, or disability to thrive. In "New Partners 2000", a special pull-out section to the California publication entitled, *The Recorder*, February 2000, in an article entitled "Building the 21st Century Law Firm", the author states, "Truly promoting diversity means examining every aspect of the firm's organization, including recruitment, training, salary structures, work hours, corporate culture, marketing and community service . . . with the goal of creating a work environment where different types of people can flourish."

b. Judicial Bias Against Women and Minorities.

Stories of judges using demeaning language toward women were not uncommon when I began to practice law in 1988, in Texas. Texas judges were not alone:

How long has it been since you have heard a story about a judge telling a female lawyer that he did not need to hear from her but that she could sit in the courtroom and "make it pretty"? Or a judge who found female lawyers "nice to look at" except when they wore those "high-necked shirts and long skirts"? Or a judge who proposed a sexual relationship with a female lawyer and when she declined, had ruled against her clients on practically every occasion that she had appeared in his court? These accounts of apparent judicial misconduct are taken from 1993 testimony before the Tennessee Bar Association's Commission on Women and Minorities in the Legal Profession.

Kathryn Reed Edge, *Gender Bias Goes to Ground in Tennessee*, 39 No. 2 Judges J. 29, 29 (Spring 2000) (footnote omitted). The Tennessee Commission went on to note:

women lawyers appearing in court were frequently assumed by judges to be clients or paraprofessionals and were addressed as such in front of juries and clients. In some courts, women lawyers were asked by judges to produce their law licenses before being permitted to practice before the bar. In probate matters, white male lawyers were appointed to handle more complex, lucrative estates, whereas, female and minority lawyers with equal competence were assigned smaller, less desirable estates. White male lawyers were awarded fees far in excess of those awarded to female or minority lawyers with comparable expertise on comparable cases. Women lawyers were subjected to demeaning references such as "honey" and "sweetie" by judges and other counsel while court was in session. Some male judges permitted male lawyers to make comments about the appearance of female lawyers. For example, one judge permitted opposing male counsel to say to a jury, "I know Mrs. Jones looks prettier than me, but don't let her snappy suit and fancy high heels fool you."

* * *

The TBA Commission heard from witnesses that in custody matters, women litigants were generally held to a higher standard than men, with judges treating extra-marital affairs as expected of men but as a character flaw in women. In divorce matters, a wife who had a typical "midlife crisis" frequently was judged much more harshly than a husband who engaged in similar behavior. Some witnesses complained that judges often treated child support guidelines as "maximums" rather than "minimums," presumably based on the assumption that women were most often in the "asking" position and men on the "paying" end. Most disturbing of all, perhaps, was the testimony that women attempting to obtain orders of protection sometimes found judges unwilling to give their allegations of abuse serious attention.

Id. See also Janet Stidman Eveleth, *Strides in Gender Equality*, 35-Feb. Md. B.J. 50 (Jan./Feb. 2002) (describing Maryland's bar initiatives to reduce judicial gender bias).

In a similar vein, a recent article in the Los Angeles lawyer states:

In 1998, 35 states and several federal judicial circuits released their reports of gender bias in the legal profession. The reports concluded that overt discrimination in the courtroom has generally been replaced by more subtle forms of sexism, such as interrupting female counsel or simply ignoring her. The reports also noted that an old standby--stating outright that a woman does not belong in the courtroom -- has not disappeared. Lest women think that they can escape by avoiding the courtroom, the

reports also noted that female attorneys in law firms suffer from a dearth of mentoring relationships, exclusion from major cases, and excessive scrutiny that is based on presumptions of women's incompetence and frailty.

Karina Bess Sterman, *The Challenge of Being a Female Associate*, 22-Feb. L.A. Law. 12 (Feb. 2000). See also Saul Green & Dawn Van Hoeck, *Unfinished Business: Racial, Ethnic and Gender Issues Still Confront Bench and Bar*, 76 Mich. B.J. 938 (Sept. 1997); Rose L. Hubbard, *Gender Discrimination: It's Still With Us*, 58-Jan Or. St. B. Bull. 70 (Jan. 1998).

Stories of judicial bias against minorities and women are well-documented. A recent author wrote:

In Connecticut, instances of racial bias are well documented. The Connecticut Judicial Branch Task Force found bias in judicial attitudes. For example, one judge said: "Hiring is not a source of bias; the problem is to get minority people to take the positions." Another judge assumed that a black defendant was a drug dealer because the defendant was wearing a beeper even though he carried the beeper for legitimate business purposes. Another defendant wearing a bright jacket was asked: "So what gang are you in?" One person believed that

"[t]he minority kid is more likely to get high bail on a drug charge than a white kid whose parents come to court, bring report cards, and demonstrate roots in the community on the grounds that this provides more evidence to prove the kid is not a danger to the community. I feel that because the white teenager in fact had more economic and social opportunities, this should add to his crime, not excuse it."

Connecticut formed focus groups as part of the investigatory process. These focus groups described many instances of disparate treatment, such as when Caucasian defendants are given accelerated rehabilitation for more serious crimes while minorities receive incarceration for less serious crimes. These focus groups also perceived that the race of both the defendant and the victim in criminal cases determined the severity of the sentence.

The Judicial Council of California Advisory Committee on Gender Bias in the Courts similarly identified many instances of race bias. One judge referred to Hispanics as "cute little tamales," "Taco Bell," "spic," and "bean" in conversations with court personnel. The Los Angeles Daily Journal reported that African American citizens of California are seven times more likely to be arrested, nine times more likely to be sent to prison, and twelve times more likely to be sentenced to death than their

Caucasian counterparts. The San Jose Mercury News criticized the California judiciary and its inability to provide competent court interpreters to serve the nation's largest immigrant state.

Instances of gender bias are equally prevalent. The Connecticut Task Force on Gender, Justice, and the Courts found many instances of gender bias in the judiciary. One female attorney reported that some judges repeatedly addressed them by their first names while male attorneys were addressed by their surnames or titles. Another judge opens court by stating: "Good Morning Gentlemen." Yet another judge questioned a victim who was assaulted by a former boyfriend: "You went where with him? What was your major in college? Psychology! Then why didn't you know better?" Furthermore, an attorney reported that a judge told a female attorney at the courthouse that: "[She would] be as busy as a bride's ass on her wedding night."

The Connecticut Task Force also discovered gender bias in attorneys' conduct. For example, an attorney was reported to have hounded a fifteen-year-old girl on the witness stand by saying: "Come on, you can tell me. You're probably just worried that your boyfriend got you pregnant right? Isn't that why you're saying he raped you?" A female attorney in Connecticut poignantly described her feelings about gender bias when she said: "Tell the judges we are not their wives, we are not their daughters, we are not their girlfriends, we are not their mothers. Whatever we may be outside the court is one thing. In the courtroom, in the courthouse, we are attorneys."

The Delaware Gender Task Force disclosed numerous incidents of gender bias in the judiciary and profession in its Final Report. One judge professed to have no reservations about commenting on a female attorney's attire during the course of a hearing. Yet another judge was reported to have asked a female attorney, preceding a courtroom teleconference, whether she wanted to sit on his lap. A female attorney recalled the time when a judge first asked her age and then stated: "[Your employer] only hires young, pretty girls." The Delaware Gender Task Force also found that attorneys exhibited biased behavior on many occasions. For example, a female attorney was asked by an older male attorney during a job interview whether it was her intention to pursue a career in law. The male attorney explained that while he did not similarly ask this question of male applicants, he did not wish to hire a woman interested in having a family in the near future. Another female attorney had been asked during several different interviews about her husband's occupation and whether he approved of her choice of profession and its time requirements. Yet another female attorney believed that when a prominent male attorney during an interview stated: "I like what I see," he was not referring to her résumé. One female attorney was advised by a

senior partner during an interview that "she ... [[[should] wear dresses because it is a man's world and if a woman has looks she should use them to her advantage." The same partner scheduled an interview with another female attorney simply to see what she looked like.

The Gender Bias Task Force of Texas reported many of the same types of gender bias found in the previous states. One Texan attorney reported that a judge not only asked her the color of her nipples, but also asked her in front of male attorneys. Another female attorney in Texas stated that she had endured many condescending inquiries about "whether [she] was having a bad hair day, broken fingernail day or a run in my stockings" when her mood was tempered. The Gender Bias Task Force of Texas also reported male attorneys' perceptions of gender bias in the judicial system. One male attorney in Texas stated that "[w]omen get away with murder in court as well as everywhere else. Men suffer great discrimination in divorce cases." One attorney believed that "[t]he so-called "gender-gap" is vastly over-blown. If people who enter the arena will concentrate on their job and get the chip off their shoulders, forgetting their sex, they should do fine in today's society." To the point, another male attorney similarly stated: "This survey is a waste of time [and] money. Women should grow up and stop whining." One attorney admitted that "[j]udges and lawyers that are male discriminate against women and women lawyers. I try not to do so, but I find myself doing so anyway quite often."

The previous anecdotes serve to demonstrate that bias is alive and well across our country. As one Delaware attorney astutely commented:

"Any one of these kinds of experiences is perhaps not all that earth-shattering. But those who dismiss these incidents fail to appreciate the cumulative effect that incidents like these have when they happen on a frequent basis. Not only do such remarks and attitudes get tiresome but they require a considerable expenditure of energy worrying about how you are being perceived. They also tell you that you are seen first as a sexual/social being rather than respected as a professional colleague."

The force of the evidence clearly suggested that these are not simply the utterances of a few "bad eggs," but frequent occurrences at all levels of the judicial system that immeasurably harm the ability of courts to administer justice.

Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 Ind. L.Rev. 1167 (1999) (footnotes omitted).

VI. Bias is Bad Business, and Bad for the Profession as a Whole.

This section briefly discusses some of the more palpable costs of discrimination and bias. While I believe that bias and prejudice are inherently harmful, the palpable costs are worth mentioning for those who do not believe so, and for other purposes.

a. Discrimination is Counterproductive

Discrimination is costly in terms of lower productivity and morale, higher absenteeism, medical bills, and stress, and wasted recruitment, training and replacement costs. The Federal Glass Ceiling Report in 1991 stated that turnover costs are 150-200% of a manager's annual salary. Therefore, firms with strong diversity programs could save significant money by retaining workers regardless of race, gender, sexual orientation, or disability.

For example, the *Los Angeles Times* reported in "Business, Babies and the Bottom Line", October 10, 1996, that the Washington Business Group on Health studied the family policies of seven large employers including the Los Angeles Department of Water & Power. According to this report, the DWP found that it realized a significant return on its investment. It saved \$2.50 for every \$1 spent on work-family programs; turnover of participants in those programs was 2% compared to 7% generally; there were reduced healthcare costs; absenteeism decreased; and legal costs--the defense of claims, fines, and damages--were down.

Discrimination can be very expensive when it gives rise to lawsuits, especially if damages or fines result. For example, in 1996, a District of Columbia Federal Court jury awarded black former associate of Chicago-based Katten Muchin & Zavis \$2.5 million (\$1.5 million in punitive damages) for racial discrimination even though no overt discrimination was found. Similarly, in 1994, the New York-based law firm of White & Case settled a race discrimination case for \$500,000.

Lawsuits, however palpable, are not the clearest or only cost caused by discrimination. Studies have consistently established the costs of bias. For example, David N. Labland and Bernard F. Lentz in *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Associates*, 51 *Indus. & Lab. Rel. Rev.* 594 (July 1998), wrote:

Female lawyers are highly educated generally and, in particular, can be expected to have acquired relatively thorough knowledge of their rights under the law when faced with sexual harassment. Not surprisingly, then, we find that female lawyers are quite likely to perceive certain actions as harassment and to report being harassed: nearly two-thirds of all female lawyers in private practice and nearly 50% of the female lawyers working in corporate or public agency settings reported (in 1990) having experienced or observed one or more of five types of sexual harassment by male superiors, colleagues, or clients during the two years prior to the

survey. Further, we find evidence that female lawyers who had experienced or observed sexual harassment in the legal workplace reported lower overall job satisfaction and a greater intention to voluntarily exit their current employment context than did other female lawyers. However, we find no evidence that hourly earnings of female lawyers were affected by the specific types of sexual harassment that were identified in the ABA survey.

Our findings raise a disturbing possibility. Sexual harassment in the workplace is a matter of degree. Employers or coworkers may be able to sexually harass female employees in manners or degrees that are not sanctionable and yet so distress the targeted individuals that they quit. If such abuses occur in the legal profession, and our evidence suggests that they do, there is every reason to believe that other occupations are characterized by similar, if not worse, sexual harassment, in terms both of degree and of adverse impact on women.

Id.

In business – and law is, of course, a business – the profitability of diversity is more widely known. As one author recently explained:

Two critical economic trends form the linchpin for the business case for diversity: demographics and globalization. First, the nation's population (and hence its labor, investor and consumer pools) is undergoing an historic change whereby the nation's minority populations are increasing rapidly, while the labor pool as a whole is stagnating. White males, therefore, constitute a decreasing percentage of key constituencies. Second, the business of America is increasingly integrated into the world economic system, meaning that American business must now deal with important constituencies (labor, investor and consumer pools) that are as multi-cultural as the world. By the year 2025, demographic experts project that the additional 72 million members of the U.S. population will include 32 million Latinos, 12 million African Americans and 7 million Asian Americans. This more diverse population pool will necessarily lead to a more diverse marketplace of consumers. Minority populations are growing in number, as well as in wealth. This wave of diverse market entrants will also be more highly educated than their parents. From 1973 to 1996, the percentage of Latinos awarded B.A. degrees grew from 6.1 to 13.4 percent for women, and from 6.6 to 12 percent for men. For African Americans the increase was from approximately 7.2 to 17.7 percent. Because these populations will expand most markedly in the key 18-24 year old range, college enrollment is expected to rise 23 percent for African Americans and 73 percent for Latinos from 1995 to 2015. Gender diversity is also on the upswing: by the year 2005 women will constitute 48 percent of the nation's workforce. Women too are attending and graduating college at

dramatically higher rates. This increased population diversity will have an enormous impact upon the business environment: for example, people of color now constitute 25 percent of the nation's consumer base.

While the size and wealth of minority populations are increasing, the population as a whole, on a global basis, is rapidly aging. This global aging will test the developed economies of the world in many ways -- including creating unprecedented labor shortages and diminishing labor pools. America's increasing diversity will save it from many of the economic disruptions implicit in global aging. Non-Hispanic whites will contribute only one-quarter of the nation's population growth over the next decade. From 2030 to 2050, the non-Hispanic white population will be contracting, and all population growth will be occurring in non-white populations. This creates a business imperative: corporations that can tap an expanded labor pool, in the coming tight labor markets, will have an advantage over those that have limited access to diverse workers.

* * *

Leading professional business associations have studied diversity management in great detail. For example, the Society for Human Resource Management ("SHRM") conducted one of the most far ranging surveys on the state of diversity initiatives in corporate America in 1998. According to this survey top executives at 8 of 10 Fortune 500 companies found diversity management to be an important part of business. The SHRM has shown that embracing diversity can help firms create an attractive place for talented employees of all backgrounds to work. This will assist companies in recruiting efforts and help companies avoid unnecessarily high, and costly, turnover rates. The Society has concluded that companies that foster a diverse workforce enjoy a competitive advantage that has a direct, positive impact on a business organization's bottom line. Consequently, the "most enlightened companies" are seeking to exploit opportunities presented by the new workforce, to increase productivity, creativity, and innovation, as a means of attaining a competitive advantage in the 21st Century. Human resource professionals and top executives at America's most successful corporations are therefore convinced that diversity adds value to their business.

The Conference Board has sponsored a series of reports exploring the utility of diversity in achieving greater business performance. The Board has specifically refused to endorse the pursuit of diversity for its own sake; instead, the Board endorses value-driven diversity management. Although the Board has recognized that measuring the benefits of diversity can be very difficult, it concluded, as early as 1995, that businesses should recognize that diversity can be used to enhance the bottom line or can have negative consequences for companies that choose

to ignore diversity issues. "Leading edge companies" are executing diversity strategies based upon business imperatives notwithstanding the lack of certain evidence showing benefits. The Conference Board reflects the beliefs of the nation's business leaders that embracing diversity is profitable. More recently, the Conference Board researched diversity at the board level of corporate America. In this study, the Conference Board concluded that board diversity can enhance shareholder value. In sum, "leading companies are integrating diversity into corporate objectives with the belief that a diverse workforce can help generate new ideas and help companies be more responsive to diverse markets."

The conclusions of the Conference Board and Society for Human Resource Management have support in a study undertaken by the American Management Association. The study included a survey of over 1,000 managers and executives and evaluated the impact of diversity upon corporate performance objectives such as productivity and net operating profits. The study concluded that diversity in senior management consistently correlates to superior corporate performance. More specifically, the study found that firms having diverse senior management teams achieved better financial performance than firms that responded negatively to the survey regarding the presence of diversity. Thus, the study indicates that diverse work groups are more productive work groups.

* * *

All of this evidence showing the value of diversity in terms of increased profitability is consistent with the actual market performance of those companies that aggressively embrace diversity. "A study of the Standard and Poors 500 by Covenant Investment Management found that businesses committed to promoting minority and women workers had an average annualized return on investment of 18.3 percent over a five-year period, compared with only 7.9 percent for those with the most shatter-proof glass ceilings." Similarly, each year Fortune magazine and the Council for Economic Priorities try to assess a company's overall diversity efforts. The 50 companies chosen as the "Diversity Elite" for 1999 as "a group have performed terrifically, about matching the S&P 500 over the past year and beating it over the past three and five years." The 1998 list also outperformed the S&P 500. On a macro scale, the U.S. economy also lends support to the value of diversity. For example, in 1986, Japan's Prime Minister Nakasone claimed that the United States could not hope to compete with Japan so long as its population has so many blacks and Hispanics. In fact, Japan has since experienced a series of economic setbacks, while the U.S. has enjoyed an unprecedented period of high growth and productivity gains. Indeed, the U.S. economy has rightfully been termed the envy of the world. The U.S. economy has scored this impressive growth at the same time that the diversity of its work force has

rapidly increased. In sum, one of the world's most diverse economies is also one of its most successful.

* * *

Some of the most persuasive evidence in favor of embracing diversity is the devastating losses suffered by those companies that have allowed sexism or racially hostile environments to fester within their businesses. The most notorious example of such a casualty is Texaco Oil Company, and the unfortunate Texaco shareholders during the time that the racism within Texaco came to light. Texaco's nightmare began in 1994, when African-American employees filed a class action lawsuit alleging pervasive racial discrimination. The extent of Texaco's discriminatory misconduct came to light in late 1996, when a senior executive released highly controversial tapes that appeared to contain racial slurs emblematic of a racially hostile environment. Once allegations of Texaco's misconduct surfaced, its shareholders suffered stunning losses, as its market capitalization plunged by \$1 billion. Subsequent reports demonstrated that the tapes were not isolated circumstances of racial bigotry, but that instead such attitudes appeared to have permeated Texaco's business culture. Ultimately Texaco paid \$176 million, the largest amount ever paid in a racial discrimination suit, to settle the class action claims of over 1,400 African-American employees. Texaco also suffered from a serious bout of negative publicity that caused investors to flee the company and consumers to threaten boycotts. Nor is Texaco alone among companies that have felt the sting of being caught engaging in blatant racism, as companies ranging from Denny's to Shoney's have paid multi-million dollar sums arising from discrimination charges. As our population gets more diverse, and globalization proceeds apace, our nation is certain to see more "Texacos," and the amount of damage to be absorbed by such firms for failing to remedy misconduct is sure to increase exponentially, as investors learn to avoid closed corporate cultures and consumers and labor markets react to patent racism.

In sum, the business world has built a powerful case that if cultural and ethnic diversity is properly managed it can lead to a variety of benefits ranging from improved recruitment and retention to more insightful marketing and superior group interaction. All of these benefits ultimately lead to increased profits. The case enjoys support from leading business professionals, trade groups and publications, as well as psychological studies and empirically-based business studies. The early returns indicate that businesses that are the most aggressive in moving to diversify their workforces are out-performing the companies that are laggards. The next section of this article will explore in detail the practices these companies are employing in connection with their diversity initiatives.

Steven A. Ramirez, *Diversity and the Boardroom*, 6 Stan. J.L. Bus. & Fin. 85 (2000) (footnotes omitted).

b. Diversity Improves Morale.

Besides being morally and politically correct, there are benefits of a diverse profession. An August 2000 survey conducted by Business-Higher Education Forum and the National Alliance of Business (comprised of 5000 business members including Fortune 500 companies and their CEO's, executives, educators, and business-led coalitions) found that 81% of American adults think it is important to have employees of different races, cultures, and backgrounds. According to the *Wall Street Journal*,

'affirmative action' is not only a legal expression but a competitive imperative. Ideas are everything in a fragmented global marketplace, and great ideas demand a diverse work force. . . . In the real world of the workplace, finding quality employees now means recruiting as broadly as possible. . . The challenge now is harnessing the power of diversity. This demands a culture of tact and respect--essentially, adopting old-fashioned 'good manners' and golden-rule sensibilities as corporate objectives.

A diverse workforce acknowledges the demographic realities; more than half of California's attorneys in practice 5 years or less are women and/or of color. It maximizes the ability to hire the best and the brightest regardless of background and, once hired, it engenders increased loyalty and productivity. Promoting diversity is great public relations, enhancing a firm's ability to attract candidates from all sources as well as a diverse client base, given the increasing diversity of the population and the globalization of business and legal activity. A workforce that draws from a variety of communities creates a larger network, and therefore, expands the potential to reach previously untapped sources of business. Workers of different backgrounds have a better pulse on the market, and bring new perspectives to a changing legal environment. As stated in "What Minority Employees Really Want", *Fortune*, July 10, 2000, "The more points of view from which you attack a problem, the more creative your solution will be."

As Professor Ramirez also concluded:

The recent psychological evidence in support of this finding is powerful. Empirical research on the diversity of small working groups directly supports the value of ethnic diversity. Heterogeneous working groups offer more creative solutions to problems than homogenous working groups. They also show greater inclination for critical thinking and are likely to avoid problems associated with "group think," where members mindlessly conform to group precepts. Ethnicity provides the necessary heterogeneous perspective sufficient to trigger "kaleidoscope thinking" by providing a variety of perspectives, and to combat "group-think." This is consistent with data showing that people of different ethnic backgrounds

hold distinct "world views" and that Hispanic, Asian, African and Native Americans have not been so assimilated that these unique views have been lost. This is the difference that drives the value of diversity. In sum, the findings based upon feedback directly from managers are consistent with a wide variety of studies examining the impact of diversity upon group action. What these managers are saying is thus backed up by scientific evidence: managers that can manage diversity well will be more productive than those who are unable to cope with increasing diversity.

Steven A. Ramirez, *Diversity and the Boardroom*, 6 Stan. J.L. Bus. & Fin. 85 (2000) (footnotes omitted).

c. Bias Harms the Professional Image.

Professor Johnson, after noting the disparity in minorities and women in the legal profession, essentially answered the question: who cares? He wrote:

The numbers are startling and conclusive. Minority attorneys are underrepresented in prestigious corporate law firms. Before turning to the numbers, however, it is important to note what this means for the state of the profession. The paucity of minority attorneys in large corporate law firms is important because of what these firms represent. The perception within the profession is that these larger firms represent the elite practitioners of the private practice bar. Employment by one of these firms indicates that the lawyer so employed is part of the legal elite. Moreover these lawyers who practice in elite firms not only represent the elite of the profession, to a large degree they control the profession and its development.

What this means for the profession is that, if it is true to its ideals as the protector and guarantor of individual freedoms and liberties, then at least minority representation in the elite firms should be proportional to minority representation in the rest of the profession, unless there is a plausible explanation for their underrepresentation. In other words, if lawyers are committed to the advocacy of individual liberties, one would expect them to keep their own "house" in order. It would be hypocritical for elite lawyers as a group to "talk the talk without walking the walk." It would also be the height of hypocrisy for them to espouse one set of ideals while practicing something egregiously different.

Underrepresentation, if demonstrable, means little if it is inconsequential or if there is a plausible explanation for it. If, for example, there are fewer minority attorneys practicing in Salt Lake City than there are in a comparably sized city, little information can be gleaned from that fact given the lack of minority residents in the city both to service and from whence to draw potential employees. But the numbers do

not lie. Minorities historically have been and continue to be severely underrepresented in these elite firms. In the most statistically valid survey to date of the career choices that lawyers make, Lewis Kornhauser and Richard Revesz conclude that minorities, that is, blacks and Latinos, are severely underrepresented in elite firms.

What does this mean for the profession? It means that a profession that prides itself on promoting equal opportunity under the law is failing to adhere to its own standards. It means that a profession that gains prestige and relative preference over other occupations because of its identification as the promoter and guarantor of civil liberties will or should be at risk of losing that prestige when the reality of its abysmal hiring practices is publicized and becomes well-known to the outside world. It also means that a profession that is highly selective because of its perceived prestige may soon lose its advantage over other professions and become comparable to other well-paying professions like accounting or dentistry, which provide valuable services to society, but whose adherents are not regarded as special keepers and defenders of society's norms and values.

Johnson, *supra*, 95 Mich. L. Rev. 1005 (footnotes omitted).

In my view, another impact on the profession is the increased risk of loss of self-autonomy. In most states, the bar is self-regulating. However, to the extent that other governmental institutions become frustrated with the bar's lack of integration and continued failures in this arena, the greater the risk that those institutions will seek to regulate the bar. If the bar is regulated in one area, it will become regulated in others. Self-interest counsels towards action.

VII. Client-Driven Initiatives.

With the understanding that law firms would diversify if their clients demanded it, in the 1990's, the ABA Minorities Commission enlisted approximately 135 leading corporate counsel such as IBM, GM, GTE, Ford and Aetna Insurance, to request outside counsel to staff minority attorneys on their matters, and to write letters to outside counsel urging the hiring and promotion of minorities. Additionally, the Federal government set quotas for its work to be given to minority- and female-owned firms, leading to majority/minority law firm pairings on legal projects.

Similarly, the California Minority Counsel Program was established in 1989 with approximately 200 minority-owned law firms, 100 "majority" firms, and 62 of the state's largest businesses such as Apple, Blue Cross, Chevron, San Diego Gas & Electric, Wells Fargo, Irvine Company pledging to give businesses to minority law firms and attorneys. This has resulted in a number of "joint ventures" between "majority" and "female- or minority-owned" law firms. There is concern, however, that this may lead to the development of parallel law firms, segregated along racial and gender lines. Also, there

were complaints that the majority firms were not assigning minority lawyers within their firms to the work once it came in the door. In any event, with the wave of anti-affirmative action initiatives passing on the California ballot, many of these efforts have been significantly diminished.

VIII. Law-Firm Initiatives.

There are a number of good articles available discussing the various measures and reforms which are available to firms to implement to reduce bias and prejudice. *E.g., Putting a Mission in Motion: One Firm's Diversity Efforts Meet Success*, 21 No. 5 Legal Mgmt. 28 (Sept./Oct. 2002). The following is culled from such articles.

a. Hiring Goals

Many city and county bar associations have established minority hiring goals. For example, the Bar Association of San Francisco (BASF) set goals that minority attorneys comprise 35% of the associates and 12% of partners by 2004, and 40% of associates and 18% of partners by 2010. Currently, 24% of the associates and 6% of partners at the large Bay Area law firms, and 20% of the associates and 2.6% of partners at mid-sized Bay Area law are minorities. In 1996, BASF's mid-term report showed that hiring goals were met or exceeded, but firms still were having trouble with retention and promotion to partnership. BASF found that "color blind" policies were not effective. The organization suggested scholarships, mentoring, national outreach publicizing commitment to minority hiring, apprenticeship programs, diversity training, and procedures within law firms to ensure valuable work assignments and business development opportunities.

The ABA Colloquium on Diversity in the Legal Profession in October 1999 stated its mission "[t]o increase racial and ethnic diversity at all levels of the legal profession." To that end, it listed several goals and priorities, including addressing the affirmative action "backlash", ensuring that minority students attend and graduate from law school and are adequately prepared to pursue a legal career, creating a "sound and fair" interviewing model, and providing mentors for minority lawyers.

b. Enhanced Recruitment Efforts

To hire more women and attorneys of color, legal employers must expand their sources of candidates. They can do this by making contacts with and seeking recommendations from specialty bar associations; minority and female judges who may recommend former clerks; law school placement directors and female and non-white faculty members; campus organizations for women and people of color; and specialty committees and sections of non-specialized national, state and local bar associations. Legal employers might send representatives to job fairs that are targeted to people of color, and sponsor, or co-sponsor with other interested firms, programs or receptions for female and minority students and potential lateral hires. Employers also could encourage

firm members, not necessarily female or people of color, to act as mentors for non-white or female students either directly or through a bar association program.

To further expand and diversify the candidate pool, on-campus recruiting efforts should include law schools with high female and racially mixed enrollment. Firms can state that they wish to hire diverse candidates, yet avoid doing so by insisting that those candidates have graduated at the top of their class or be a member of the law review at one of the top 20 schools in the nation. Very few candidates, white or non-white, fit those criteria, giving rise to the issue of a double standard, or holding candidates of color to a higher standard, than other candidates. An employer committed to hiring a diverse group of lawyers must re-evaluate its hiring criteria and determine whether other credentials, such as work experience and community leadership, might be equally indicative of excellence.

For example, Perkins Coie in the late 1980's established a Minority Hiring Task Force to develop and manage programs for minority recruitment and retention. *See Putting a Mission in Motion: One Firm's Diversity Efforts Meet Success*, 21 No. 5 Legal Mgmt. 28 (Sept./Oct. 2002).

c. Improved Interviewing Techniques

The firm's current minority and women attorneys should be involved in every stage of the interviewing process. Without regard to gender or color, each candidate should be asked the same questions, and requested to provide the same documentation such as law school transcripts, writing samples, and references. All interviewers must be trained to be sensitive to inappropriate questions, comments, and activities, and to communicate a sincere commitment to diversity. Moreover, firms can emphasize their commitment to hiring a diverse workforce by communicating that intent through all of its written and website recruitment materials.

d. Improving Retention and Promotion After Hiring

A diverse work environment is not necessarily an inclusive work environment. The firm or corporation must work to ensure that all attorneys, regardless of background, are included within the dominant corporate culture. After hiring, legal employers must take steps to retain, develop and promote female and minority attorneys in order to maximize their contributions to the firm. A recent study by the executive search firm Korn/Ferry and the Columbia Business School found that over half of the minority executives in the US say they are likely to leave their current position for another where their talents and skills would be better utilized, where they would be more challenged, find a more supportive work environment, have the opportunity to impact the organization in a meaningful way, and find faster career advancement.

1. Ensuring Equal Access to Opportunities to Advance

At minimum, therefore, it is essential that minority and female attorneys be given the same opportunities and resources as other lawyers in the organization. All attorneys must be given equal access to challenging work assignments, professional education and skills training, client contact, business development opportunities, and social interaction with peers and partners. Extra effort should be made to include women and minorities in informal business activities, such as golf or sports events, where “old boy” networking traditionally occurs. Furthermore, the firm should ensure the fair and equal allocation of resources such as secretarial and support staffing, office services, overtime, research materials, and so forth, to all of its attorneys, regardless of their gender or race. Also important is timely, candid, comprehensive, meaningful, and specific evaluations and feedback, so that women and minorities have the same opportunities as other associates to develop their skills and overcome any weaknesses.

However, this clearly is not the case in many firms. Testimony from the Tennessee Commission on anti-gender bias, for example, that:

In the law firm setting, women associates were assigned work that their firms viewed as less desirable, while their male counterparts were assigned more complex work. Some firms assigned litigation matters to male lawyers because they were unsure of how juries would react to women (particularly "attractive" women) lawyers in the courtroom. Women being considered for partnership were frequently held to a higher standard than men of comparable experience. Some firms hired only one or two women litigators and then assigned them only domestic relations cases. TBA Commission witnesses also complained that women associates and partners were excluded from networking opportunities that led to business development and, ultimately, firm advancement. Women lawyers also reported that law firms hold memberships in exclusive clubs that deny membership to women and minorities.

Edge, *supra*, 39 No. 2. Judges J. 29.

The firm should endeavor to use egalitarian, gender- and ethnically-neutral standards for partnership evaluation. BASF and ABA committees are working on “Fair Measure Toward Effective Attorney Evaluation”, concrete recommendations for employers to use in the elimination of bias from the process. It is instructive to note that, in the Katten case mentioned earlier, while no overt racism was alleged, the African-American plaintiff claimed that he was treated differently than white associates. He was paid less, denied training, challenging work assignments, access to clients, and semi-annual reviews, and the firm failed to even consider him for partnership.

2. Fostering Diversity

Beyond giving all attorneys equal opportunity, employers can take additional steps to foster diversity in their ranks. Firms can demonstrate a commitment to diversity from the top down by integrating in-house management, committees, and task forces, and

holding management accountable for the development and promotion of women and people of color. Diversity must be an organizational value, and statements emphasizing the benefits of diversity and intolerance of discrimination and harassment should be found in all brochures, employee handbooks, offer letters, promotional materials, websites, etc. Diversity training should be offered at all levels of the organization, and repeated periodically. Depending upon the needs of the organization, there should be a diversity oversight committee that includes both partners and associates, where progress can be monitored, and shortcomings addressed.

3. Providing Role Models, Mentors, or Both

The lack of role models often is cited as a critical reason for the under representation of women and people of color in the profession. A firm can help create positive role models by placing female attorneys and attorneys of color in high-visibility and influential roles within the organization's management structure. Mentoring is an effective strategy toward fostering role models. Some firms create mentoring programs for particular groups such as women, gay/lesbian, or ethnic minorities, in addition to assigning mentors to all new hires, whether entry-level or experienced. Formal in-house mentoring programs should include training for mentors, a commitment to a minimum number of meetings between mentors and protégés, and a process to reassign any incompatible match. Furthermore, employers should support membership and active participation of its attorneys in specialty bar and professional associations, and encourage them to take advantage of mentoring programs offered by those organizations. In larger firms, providing attorneys with a directory identifying their colleagues facilitates informal networking.

Firm sponsored social events often play an important role in an attorney's career advancement. These events should not be held in discriminatory clubs or any other venue where any attorney might be uncomfortable. And firms should not be involved in entertainment or activities that could be offensive to any of their members. At social occasions, a firm should make it a point to invite female and racially diverse clients, prospects, co-counsel, judges, and public figures. To further promote a culture of inclusiveness, legal employers can expand the charity and community organizations it supports to encompass a wider cross-section, including those serving women, minorities, gay/lesbian, and disabled constituents. Additionally, add minority- and women-owned businesses to your list of approved vendors and suppliers. These strategies help dispel the image of the "old-boy network".

4. Respecting Differences

On a personal level, to retain women and non-white attorneys, a firm must create a hospitable environment. Each attorney must be treated as an individual. Often, for example, African-American male attorneys complain of being confused with other African-American males, Hispanic females with other Hispanic females, and so on. It is imperative not to impute the attributes or failures of one in a group to all members of that group. Furthermore, female and non-white support staff must be treated well, and not

necessarily paired with female or non-white attorneys. Additionally, legal employers should accommodate religious or cultural holidays, dietary restrictions, and dress requirements as far as possible within the business context. In a diverse world, it is not sufficient to treat all people the same; rather, all people should be treated fairly, with respect for their differences.

E. Diversity Through Pro Bono or Other Initiatives.

Several firms have utilized grassroots community involvement or pro bono activities as means to facilitate diversity efforts. As one article explains:

In 1993, Perkins Coie accepted the American Bar Association's law firm pro bono challenge to strive for pro bono legal services equal to at least 3 percent of the firm's annual billable hours. According to Parsons Clarke, in 2001 the firm's lawyers and staff contributed nearly 18,000 hours of pro bono legal services.

Many of those hours went to promote diversity in the community.

"We provided direct legal services to low-income political refugees seeking asylum and worked in legal clinics and local homeless shelters to represent persons of limited means," Birdsong says.

Parsons Clarke adds: "We also worked on important impact cases in furtherance of our goal to promote diversity in the community such as the *Smith v. University of Washington* case, involving a challenge to the University of Washington's affirmative-action program, and *Washington Legal Foundation v. Legal Foundation of Washington* case, involving a constitutional challenge to the funding system for legal services for the poor.

"In addition, we donated pro bono work to a variety of social services organizations and other nonprofit organizations," Parsons Clarke says. "To reinforce its commitment, the firm annually recognizes attorneys and staff who provide exceptional pro bono services for our clients."

When Perkins Coie was seeking a way to celebrate its 75th anniversary in 1987, the theme of giving back to the community was once again demonstrated with the creation of the Perkins Coie Community Service Fellowship. The fellowship allows an associate to devote up to six months of full-time work to a community organization on a significant public service project.

Many of the projects chosen have furthered diversity in the community, among them work on refugee asylum matters for the International Rescue Committee and on tax matters relating to the creation

of a pooled-income fund for low-income housing, assistance to low-income families with landlord/tenant, consumer and debtor/creditor problems and to low-income persons facing civil or criminal charges, and legal services for an innovative nonprofit project for at-risk youth in the juvenile justice system.

A firm of any size can encourage pro bono work by its lawyers, Alli says. Again, putting a goal for pro bono work in writing, finding specific opportunities for attorneys to participate, and providing an atmosphere that encourages them to contribute provide the framework for a successful program.

Diversity Through Grassroots Community Service

Although grassroots volunteerism is a hallmark for the firm, management also actively helps identify and sponsor opportunities for both attorneys and staff to contribute time to a variety of causes and programs that encourage diversity.

"Staff and attorneys in many of our offices create or sponsor many types of volunteer projects each year, such as helping social service agencies with their holiday giving needs, raising money for hospitals or other institutions and joining community-based efforts such as United Way's Christmas in April, which repairs and renovates houses for seniors in low-income housing," Alli says. "For the 'Expanding Minds' program, we host diverse students from inner-city middle schools for a day as attorneys introduce them to the possibilities of a career in business."

"We also work with summer internship programs targeted to high-school-aged, inner-city youth to offer lower-income youth a chance to gain valuable work experience at our firm during the summer," Birdsong says. "While earning a regular salary, they get a first-hand look at what it takes to become successful in the business world."

The firm's Seattle Manager of Operations Marc Campbell found the relationship personally rewarding. "One scholar invited us to attend his high school graduation, and another keeps in touch with us via e-mail," he says. Paralegals and other supervisors express similar satisfaction.

Every community has a wealth of volunteer opportunities available for firms who truly wish to take an active role in public service. If programs for hiring minority youth are not in place in a particular city, a high school guidance counselor or administrator for a youth organization such as Girls and Boys Club could recommend interested candidates for summer or part-time employment.

Putting a Mission in Motion, 21 No. 5 Legal Mgmt. 28 (Sept./Oct. 2002).

F. A Model Diversity Program – Some Elements

A well-developed corporate diversity program, taken from a Fortune 500 website, included the following:

A statement that the corporation values diversity;

A listing of support/networking programs for women, various ethnic/minority groups, gay/lesbians, and all new hires;

Awards for employees who have successfully implemented inclusionary practices;

A formal partner/associate mentoring and career development program;

A listing of work-life initiatives such as alternative work arrangements, stress-management programs, eldercare and childcare accommodations, telecommuting, maternity/paternity leaves, etc.;

Volunteerism, listing a variety of community groups that serve various constituents such as women, handicapped, children, ethnic/minority and gay/lesbian groups
The minority- and women-owned vendors program;

A listing of training programs including technology, time management, diversity training, etc.;

Benefits such as domestic partner health benefits, adoption benefits, dependent care referrals;

A list of recent awards given to employees by diverse community, civic, and professional groups;

A list of diverse charities supported by the organization

Obviously, not every organization can provide such a comprehensive program but, depending upon the size, needs, and capabilities of your organization, this list can be used as a menu from which to select components with which to build an effective employer diversity program.

There are less formal means to encourage diversity and understanding. An interesting website, tolerance.org, gives this listing, excerpted from its “101 tools” to enhance diversity:

61. Hold a "diversity potluck" lunch. Invite co-workers to bring dishes that reflect their cultural heritage.

62. Arrange a "box-lunch forum" on topics of diverse cultural and social interest.
63. Partner with a local school and encourage your colleagues to serve as tutors or mentors.
64. Sponsor a community-wide "I Have a Dream" essay contest.
65. Examine the degree of diversity at all levels of your workplace. Are there barriers that make it harder for people of color and women to succeed? Suggest ways to overcome them.
66. Cast a wide net when recruiting new employees.
67. Give everyone a chance for that promotion. Post all job openings.
68. Fight against the "just like me" bias — the tendency to favor those who are similar to ourselves.
69. Value the input of every employee. Reward managers who do.
70. Avoid singling out employees of a particular race or ethnicity to "handle" diversity issues on behalf of everyone else.
71. Vary your lunch partners. Seek out co-workers of different backgrounds, from different departments, and at different levels in the company.
72. Start a mentoring program that pairs veteran employees with newcomers.
73. Establish an internal procedure for employees to report incidents of harassment or discrimination. Publicize the policy widely.
74. Add social justice funds to 401(k) investment options.
75. Ensure that your workplace complies with the accessibility requirements of the Americans with Disabilities Act.
76. Push for equitable leave policies. Provide paid maternity and paternity leave.
77. Don't close your door. Foster an open working environment.
78. Advocate for domestic partnership benefits.
79. Provide employees with paid leave to participate in volunteer projects.
80. Publicize corporate giving widely, and challenge other companies to match or exceed your efforts.

IX. Bar Initiatives

Structural initiatives directed toward coercing proper behavior are growing in number. This section briefly addresses the responses of the bar and judiciary, and other groups, toward bias and prejudice.

a. Initiatives Directed at Lawyers.

Beginning in the 1990's, state bar associations and other organizations began to address bias and prejudice in the profession, including requiring continuing legal education for bias and prejudice, adopting rules to limit admission to the bar of those with racist or similar views, and other initiatives. *See, e.g.*, D. Larkin Chenault, *Fostering Diversity in the Legal Profession*, 79 Mich. B.J. 18, 18 (Jan. 2000) (discussing Michigan's efforts); Lorraine H. Weber, *Eliminating the Barriers, Opening the Doors*, 80 Mich. B. J. 24 (Jan. 2001) (same); Kathryn Reed Edge, *Gender Bias Goes to Ground in Tennessee*, 39 No. 2 Judges J. 29 (Spring 2000) (describing Tennessee efforts to combat gender bias).

As of this time, about fifteen states have adopted disciplinary rules which, in one form or another, prohibit lawyers from making statements or engaging in conduct which constitutes discrimination. The problems the bars have faced arise from the need for a rule to be specific, so that it is enforceable, and which does not impinge upon the free speech rights of lawyers. These issues are discussed more fully below.

Several states require continuing legal education concerning bias and prejudice. For example, California's rule provides:

All members of the State Bar of California on active status shall demonstrate their compliance with the continuing legal education requirement at the end of each compliance period and, except as otherwise provided, shall complete at least 25 hours of approved continuing legal education activities every 36 months. Of the 25 hours:

2.1.1 At least four shall be in the area of legal ethics;

2.1.2 At least one shall relate to prevention, detection, and treatment of substance abuse; and

2.1.3 At least one shall relate to elimination of bias in the legal profession based on any of, but not limited to the following characteristics: sex, color, race, religion, ancestry, national origin, blindness or other physical disability, age, and sexual orientation. Instruction in legal ethics, prevention, detection, and treatment of substance abuse and emotional distress, and elimination of bias may be a portion of a substantive law education activity.

http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?sImagePath=MCLE_Rules_Regulations.gif&sCategoryPath=/Home/Attorney%20Resources/Rules%20%26%20Regulations&sHeading=MCLE%20Rules%20%26%20Regulations&sFileType=HTML&sCatHtmlPath=html/AI_RR_MCLE-Rules-Regs.html

Similarly, Minnesota lawyers are required to take CLE which focuses “on issues in the legal profession and in the practice of law and not upon issues of bias in society in general” and which “may not include courses on the substantive law of illegal discrimination...” <http://www.courts.state.mn.us/cle/clehome.html> Oregon’s rule requires three hours on "other aspects of professional responsibility," which is defined as "courses pertaining to the role of lawyers concerning racial and ethnic issues, gender fairness, disability issues, and access to justice." *See generally*, Jordan W. Lorence, Alan E. Sears Benjamin W. Bull, *No Official High or Petty: The Unnecessary, Unwise, and Unconstitutional Trend of Prescribing Viewpoint Orthodoxy in Mandatory Continuing Legal Education*, 44 SO. Tex. L. Rev. 263 (2002); Kari M. Dahlin, *Actions Speak Louder than Thoughts: The Constitutionality Questionable Reach of the Minnesota CLE Elimination of Bias Requirement*, 84 Minn. L. Rev. 1725 (June 2000).

Again, the controversy surrounding these efforts is discussed below.

b. Initiatives Directed at and Taken by Judges

Some of these initiatives have targeted judges, or been proposed by them. The reason why judges can be a major influence on anti-bias efforts, and the responsibility they bear was addressed in connection with gender initiatives by the Tennessee bar association:

What is the responsibility of the judiciary to help eliminate gender bias in the justice system, and how can each judge make a difference? The August 10, 1998, Report of the ABA House of Delegates on the Status of Women in the Legal Profession cited a 170 percent higher percentage of women federal judges than in 1987 (19 percent in 1998 versus 7 percent in 1997); and 186 percent higher percentage of women judges in state courts of last resort (20 percent in 1997 versus 7 percent in 1996). Based on sheer numbers, the influence of women will, over time, become more equitable but, in the meanwhile, judges of both genders have significant opportunities to effect meaningful change by their conduct in the courtroom. Numerous studies, beginning with the groundbreaking 1982 Task Force established by the New Jersey Supreme Court, have confirmed the existence and pervasive nature of gender bias against women judges, lawyers, litigants, witnesses, and court personnel.

In 1997, five national organizations--the National Judicial College, the National Center for State Courts, the ABA Commission on Women in the Profession, the National Association of Women Judges, and the National Judicial Education Program--began a project to "revitalize the

national gender bias task force movement," further evidence of the legal profession's continuing concern about the problem. By affirmatively requiring lawyers in a judge's court to treat women lawyers, court personnel, litigants, and witnesses with respect; by refraining from judicial behavior that sends subtle messages to juries that women do not count as much as men: by holding the justice system accountable for its insidious biases, judges have the power to make a difference.

Edge, 39 No. 2 Judges J. 29, *supra* (footnotes omitted).

As a result of their power and influence, specific initiatives have been directed at judges. For example, Tennessee included the following specific recommendations:

- Continuing legal education programs be established for all judges, judicial employees, and lawyers concerning the existence and consequences of gender bias, as well as ways in which gender fairness can be achieved.

- Questions regarding potential gender bias should continue to be a part of any evaluation questionnaire designed and used to evaluate judges.... The CGF also endorsed Tennessee's Judicial Selection Commission as the appropriate body to identify qualified persons to serve in the Tennessee judiciary, regardless of the gender of the applicant.

- Although Tennessee's courts have already undertaken an extensive rewrite of their rules to reflect appropriate gender-neutral language, the courts should continue their diligence in this area and that all executive orders, state statutes, and regulations be written with an eye toward gender-neutral usage.

- The various judicial conferences, agencies, law schools, bar associations, and the Board of Professional Responsibility provide demographic information on membership and leadership, where applicable, to the state supreme court on an annual basis and that the Administrative Office of the Courts undertake the collection of the data, especially with respect to perceptions and attitudes of judges and nonjudicial court personnel.

- Judges should develop guidelines to ensure that lawyer appointments and all fee awards are based on gender-neutral considerations and that a record of such appointments, including fees awarded, be maintained and made available for inspection by the public.

- ...establish a speakers' bureau, administered by the Administrative Office of the Courts and staffed by speakers whose repertoire includes an expertise in gender-equity issues.

- ... implement the broadest possible recruitment efforts for all positions on a continuing basis, with special emphasis on measures designed to increase the number of women in higher paying and higher status positions in the justice system.

- ... adopt a courtroom conduct handbook modeled on the guide prepared and used by the Memphis Bar Association.

- The Tennessee Supreme Court carefully consider revising existing rules to make it a disciplinary violation for a lawyer to engage in inappropriate gender-based conduct.

- The court appoint a statewide committee charged with planning, overseeing, and monitoring implementation of the CGFs recommendations.

Edge, 39 No. 2. Judges J. 29.

A Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, 1997 Ann. Survey Am. L. 117 (1997) details efforts by judges in the Second Circuit to reduce prejudice in bias among the court systems there. A recent article surveyed the various efforts directed at removing judicial bias, and explained:

The force of the evidence clearly suggested that these are not simply the utterances of a few "bad eggs," but frequent occurrences at all levels of the judicial system that immeasurably harm the ability of courts to administer justice. As a result, many states have chosen to address race and gender bias by implementing the recommendations of their respective task forces. While some states have unique circumstances to address, many common themes can be gleaned from the task force recommendations. Some of the changes are described below.

Several task forces focused their attention on revising or amending rules that govern the conduct of judges, lawyers, and court employees. Some states now prohibit judges from engaging in any racially or sexually biased conduct or maintaining memberships with any organization that discriminates on the basis of race or sex. The Rules of Professional Conduct similarly address lawyer behavior. Some states have developed extensive court employee handbooks describing, for example, race and gender discrimination complaint procedures, diversity training requirements, flexible work schedules, standards for interviewing job applicants, gender-neutral language requirements, and sexual harassment policies.

Some states have developed comprehensive educational programs to train court personnel at all levels of the judicial system. For instance, educational programs have been created for court personnel, judges, judicial disciplinary commissions, judicial nominating commissions, and lawyers. Other educational programs extend beyond the court system and target law enforcement agencies and the public.

Several states enacted legislation to address race and gender bias in substantive areas of the law. States often reviewed and amended statutes involving child abuse and neglect, child support, divorce, domestic violence, family law, guardians ad litem, rape and sexual assault, sentencing and prison, and spousal support to eliminate the possibility of biased results. States also amended statutes and rules to reflect gender-neutral language.

Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 Ind. L. Rev. 1167 (1999) (footnotes omitted).

Judge Ruth Bader Ginsburg explained why these internal efforts are so important:

Self-examination of the courts' facilities and practices ... can yield significant gains. First, such projects enhance public understanding that gender equality is an important goal for a Nation concerned with full utilization of the talents of all of its people. Second, self-examination enables an institution to identify, and devise means to eliminate, the harmful effects of gender bias. Third, close attention to the existence of unconscious prejudice can prompt and encourage those who work in the courts to listen to women's voices, and to accord women's proposals the respect customarily accorded ideas advanced by men. And finally, self-inspection heightens appreciation that progress does not occur automatically, but requires a concerted effort to change habitual modes of thinking and acting.

As Professor Selby explained:

It is essential that the judicial system convey to the public its appreciation for the goal of racial and gender fairness. Our nation has long been struggling with racial and gender discrimination and it may be that we will never see that perfect day when such attitudes do not exist. However, the judiciary, charged as it is with protecting individual rights, has a heightened level of responsibility to foster and promote equality. The judiciary must lead the effort to achieve unprecedented fairness in the judicial system and demonstrate to the public that these issues are not only real, but demand serious attention. Moreover, implementation of anti-discrimination policies and procedures requires judges, attorneys, bailiffs, clerks, and litigants to conform their behavior, if not their beliefs, to acceptable standards. The hope is that while racial and gender bias may

linger in society at large, the judicial system would be insulated from such devastating and counter-productive beliefs and perceptions. Furthermore, improved public perception of the judicial system as a whole may result from such efforts.

Conduct that causes women and persons of color to conclude that bias exists in the court system may be more systemic than individualized. While instances of overt bias certainly do occur, the larger problem stems from behaviors that, while not overtly biased, create the perception of bias. Examples of such inadvertent attitudes and behaviors include mistaking a lawyer for a secretary or staff person, stereotyping criminal defendants by their type and manner of dress and generally regarding members of a particular minority or ethnic group as defendants. Individual instances such as these probably will not warrant a full scale investigation and discipline, but will result in unchecked behavior leading to the perception of bias.

Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 Ind. L. Rev. 1167 (1999) (footnotes omitted).

X. Personal Initiatives

Change in things such as race relations can, I believe, only come in true form on an individual level. Understanding one another thus will lead to less bias, greater respect, and greater diversity. This section first provides some, perhaps obvious, insight into race and gender relations before turning to particular personal initiatives which could be used to reduce bias.

In my own experience, much exclusion comes from the simple and understandable human desire to be with those who are like we are. Men are, generally, more comfortable having lunch with other men; older women with older women, and so on. The problem is that, where because of past bias, the top is dominated by older white men, then women, persons of color, and those who share less in common with older white men get excluded more often from lunches, activities, and other networking possibilities – not because of invidious or intentional discrimination or bias, but as a consequence of the simple human need to be with those who are most like us.

In addition to institutional strategies to combat bias in the legal profession, there are steps that individuals can take whether they find themselves in the "minority" or the "majority" in any particular situation. Most of these recommendations may fall within the realm of common sense, but awareness and sensitivity are a prerequisite.

In some respects, one of the broadest and perhaps most effective means to challenge bias and prejudice is to challenge your assumptions ("CYA"). Prejudice means prejudging, and is often subtle and unintended. It can take the form of assuming that the minority is the secretary, not the partner. *See* Larry V. Starcher, *Diversity*, 2003 W. Va.

Lawyer 8, 8-9 (June 2003). It can take more subtle forms. By focusing attention in on whether you are assuming something about the minority before you, you may recognize that subtle bias and prejudice are impacting your world view.

One African-American lawyer noted these assumptions in responding to a question about what was the greatest challenge facing African-American lawyers:

It's difficult to identify one specific thing. I think that, in general, it is the perception in the legal community that African-American lawyers are limited in their capacity. Historically, there have been certain stereotypical views about lawyers of color. For example, we're perceived as being good criminal lawyers and domestic relations lawyers. While that may be true, many African-American lawyers are outstanding in commercial litigation, mergers and acquisitions, intellectual property matters--the entire gamut.

Another perception is that many African-American lawyers have achieved what they have because of affirmative action and not because of hard work and the experience they've acquired through the years. I think that perception is pervasive, and in many instances it prevents African-American lawyers from getting opportunities to advance their careers that others might have.

Barriers at the Bar, 38-Aug. Trial 38, 38 (Aug. 2002).

From the "majority" standpoint, first, admit there is a problem--identify your own stereotypes and assumptions. Be aware of your words and actions. As required in the 1996 California Guidelines for Judicial Officers, lead by example and insist that others also treat everyone (staff, witnesses, other attorneys, etc.) with courtesy and dignity regardless of sex, race or any other characteristic. In your speech and writing, use consistent and respectful forms of address and refrain from any unnecessary designation of gender or race. Introduce female or minority colleagues to clients or other counsel as an equal and important part of the team. Make a point to include women, minority, disabled, and/or gay colleagues in all business activities.

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 and others as a clue to how they would like to be treated. If unsure of how to act in a particular situation, ask. For example, ask a person with disabilities if they would like assistance; do not assume they cannot handle something themselves. Take anger and upsets seriously, and apologize if you unintentionally offend someone. Respect others' differences and wishes. And, again, be flexible. Speak up when others exhibit bias. As Attorney General Janet Reno remarked at a Women Lawyers Association of Los Angeles reception in June 1996, "Haters are cowards. When confronted they will often back down; left alone, they spread."

In a recent article, an African-American West Virginian was asked to write about what diversity meant to her. Her words are revealing:

What does it mean to be a person of color in this state, in this nation? For me, it's the fear that nothing will keep you safe. Fear that no matter how much money I earn, or for whom I work, one glance at my skin and people will think they know all there is to know about me -- that I'm the secretary and not the attorney. Knowing that I'll have to work extra hard to prove myself. Knowing that I'll need to call first before showing up to rent an apartment -- or all the spaces will suddenly be taken. Deciding whether I want to raise children in West Virginia, where my family has lived for over four generations.

Janie O. Peyton, *Diversity*, 2003 W. Va. Law. 8, 8 (June 2003).

Looking at this issue from the other perspective, a white person described more than fifty ways in which she had an advantage in daily activities, conversations, and interactions. Normally, we read lists quickly, but be sure to read this one slowly and thoughtfully. I found it profound:

In a 1989 article, "Unpacking the Invisible Knapsack," Peggy McIntosh lists 50 situations in which she, as a white person, has an unspoken advantage. She states that "as far as I can tell, my African American coworkers, friends, and acquaintances with whom I come into daily or frequent contact in this particular time, place, and line of work, cannot count on most of these conditions." Here are a few of the situations that Ms. McIntosh discusses.

1. I can do well in a challenging situation [or be well-spoken] without being called a credit to my race.
2. I am never asked to speak for all the people of my racial group.
3. I can swear, or dress in second-hand clothes, or not answer letters without having people attribute these choices to the bad morals, the poverty, or the illiteracy of my race.
4. If I should need to move, I can be pretty sure that my new neighbors will be neutral or pleasant to me.
5. I can go shopping, pretty well assured that I will not be followed or harassed.
6. I can easily buy posters, postcards, greeting cards, etc. featuring people of my race.
7. I do not have to educate my children to be aware of systemic

racism for their own daily protection.

8. Whether I use checks, credit cards, or cash, I can count on my skin color not to work against the appearance of financial reliability.
9. I can criticize our government and talk about how much I fear its policies without being seen as a cultural outsider.
10. I can be sure that if I need legal or medical help my race will not work against me.
11. If a traffic cop pulls me over, I can be sure I haven't been singled out because of my race.
12. I can choose public accommodations without fearing that I'll be denied service or mistreated because of my race.
13. If my day, week, or year is going badly, I need not ask whether each negative episode or situation had racial overtones.
14. If I declare there is a racial issue at hand, or there isn't a racial issue at hand, my race will lend me more credibility for either position than a person of color will have.
15. I can be late to a meeting without having the lateness reflect on my race.

Peggy McIntosh, *Unpacking the Invisible Knapsack* (1989), quoted in Larry V. Starcher, *Diversity*, 2003 W. Va. Lawyer 8, 8-9 (June 2003).

XI. The Minority Responsibility.

From the “minority” standpoint, to reduce bias in the workplace, act as a professional at all times, be worthy of respect, and do not harass others (it goes both ways). Avoid reinforcing stereotypes, such as using “feminine wiles”. Look out for your own career advancement and promote your accomplishments. Meet expectations; perform well--”success breeds success”. Help other minority lawyers whenever possible, and support and promote, but do not create exclusionary cliques. In the face of discrimination, stay calm and speak up--tell the offender what, why, and how a particular comment or behavior is offensive. And, if necessary, bring the incident to the attention of the appropriate person (s) in your organization. Be flexible, and use humor when possible to diffuse tense situations.

An African-American attorney wrote about his own obligations to ensure that the successes achieved are continued and enhanced:

Earlier, you said that even though we haven't achieved full equality in the legal profession, minority attorneys are better off today. If things have gotten better, do we risk lapsing into a sense of complacency?

I think there is some complacency. It's possible for those who have done well to insulate themselves from the problems that exist among the majority of Americans of color.

I could hide in suburbia and never drive through the neighborhoods where the majority of people of color live, or acknowledge that they even exist. There are those who do that. They think their personal accomplishments are the result of their ability alone.

I would be foolish to think that I would have had the same opportunities had I been born in 1930 rather than 1950. I think the opportunities that my children will have are far greater than the opportunities that I had. If I've succeeded, it's not because when I came along I was just such a great person [that] these doors were opened for me. It was because of Martin Luther King Jr., Rosa Parks, and countless unnamed individuals who stood up and fought-- people who didn't have education, who didn't have opportunities, who never received any benefit from their acts--who made America stand up and take notice.

I stand on the shoulders of those who came before me. Not just the famous ones, but the countless others who stood up so I could have the opportunity.

Diversity at the Bar, 38-Aug. Trial 38 (Aug. 2002).

XII. Moving Beyond Women and Persons of Color

While this discussion, thus far, has focused primarily on bias against women and minorities in the legal profession, there are other groups, such as gay and lesbian attorneys, or lawyers with disabilities, which face similar bias, and the strategies to combat it are virtually the same. *See generally*, Jennifer Durkin, *Queer Studies I: An Examination of the First Eleven Studies of Sexual Orientation Bias by the Legal Profession*, 8 UCLA Women's L.J. 343 (1998); William C. Duncan, *Sexual Orientation Bias: The Substantive Limits of Ethics Rules*, 11 Am. U.J. Gender, Soc. Pol'y & L. 85 (2002); Amelia Craig Cramer, 11 Am. U.J. Gender, Soc. Pol'y & L. 25 (2002).

a. Gay and Lesbian Attorneys.

Gay and lesbian attorneys generally feel disadvantaged in hiring, evaluation, promotion and compensation. Approximately 3% of the members of the State Bar of California identified themselves as being gay or lesbian. A 1994 Los Angeles County Bar Association study showed that 68% of the lesbian attorneys and 58% of gay attorneys

reported witnessing or experiencing anti-homosexual discrimination. In the *American Lawyer* “1998 Mid-Level Associate Survey”, 33% of the attorneys who identified themselves as being gay encountered homophobia within their firms. And 60% of the gay respondents in the 1990 District of Columbia Bar survey reported that being openly gay limits career prospects. One employer’s response to a survey question regarding the numbers of gay or lesbian attorneys at the firm was: “Don’t have any. Don’t want any.”

In September 1996, the California State Bar Board of Governors unanimously approved six recommendations, which made it the first mandatory state bar to adopt a policy against sexual-orientation bias. The policies recommend that legal employers do the following:

- 1) implement policies discouraging verbal harassment of gays;
- 2) improve grievance procedures;
- 3) allow homosexual lawyers to participate in hiring;
- 4) prevent work assignments and promotions from being based on clients' perceptions of homosexuals;
- 5) provide domestic partner benefits;
- 6) maintain work environments where gay employees do not have to be closeted.

New York-based Milbank Tweed was the first law firm to provide domestic partner benefits, which now are the norm at law firms on both coasts and in Chicago. Other strategies to let employees know that it is safe to be “out” at work are: to make domestic partners welcome at employer-sponsored social events where spouses or dates are included; including sexual orientation in all anti-discrimination training and policies, especially where such policies are in writing; and including gay/lesbian organizations and charities among those supported by the employer.

b. Attorneys with Disabilities

Almost 50 million Americans have disabilities--one in five. Approximately 6%, or over 8000 lawyers in California have disabilities. And, because of continuing advances in technology, such as computer assisted transcription and e-mail, among many others, people with disabilities are increasingly able to enter the legal profession. There are two types of impairment, mobility and sensory, and some disabilities are invisible. A 1993 State Bar Subcommittee on the Employment of Attorneys with Disabilities survey found that 73% of lawyers with disabilities perceive that they have less opportunity for advancement than non-impaired attorneys. Approximately half do not request needed accommodations because they anticipate professional repercussions. A disproportionate number, approximately 40%, of attorneys with disabilities are engaged in sole practice,

compared to 26% of non-disabled, and more are in government practice, as well. Thus, as a group disabled attorneys earn less than those without disabilities.

California also is the first State Bar to initiate a pledge program with regard to hiring and accommodating attorneys with disabilities. More than 100 of the state's major law firms and corporations signed the pledge to support the goal of promoting full and equal participation of legal professionals with disabilities. In addition, California court rules provide for a request for accommodation, not just for attorneys, but also for all persons involved in court proceedings.

To create an inclusive environment for attorneys with disabilities, employers must ensure that all work-related events, whether business or social, are fully accessible. It must not be assumed that, just because a disability is not evident, that there is no disability. Requests for accommodation should not be treated as requests for special treatment, nor should it be assumed that an accommodation that is appropriate for one person is appropriate for the next similarly situated person. Employers should have a process by which employees can identify whether they have a need for accommodation, and what that accommodation might be. Employers often are concerned regarding the cost of accommodation. However, according to HirePotential, a Virginia-based company that specializes in placing disabled persons, only 10% of their candidates required any equipment, and the average cost of a technical device is approximately \$200.00. There are over 20,000 assistive devices available today, which allows for customization.

c. Other Groups.

In a recent and rather provocative article, a student raised the broader issues of culture, dress, and appearance as forms of bias, writing in part:

American society has become more casual and more tolerant toward diverse physical appearances in people's clothing in recent years, and the legal profession is no exception. Whereas suits and ties once were the unquestioned, everyday including Saturdays uniform for attorneys, corporate casual now may be the norm. However, the legal profession has not become more tolerant toward permanent and semi-permanent aspects of a person's physical appearance, e.g., long cranial hair and facial hair on men, tattoos, and piercings. A bland, conservative physical appearance remains the standard in the legal field to the detriment of its practitioners, the profession itself, and society at large.

For the majority of this country's history, the legal profession virtually was closed to members of ethnic minorities. Likewise, beginning at the turn of the twentieth century, professional ethics were shaped by elite groups, including corporate attorneys and law professors, whose relatively small percentages of lawyers and interests did not accurately reflect the interests of all attorneys. Their values, shaped by their ethnicity and class (Anglo-Saxon Protestants in the upper strata of the American

socioeconomic spectrum), and their interests became the perceived norms for the entire legal community and were codified in model rules and canons. These standards reflected the elite's subconscious *128 biases and views regarding what the legal profession should be and its interest in self-preservation.

Out of this culture came current values and ideas as to what an attorney should look like, and the outward appearance of attorneys has been shaped by the conservatism and self-interests of this group ever since. Conservative appearance and attire remains prevalent within the legal profession in part because the elite group of attorneys that creates and enforces professional standards and mores has a vested interest in its continued existence as the norm.

Although many believe that how an attorney presents him or herself through his or her physical appearance can project many messages, e.g., authority, affluence, confidence, conformity, or individuality, "blending in" so as not to draw attention to oneself appears to be the norm for attorneys primarily because many feel that this is how attorneys should appear. This, however, does not mean that the bland appearance is how attorneys should appear; rather, this is merely what lawyers believe that they should do. It may be that fear, rather than rationality or personal satisfaction, is the motivating factor for sartorial and grooming choices, because some attorneys (and indeed the high-powered corporate attorneys who often set the norm and the standards for the profession as a whole) feel they are constantly being judged (e.g., for partnership) and do not want any demerits resulting from a perceived "misstep" in their personal life. Therefore, rather than taking a chance on something untried, they succumb to the perceived norm and dress and groom conservatively.

Eventually, ethnic minority group members were allowed into the elite ranks of the legal profession, thus diversifying the ethnic make-up of the profession, but they had to conform to the elite's values at the expense of their own in order to do so. In time, legal thought, too, reflected divergent attitudes and ideas about what the goals and standards of the legal profession should be. Over the past ten years, the attire of attorneys has begun to diversify, with many attorneys still preferring the standard suit, but with many others opting for a variety of other standards of dress. The trend, therefore, is toward greater diversity and tolerance of informality because these aspects of the profession have become exceedingly more diverse as time progresses. However, "[t]he problem of minority-group admission has not disappeared; only the identity of the victims of discrimination has changed" because longhaired men, creatively facial-haired men, the tattooed, and the well-pierced have not been accepted into and overwhelmingly tolerated by the legal profession to reflect their standing in American society at large. Although they are not

actively and directly precluded from joining the profession, they are pressured to suppress their true selves and appearance by cutting their hair, covering their tattoos, and removing their piercings or they are not considered for all employment opportunities for which they are qualified.

Because the profession's members' ethnicity, values, and physical attire have become more diverse and because the profession has become more tolerant toward informality, the logical conclusion and synthesis of these trends is greater diversity in, tolerance toward, and acceptance of long haired male attorneys, attorneys with creative facial hair, well-pierced attorneys and tattooed attorneys. Although the obstacles that these groups encounter pale in comparison to those that ethnic, gender, and sexual minorities faced and continue to face, the time has come to examine and acknowledge the difficulties faced by the longhairs, the creatively facial-haired, the well-pierced, and the tattooed.

Paul Andrew Burnett, *Fairness, Ethical, and Historical Reasons for Diversifying the Legal Profession with Longhairs, the Creatively Facial-Haired, the Tattooed, the Well-Pierced, and Other Rock and Roll Refugees*, 71 U. M. K.C. 127 (2002) (footnotes omitted).

Some may view his comments as illustrating a slippery slope: where will it end? Others may recognize that he presents, as noted above, a challenge to the assumptions that we carry with us: must an attorney where a suit, be devoid of tattoos, have a “proper” haircut, and be without piercings in order to be an effective attorney?

XIII. Controversies of Anti-Bias Initiatives

In recent years, bar associations and courts have struggled with whether the constitution prohibits taking into account the bias of lawyers in admission decisions, and whether anti-bias CLE requirements likewise violate the constitution. This section briefly surveys these important issues.

a. Good Moral Character in Admissions

Every jurisdiction imposes a “good moral character” requirement on admissions. Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 Notre Dame L. Rev. 67 (1984) (citing RULES FOR ADMISSION TO THE BAR IN THE UNITED STATES AND TERRITORIES (West 1982)). The United States Supreme Court in *Konigsberg v. State Bar of California*, 81 S.Ct. 997 (1961), analyzed the moral character inquiry, and characterized it as seeking to determine whether "a reasonable [person] could fairly find that there were substantial doubts about [an applicant's] 'honesty, fairness and respect for the rights of others and for the laws of the state and nation.'"

At the same time, of course, the First Amendment to the United States Constitution permits freedom of speech. Can a bar association deny licensure of an applicant who is a racist? One leading commentator put the issue in context:

Admittedly, the moral character requirement is a subjective standard for determining fitness to practice law. Most bar admission cases that seek to determine moral character fall within one or more of the following categories: political/religious belief and conduct; "misconduct in the bar admission process; past illegal conduct; financial malfeasance; and emotional or mental instability." Both past illegal conduct and misconduct in the bar admission process are non-controversial factors that routinely have been used as a basis for determining that a candidate does not possess the requisite moral character for admission to the bar. Factors that indicate that a candidate is dishonest are generally agreed upon as legitimate grounds for denial of membership to the bar. The more controversial factors that bar authorities have used to reach the conclusion that an applicant does not possess the requisite moral character include membership in controversial organizations and repetitive use of speech and/or the media to personally attack others. These factors are controversial because they involve the bar candidate's exercise of First Amendment rights such as the right of association or the right to practice one's religion without governmental intrusion. Thus, these factors have provoked disagreement about whether conduct that is arguably protected by the First Amendment, such as advocating and practicing private racism and discrimination, can be considered by bar authorities in their assessment of an applicant's moral character. This question must be answered in the affirmative if the profession is to preserve its integrity and its core values, and thereby not to undermine the fair administration of justice.

Carla D. Pratt, 30 Florida L.J. 858 (Summer 2003).

The issue became clarified when in the late 1990's Illinois had to address the bar application of Matthew Hale. See *In re Matter of Matthew F. Hale*, 723 N.E.2d 206 (Ill. 1999). The facts the court faced were these, taken from Hale's brief on appeal to the Seventh Circuit, when he later raised constitutional challenges to the denial of his application:

Hale is a well-known and long-time advocate of racist and anti-Semitic ideas. R. 1, ¶ 1. In 1998, Hale graduated Southern Illinois University at Carbondale School of Law; took and passed the Illinois State Bar Examination; and applied for a license to practice law. *Id.* ¶ 19. Hale had no incidents of misconduct in his past to justify denial of his application to practice law, *id.*; to the contrary, unlike many successful applicants to practice law in Illinois, Hale has no criminal record whatsoever, and the Illinois Character and Fitness Committee's Inquiry Panel ultimately

determined that Hale had demonstrated an "absence of criminal conduct ... by clear and convincing evidence." *Id.* ¶ 25.

Brief of Appellant, Matthew F. Hale, 2002 WL 32170412 (2002). Or, as the Seventh Circuit wrote:

Hale's avowed mission in life is to bring about the hegemony of the white race, the legal abolition of equal protection, and the deportation of non-white Americans by non-violent means. With these goals in mind, Hale attended Southern Illinois University School of Law, graduating with a J.D. and passing the Illinois bar exam in 1998. In his application for admission to the Illinois State Bar, Hale disclosed his active role in promoting racism and anti-Semitism.

Hale v. Committee on Character and Fitness for the State of Illinois, 335 F.3d 678 (7th Cir. 2003).

An article gives some greater details of Mr. Hale's beliefs, and of how the bar association reacted to them:

In October 1995, Mr. Hale became (and continues to be) the head of an organization called the World Church of the Creator, which claims to be a religious organization. By Hale's frank admission, he is an avowed racist who, "since his teenage days, has been actively involved in promoting white supremacy through organizations and the distribution of literature." This literature, now widely visible on the Internet, portrays blacks, Jews, and other minorities in an extremely negative light. Much can be learned about Hale's beliefs by reviewing materials contained on the website of the WCOTC as well as statements that he has made, as Hale relies heavily on the WCOTC as a springboard to profess racial and discriminatory teachings.

Hale's title as head of the WCOTC is Pontifex Maximus (Latin for "Supreme Leader"). Hale has stated that "he would dedicate his life to Creativity," referring to the WCOTC, a "completely legal religious organization" that, according to its founder, Ben Klassen, has as one of its major tenets the hatred of Jews, blacks, and other minorities. The motto of this supposed faith is Rahowa (Racial Holy War). The WCOTC has as its emblem the "Simulacrum Candidus." According to the WCOTC's membership manual:

The "W" of our emblem stands, of course, for the WHITE RACE, which we regard as the most precious treasure on the face of the earth. The Crown signifies our Aristocratic position in Nature's scheme of things, indicating that we are the ELITE. The Halo

indicates that we regard our race as being UNIQUE and SACRED above all other values.

Two of the most telling documents include the Church of the Creator Membership Manual and a piece entitled Facts that the Government and the Media Don't Want You to Know. As the Anti-Defamation League notes, Hale's writings "run the gamut of anti-Semitic accusations" -- including allegations that there is Jewish control of electronic media and entertainment media, Jewish control of the print media (The New York Times, The Washington Post, and the Wall Street Journal), Jewish control of the slave trade, and Jewish control of the government. Furthermore, Hale asserts that there is a "Kosher Food Tax," which he defined using such terms as "heist" and "consumer fraud." The second half of Hale's Facts that the Government and the Media Don't Want You to Know is devoted to crude racism in the form of distorted statistics and a discussion of the "biological differences between the races."

Hale's literature includes the slogan "Delenda Est Judiacia," meaning Judaism must be destroyed. This is boldly pronounced in the "Third Commandment" of the WCOTC which clearly states: "inferior mud races are our deadly enemies, and the most dangerous of all is the Jewish race. It is our immediate objective to ... keep shrinking our enemies." Likewise, the "Sixth Commandment" of the WCOTC instructs Hale's followers that "Your first loyalty belongs to the White Race." Similarly, the "Seventh Commandment" of Hale's religion requires members to show preferential treatment in business dealings to "members of your own race" -- meaning whites. The "Seventh Commandment" continues: "Phase out all dealings with Jews as soon as possible. Do not employ niggers or other coloreds. Have social contacts only with members of your own racial family."

Under a section of the WCOTC Membership Manual entitled "The Essence of a Creator," followers are instructed:

V. A CREATOR realizes that both love and hate, in order to be constructive, must be directed in the proper channels and to do otherwise is destructive and suicidal;

VI. A CREATOR therefore makes a careful distinction between his loved ones and his enemies. He loves, aids, and abets those of his own race and his own kind, and hates his enemies, namely Jews, niggers, and the mud races.

According to the Response filed with the Illinois Supreme Court on behalf of the Committee of Character and Fitness, Hale's "Commandments" and

other instructions to his followers were not merely words on paper. During the panel hearing, Hale elaborated when questioned about these beliefs. The Response notes that:

Hale considered the precept "all men are created equal" an "idiotic notion" since non-white races are inferior. [He] described the average black man as intellectually inferior to the average white man According to Hale, a self-professed Anti-Semite, Jews are "morally inferior," "morally bankrupt," and "orientals," who should be driven from power and sent "back to Israel."

A three-member Inquiry Panel refused to certify him for admission to the Illinois Bar in February of 1999 because, in the words of the majority opinion,

While Matthew Hale has not yet threatened to exterminate anyone, history tells us the extermination is sometimes not far behind when government power is held by persons of his racial views. The Bar of Illinois cannot certify someone as having good moral character and general fitness to practice law who has dedicated his life to inciting racial hatred for the purpose of implementing those views.

Hale appealed the decision, and on April 10, 1999, he was given the opportunity to testify and present evidence before the Third District Character and Fitness Committee's five-member panel. Prior to ruling that it would not certify Hale's admission, the Committee panel posed questions of Hale and his friends, followers, and father for nearly two hours. The panel's intent was unmistakably clear -- it was interested in ensuring that all relevant information had been examined. The panel was thorough and methodical in its evaluation of Hale's record. In April of 1990, while Hale was an undergraduate student at Bradley University, he attended a prayer meeting against racism held at Bradley where he distributed material bearing the swastika symbol, urging membership in the American White Supremacist Party and listing his address as a point of reference. Later in 1990, Hale was arrested for violating a city ordinance for burning a flag, although it was pointed out by Hale and one of his witnesses that the flag was an Israeli one, arguing that this was therefore not a crime in the United States. Likewise, Hale has been found guilty and fined fifty dollars for distributing hand bills -- a conviction that he did not include on his bar application. The panel also called attention to an incident in May of 1991 that included Hale's brother. Hale and his brother were carrying signs and chanting white supremacist slogans near the University of Peoria, where they were later threatened in their car by a group of African-Americans. Hale's brother used a handgun in the car to threaten the group of men and then

fled the scene, leaving Hale behind. Hale was apprehended by a police officer, with whom he refused to cooperate, instead lying about the event. Because this incident cast doubt on Hale's truthfulness, Hale's lie was troubling to the panel.

Furthermore, Hale's past offenses included an arrest for assault and battery (for aggressively resisting a shopping mall security officer), disciplinary probation while at Bradley University (for violating two rules of the University's student policies with respect to the registration of student organizations and the use of University facilities, as well as conduct or action that threatens the educational process or the health or safety of any member of the University community), and an appearance before the Bradley University disciplinary body on the charge that he had called a member of the community a "Jew Boy" -- another item not listed on his bar application.

Certainly one of the most disturbing aspects of Hale's file was a letter Hale wrote in 1995 to a woman who had made published statements in the Peoria Journal Star in support of affirmative action. The panel focused on the following language from Hale's letter:

Your comments appearing in the Saturday, July 22nd issue of The Journal Star were as pathetic as they were asinine. When in the hell are people of your ilk going to face the fact that the nigger race is inferior in intellectual capacity. And I underline inferior. You have examples all around you, and yet you continue to cling to the misbegotten equality myth, which is not only destroying our universities but also our whole country. Is it going to take your rape at the hands of a nigger beast or your murder before you become aware of the problem I'm looking forward to the day when our people's eyes are opened and when people who believe in the equality myth no longer have any power to promote this garbage to others.

The panel paid careful attention to the portion of Hale's letter asking whether it would take the rape and murder of the woman at the hands of a "nigger beast" to change her mind. The panel concluded: "This statement shows a monumental lack of judgment This lack of judgment will surely set the applicant, if admitted to the bar, on a collision course with the Rules of Professional Conduct." The panel further faulted Hale for not attributing the letter to youth or poor judgment during the hearing. In responding to questions from the panel about his choice of language, Hale asserted that he did not consider the language insulting, though stating he would not write that letter today. But Hale used this incident to make the point that "the rules of professional responsibility ... don't apply to a fellow in his own house writing his own letter to somebody, to

something unrelated to the law." To be sure, Hale's position on this point - - that the rules of professional responsibility can somehow be turned "off" or "on" -- demonstrate a clear lack of understanding of and appreciation for the rules.

The committee members, likewise, asked Mr. Hale whether he could take the oath to support the United States Constitution and the Constitution of the State of Illinois in good faith. Hale "unhesitatingly answered that he would have no difficulty even though, based on his beliefs, he obviously would be in substantial disagreement with current interpretations of the constitutions." The Committee continued its questioning of Hale on this topic, presenting him with text from [the Illinois Constitution] which condemns "communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or religious affiliation." The Committee pointed out that the Illinois Rules of Professional Conduct require an attorney to deal with others in a fair manner and forbid an attorney from taking any action to harass or maliciously injure another, from engaging in conduct prejudicial to the administration of justice, or from discriminating against others. The Response of the Committee to the Illinois Supreme Court notes that Hale responded to this line of questioning by stating he did not feel as if he would be acting inconsistently by concurrently abiding by the Illinois Rules of Professional Conduct, while at the same time harboring his anti-Semitic and racist beliefs. The Committee described Hale's response: 'when I go to the grocery store, I buy groceries; I don't call them nigger or anything else. I buy groceries and I'm on my way', attempting to show he could still work with people of a different race, regardless of his personal beliefs.

In its conclusion, the five-member panel looked towards Hale's comments, actions, and teachings to buttress their decision to deny him admittance to the Illinois Bar. Recognizing the anti-discrimination rule in the Illinois Rules of Professional Conduct, the panel concluded: "It is axiomatic that an applicant who will not or cannot abide by the Rules of Professional Conduct should not be admitted to the bar." The opinion of the Committee included a restatement of the commitment of the bar to certain fundamental truths, noting:

- . All persons are possessed of individual dignity.
- . As a result, every person is to be judged on the basis of his or her own individuality and conduct, not by reference to skin color, race, ethnicity, religion or national origin.
- . The enforcement and application of these timeless values to

specific cases have, by history and constitutional development, been entrusted to our courts and its officers - the lawyers - a trust that lies at the heart of our system of government.

. Therefore, the guardians of that trust - the judges and lawyers, or one or more of them - cannot have as their mission in life the incitement of racial hatred in order to destroy those values.

The opinion of the majority ended with the statement: "The bar of Illinois cannot certify someone as having good moral character and general fitness to practice law a person who has dedicated his life to inciting racial hatred." Matthew Hale, by virtue of his unwavering convictions and dedication to certain beliefs, could not faithfully execute the requirements of the position of a lawyer as an officer of the court. With this recognition, it was completely appropriate -- and, in fact, necessary -- for the Committee on Character and Fitness of the Supreme Court of Illinois to deny Mr. Hale's application for admission to the bar. In so concluding, the Committee was able to reflect on a wealth of evidence to support its decision against certifying Hale, satisfying the requirement that a denial of certification not be for arbitrary reasons.

The decision of the panel was not unanimous. As the sole dissent, panel inquiry member Baxter argued on Hale's behalf, noting that it is plausible for Hale to hold racist views and practice law in accordance with his oath of office. In an eerie pre-cursor to the events that followed the Committee's decision, Baxter wrote that the actions of the Committee to deny Hale certification to practice law were based on speculation that Hale would violate his oath as an officer of the court. Unfortunately, the cautious instincts of the majority proved correct, and Baxter had been too generous with Hale in giving him the benefit of the doubt.

Richard L. Sloane, *Barbarian at the Gates: Revisiting the Case of Matthew F. Hale to Reaffirm that Character and Fitness Evaluations Appropriately Preclude Racists from the Practice of Law*, 15 *Geo. J. Legal Eth.* 397 (2002) (footnotes omitted).

Some say the answer to whether an extreme case, such as Mr. Hale's, should be admitted to the bar is clear. "White supremacists lack the requisite moral character and fitness to be lawyers." Pratt, 30 *Florida L.J.* at 864. The argument they make is this typified by this excerpt:

Politically or religiously inspired conduct that is prejudicial to the administration of justice can serve as the basis for denying admission to the bar. Denying admission to an individual whose stated "religious" mission requires the individual in part to transgress the limitations of the law by refusing to represent or hire blacks, for example, is not only reasonable, it is necessary to preserve the integrity of our entire system of

justice. "Maintaining public respect for the laws and the courts is essential to the effective administration of justice." Our profession plays a crucial role in our legal and political order. Thus, any conduct by a lawyer that decreases public confidence in our legal system should be condemned.

How could a lawyer who regards blacks as inherently inferior and undeserving of equal treatment under the law adequately represent a black person? Such preconceived notions about the worth of the client would "likely impair [the lawyer's] ability to represent the client" and would seriously damage and erode the lawyer-client relationship. This argument assumes, of course, that a white supremacist lawyer would even accept a black client. The Model Rules specifically allow a lawyer to refuse to accept a court appointment in circumstances where "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." Moreover, a lawyer has the right to control his or her own labor, meaning that a lawyer does not have to accept as a client, every person who seeks his services. Thus, a racist lawyer, which I will define in this instance as one whose beliefs mandate discriminatory behavior against non-whites, necessarily will be more likely to discriminate against a black in determining whether to accept that individual's case. Since he has the intellectual acumen to become a lawyer, he probably will be astute enough to offer a pretextual reason for declining to accept a black client. For example, Hale could deny a black person representation with the explanation that he thinks the case lacked merit or that his current caseload or other commitments would not permit the representation. These rationales are race-neutral on their face and reasonable. In fact, Hale's real reason for denying the representation may be the race of the potential client. Rather than allow this type of subtle and often unprovable discriminatory behavior, bar examiners are correct to not empower white supremacists with a license to practice law.

While some jurisdictions still do not have ethical rules precluding lawyers from refusing to represent an individual based on the race of the would-be client, this author submits that it is morally and ethically improper for a lawyer to refuse to accept a matter if that refusal is based even partially upon the race of the potential client. Indeed, even in the absence of an ethical rule precluding discrimination in the acceptance of clients, such conduct may be illegal under federal, state, and/or local public accommodation laws, as well as 42 USC 1981 which guarantees to blacks the same right to make and enforce contracts as to whites. Thus a lawyer who refuses to enter into a lawyer-client relationship, which is a contractual relationship, solely on the basis of the potential client's race would be violating Section 1981. This "status-based discrimination" undermines the legitimate social purposes underlying the rules regarding client selection. The law governing lawyers has historically permitted a lawyer to choose which clients and causes the lawyer will represent. The

reason that the law has granted a lawyer this type of autonomy is so that the lawyer's independent professional judgment will not be compromised by the lawyer's personal beliefs and/or morals that may conflict with the client or the client's legal position. The classic example of such a conflict is the lawyer who is asked to represent a person charged with a sex offense against a child. Many lawyers would refuse this representation because their own beliefs and morals are so offended by the alleged offense that they would be unable to zealously represent such a client.

Lawyers as administrators of justice stand as an instrumentality of government. The judicial process itself is viewed as government. Lawyers have a government-granted monopoly on the administration of justice in this country which gives them power to affect the lives of others. Racially discriminatory or racially charged behavior by lawyers obstructs the fair administration of justice. Granting a license to practice law to an individual who practices racial hatred and discrimination effectively gives that person more ammunition to add to his arsenal to support his personal race war because a lawyer has more powers and privileges than he had as a lay person. Thus, whether a law office constitutes a public accommodation or not, the profession's commitment to "equal access under law" and "justice for all" is undermined if an individual lawyer is permitted to refuse to represent individuals on the basis of race or other "considerations that have nothing to do with either their moral worth as human beings or the legitimate interests of attorneys," such as the merits of the case.

There is precedent for excluding white supremacists from a profession or occupation. The military has found that active participation in hate groups such as the KKK is incompatible with military service, which requires trust, cohesiveness, and discipline among service members. While the military is easily distinguished from the legal profession due to its status as a separate community, the legal profession, not unlike the military, has a compelling interest in ensuring that its lawyers adhere to the values of the community, one of which is equal justice. Public employers other than the military have attempted with mixed success to deny employment based on membership in a hate group. Thus, police forces that have sought to exclude members of hate groups from their ranks have only been successful when the hate groups in question had been involved in the commission of violent crimes.

Id. (footnotes omitted).

On the other hand, and even with the case of Mr. Hale, there is this sort of argument:

The argument that Hale's racism renders him unfit for lawyering becomes more sound when rooted in the United States Constitution, rather than in the UN Charter. The committee posits this problem: 'Hale testified that he could swear to protect and defend the United States Constitution, the Illinois Constitution, and the laws of the State of Illinois. Hale, however, acknowledged that the 'Sixth Commandment' of his 'religion' requires him to put his 'own race above every other loyalty.' They also point out that the 'Seventh Commandment' of Hale's religion requires preferential treatment in business dealings with whites.' To this effect, Hale has stated to the committee that 'I probably would never have a black client personally. ' Hence, the committee has taken the position that 'Mr. Hale's publicly displayed views are diametrically opposed to the letter and spirit of Rule 8.5(a)(5) (of the Rules of Professional Conduct) 'which forbids adverse discriminatory treatment of others.' For the committee, the essence of the issue is that 'Mr. Hale's beliefs do not exempt him from obeying the same rules as every other attorney.'

Once again, the moral argument against Hale is much stronger than the legal argument. It seems axiomatic that Hale will violate, at the very least, Rule 8.5a of the Rules of Professional Conduct by 'adversely discriminating against others' based on race. However, speculation that future violations of these rules will occur has never been a viable method for the Character and Fitness Committee to reject an applicant. The best source for the rule on this matter is found in the last of the line of cases dealing with the issue of bar applicant rejections based on political beliefs. In *Law Students Research Council*, the Court advocated the 'least restrictive' means of protecting the public from inchoate violations of the Professional Rules by aspiring lawyers. This 'least restrictive' method did not include speculation about an applicant's future conduct based on political beliefs. Rather, the Court advocated the wisdom of using the deterrent and punitive effects of post-admission sanctions as the principal means of policing the conduct of prospective attorneys.

As pointed out by the ACLU of Illinois on Hale's behalf, '[d]isciplinary rules, contempt sanctions, civil suits and the threat of criminal prosecution are all tools at the disposal of courts and citizens who are disaffected in their interactions with attorneys in Illinois.' As pointed out in Lawrence Baxter's dissent from the decision of the inquiry panel, 'The Rules of the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court are the profession's and the public's protection against any abuse. That such abuse may occur is only speculation at this time.' And such speculation, particularly in Hale's case, is egregious because it is based strictly on his beliefs and expression of those beliefs, not upon his conduct. While a legal intern, Hale's secretary was married to an African American, and they shared a biracial child, a matter which Hale and his church view with disapproval. However, Hale did not interject his views

on the matter into the workplace, and he treated his secretary in a professional and courteous manner. Hale also told the committee that during his legal clerkship, he dealt with black clients and engaged in no acts of racism toward them. The accuracy of this statement was confirmed by independent inquiry. Hale testified that he would work toward repeal of the anti-discrimination laws of Illinois, but that in the meantime, he would comply with those laws. Finally, Brian McPheeters, the lawyer supervising Hale's internship, testified that Hale could comply with the professional requirements with respect to the provision of legal services to racial minorities. In terms of policy considerations, as pointed out by the ACLU, 'the danger is clear, - no future applicant to the bar in Illinois may hold and express unpopular views no matter how sincere their intent may be to adhere to the oath and ethical code for Illinois attorneys.'

'Proof' of Hale's Lack of Good Moral Character

At this point in the discussion, the reader may find the defense of Hale interesting on a point-by-point basis, but ultimately a losing battle. After all, Hale is undeniably racist bigot. The reader may suspect that exposure to any of Hale's hate-speech or literature would make the stomach churn, and render the prospect that the man possesses good moral character inconceivable. That would make sense. But any one of us would admit that however justifiable our emotional responses, the law must remain more sober and neutral than any one of us individually can. Even Hale's opponents have recognized this, and attempted to 'prove' a lack of moral character on a point where the law is, for them, stiflingly unhelpful.

Again, regardless of how one interprets the importance of Hale's racial views, he and all applicants must make a forceful showing of their own good moral character. Among the first in the line of cases to discuss this issue, the U.S. Supreme Court in *Konigsberg* stated that a definition of good moral character would include 'whether on the whole record a reasonable man could fairly find that there were substantial doubts about (applicant's) honesty, fairness, and respect for the rights of others and for the laws of the state and the nation.' Naturally, the bar of Illinois, in denying Hale, chose as their preferred definition of good moral character this 'reasonableness' standard from *Konigsberg*. Accordingly, in the final line of their decision, it is only reasonable that 'The Bar of Illinois cannot certify someone as having good moral character and general fitness to practice law who has dedicated his life to inciting racial hatred for the purpose of implementing those views.' If the *Konigsberg* reasonableness standard still governed who should and should not be admitted to the bar based on good moral character, then Hale's denial should stand. After all, 'a reasonable man (or woman)' in this nation generally will find Hale lacking in moral character, to say the least. But *Konigsberg* was admitted to the bar in 1960, partly because he was a 'vigorous supporter of civil rights,' and 'indicated open-mindedness.'

By the end of the 60's, the inadequacies of such narrow notions of good moral character factored into the Court's thinking. The 60's bore witness to the reality that honest people could, in good conscience, possess vastly different ideas about right and wrong. As previously stated, by the time of Baird in 1971, mere membership in an organization actively dedicated to the violent overthrow of the U.S. government was not, by itself, sufficient to brand an applicant to the bar as one lacking in moral character. Though most 'reasonable' people would probably have agreed, even in 1971, that one actively advocating the violent overthrow of the government lacked moral character, the Konigsberg standard had been replaced by a much more liberal standard. And this liberal standard, reinforced later in 1971 by Law Students Research Council, remains the standard to which we must adhere today.

The Illinois Court's decision to refer to the 'good moral character' standard from Konigsberg (1960), rather than to the more nuanced definitions of Law Students Research Council and Baird (both 1971), reflects a return to a more willfully narrow-minded outlook on what constitutes political speech. To adjudicate the way it did, the court in Hale's case had to circumvent the development in the law in this area, culminating in the U.S. Supreme Court's proclamation in Baird that: 'The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs.'

Indeed, Hale does hold certain beliefs, and as the Bar of Illinois has stood in judgment of those beliefs, so has Hale been left off the Bar. As stated in Hale's petition for writ of certiorari, 'when petitioner's views and rhetoric are redacted, the only remaining charges are incidental arrests for ordinance violations, and allegations related to Petitioner's exercise of his constitutional rights.' And, as previously stated, the committee freely admitted that 'The Inquiry Panel attaches no significance to these convictions because countless individuals have been admitted to the Bar with more serious criminal violations,' and because Hale 'may have been selectively prosecuted' due to his beliefs. So, by the Committee's own admission, all that remains is the de facto violation of the above decree from Baird. What makes the Committee's willful violation of the most recent and relevant case law on the subject: Baird, Law Students Research Council, and In re Stolar, all 1971 cases, even more egregious is that all these cases are in essential agreement with one another in making a clear attempt to extend protections to prospective lawyers from Bar denial based on political beliefs. No cases have come down since 1971 to challenge the principles founded by these cases.

In absence of precedence to aid in the denial of Hale on grounds of

prejudice against his politics, the Illinois Bar has sought to circumvent precedence by making a special case of Hale. This has required special measures. The response in opposition to Hale's petition for a writ of certiorari contends that 'Hale's doctrines and conduct are potentially lethal.' In none of the other aforementioned cases on this topic have the doctrines of the applicants been so categorized. The Illinois Bar also contended 'the First Amendment would not be violated under the present circumstances (because) Illinois' legitimate interest in preventing racial discrimination outweighs Hale's interest in spewing racial venom.' The Inquiry Panel found that their 'fundamental truths' must be 'preferred over the values found in the First Amendment.'

Once again, while these arguments have great emotional appeal, they are riddled with inherent legal flaws. First, the forces opposing Hale cannot even decide whether his First Amendment rights are being violated. If they are not, it is because (absent any legal citation) the rights of the state come before one such as Hale. If his rights are being violated, it is justifiable because the 'fundamental truths' of the United Nations trump Hale's rights. Either way, he shall be left off the Illinois Bar. In addition, even at the time of Konigsberg, the Court recognized that 'A bar composed of lawyers of good character is a worthy objective, but it is unnecessary to sacrifice vital freedoms in order to obtain that goal.' In other words, Hale is indeed entitled to his freedom of speech, 'and it is also important to society and the bar itself that lawyers be unintimidated--free to think, speak and act as members of an Independent Bar.'

In recognition of Substantive Due Process, the 1971 case of *In re Stolar* determined that a prospective lawyer's rights to belief and association could not be impinged upon absent a legitimate government interest. Preventing the 'spewing of racial venom,' and its equivalent, has never been recognized by the Supreme Court as a legitimate government interest sufficient to curtail free speech, even for lawyers. However, the Illinois Bar's argument is irrelevant in any case. Keeping Hale off of the Bar will not prevent him from 'spewing venom,' and in no way serves the purpose to which Hale's denial is ostensibly directed.

Hale Cannot Practice the Law, If He Wishes to Destroy It

The last, and perhaps most compelling of the arguments against Hale is that one who wishes to deport all non-whites from the United States, and who openly admits his desire to work for a change in the law to allow this end, cannot possibly be deemed fit as an officer of the Court. Specifically, the deportation of non-whites requires suspension of all such people's 14th Amendment Right to Due Process. In fact, Hale admits that his life's mission entails bringing about peaceable change in the United States in order to deny the equal protection of the law to all non-white

Americans. None of the forces against Hale advocate curtailing Hale's right to express his desire to limit constitutional rights to whites. Specifically, the inquiry panel suggests that a 'balance' has already been struck, by which Hale is permitted to speak of such sweeping changes to the law as he sees fit, and even to incite racial hatred, but that he cannot do this as an officer of the court. The crux of the argument is that rights such as the 14th Amendment are so fundamental as to comprise the very rule of law. 'Mr. Hale's life mission, the destruction of the Bill of Rights, is inherently incompatible with service as a lawyer or judge who is charged with safeguarding those rights.' The prospect of allowing one such as Hale to take the oath to become an officer of the court, while advocating the overturn of the very rule of law, represents a patent absurdity.

The position seems relevant, but once again, no legal precedence exists to give the argument substance. The line has never been drawn to demarcate which laws a prospective lawyer may permissibly advocate overturning, and which laws must remain forever off-limits to the scrutiny of lawyers-to-be. Hale testified that while working to peaceably to change the law as he sees fit, he had 'no reservation or hesitation in subscribing to the oath required of him.' That oath requires attorneys to swear that they 'will support the Constitution of the United States and the Constitution of the state of Illinois,' and to 'faithfully discharge the duties of the office of attorney and counselor at law to the best of their ability.' The Committee challenges Hale's sincerity in taking the oath, and claims the right to deny him based on their finding of lack of sincerity 'lest it be said that the Committee has no obligation to protect the public from unsavory individuals.'

Yet the Committee is not so empowered to challenge the sincerity of the oath taker. This issue had been resolved, again, back in 1971, with the case of Law Students Research Council. Then, the Court held no more is required of a bar applicant than 'a willingness to take the constitutional oath and ability to do so in good faith.' How do we know if the oath is taken in good faith? That issue had been resolved in *Bond* (1966), where the Supreme Court held 'the oath taker's willingness to accept the oath creates an irrebuttable presumption of the oath taker's sincerity.' Ergo, if Hale swears that as a lawyer, he shall uphold the law, the character and fitness committee is bound to honor that pledge, not to second-guess it. Manifold measures, including disbarment, remain open for imposition by the bar in the event that a lawyer chooses not to uphold the law. And what of Hale's desire to overturn the 14th Amendment? As stated by Mr. Baxter's dissent from the decision of the Inquiry Panel; 'the holding and even active advocacy of beliefs, no matter how repugnant to current law, cannot be the basis for denial of certification to an applicant who will subscribe to the oath. All lawyers disagree with some laws.' Again, the forces opposing Hale

at no point cite precedence to demonstrate how his desire to overturn the 14th Amendment should create a special case.

The committee periodically digresses from its own positions, perhaps in realization of its weak legal legitimacy. This underscores the ultimate reason why Hale should be admitted. The inquiry panel articulated the following summation of its own position: 'The Inquiry Panel did not base its decision to deny admission to Applicant solely upon his beliefs or upon his membership in the World Church of the Creator. There is ample evidence of actions taken by Applicant that he is not of good moral character.' According to this reasoning, Hale's beliefs are not at the heart of the Panel's reason for denying him. Rather, Hale's 'actions,' specifically, criminal charges (dismissed) and public ordinance violations are the cause of condemnation for Hale's application. Yet this same panel had previously 'attached no significance to these convictions.' Rather, the panel 'doubted the appropriateness of these convictions because they related to the exercise of constitutionally protected activity' and had resulted in Hale's 'selective prosecution.' Put another way, the forces opposing Hale find in his distasteful speech inappropriate grounds upon which to condemn his application. The committee and the panel have also voiced their opinion that Hale's actions cannot fairly be used against him for the purpose of dismissing his bar application. And though neither Hale's speech nor his actions present fair grounds to condemn Hale, taken together, they somehow can be used against him. $0 + 0 = 1$. The illogic, and lack of legal precedence for the case of bar denial for Matthew F. Hale should, by now, be clear.

Precisely for this reason, Montana should allow Hale to take the Bar here. At the present moment, the public is not privy to any information regarding Hale's case, save the mere fact that the Montana subcommittee on Character and Fitness has recommended denying him, and the regular committee has tabled Hale's case pending further inquiry. The Montana Supreme Court will likely hear Hale's case on appeal. If and when they do, they should exercise their right to reverse the committee's decision. First, the Bar of the state of Montana has not been notoriously stringent in its character and fitness standards. In fact, not since cases from the early nineties, *In re Pederson*, *In re Matt*, and *In re Steele* have cases of character and fitness refusals gone to the Supreme Court only to have the rejections affirmed. In *Pederson's* case, the committee and the Supreme Court based their denial on a number of debt collection actions against the defendant (traditional grounds for denial), and one such action involved a lawsuit. Additionally, several complaints had been filed with the Attorney Registration and Disciplinary Commission against *Pederson* during his tenure as a lawyer in Illinois, where *Pederson* was, at the time of the hearing in Montana, also the defendant in a malpractice action. *Pederson* had failed

to disclose his attorney-client difficulties to the Montana character and fitness committee.

In the case of Matt, another former bar member, this time from Nebraska, the committee and ultimately the Supreme Court denied the applicant for his failure to consistently and truthfully answer questions about possible drug dealing. During the hearings against him, Matt both admitted to the use of drugs, and claimed that he 'hadn't ever used drugs.' Matt also misled the committee about charges for dealing cocaine, ten years previous, which were dropped only after Matt's agreement to perform 100 hours of community service. In spite of the evidence against Matt, and his lack of forthrightness in the application process, both justices Gray and Trieweiler dissented. Trieweiler voted for Matt's admission to the bar, while Gray argued for remanding the case for further proceedings. In the case of Steele, following a history of tax evasion (prime traditional grounds for bar denial), criminal investigations into such conduct, and a litany of lies about such evasion on the bar application, the Supreme Court affirmed denial, again with Trieweiler dissenting.

The point is that in all of these cases, rare as they are in Montana, the applicants had willfully and egregiously evaded the committee's inquiries into matters of obvious relevance. In all cases, the conduct in question was more serious, so far as its legal relevance is concerned, than anything Hale has ever been accused of, let alone convicted of. Also, the pattern of evasion in these cases was far more systematic, and ill-explained. And yet these cases were marginal enough that the Supreme Court granted them a hearing. One can only speculate how many denials, only slightly less marginal in legitimacy, were overturned by the Supreme Court, allowing applicants with questionable histories to become lawyers in this state.

Matthew Stevenson, *Hate vs. Hypocrisy: Matt Hale and the New Politics of Bar Admissions*, 63 Mont. L. Rev. 419 (2002) (footnotes omitted).

What should the bar do with less clear cases than Mr. Hale's, or even those as extreme as his own? What can it do, in light of the First Amendment?

b. Anti-Bias CLE Requirements

As noted above, several states have required continuing legal education which addresses bias or prejudice. (Indeed, this seminar is offered to satisfy those requirements.)

Efforts to require CLE relating to bias and prejudice have been met with some criticism. See, e.g., Jordan W. Lorence, Alan E. Sears Benjamin W. Bull, *No Official High or Petty: The Unnecessary, Unwise, and Unconstitutional Trend of Prescribing Viewpoint Orthodoxy in Mandatory Continuing Legal Education*, 44 SO. Tex. L. Rev. 263

(2002); Kari M. Dahlin, *Actions Speak Louder than Thoughts: The Constitutionality Questionable Reach of the Minnesota CLE Elimination of Bias Requirement*, 84 Minn. L. Rev. 1725 (June 2000).

For example, one commentator forcefully argued that such requirements are unconstitutional:

The Elimination of Bias Requirement Violates Lawyers' Freedoms of Conscience and Association

1. Freedom of Conscience

The elimination of bias rule violates lawyers' freedom of conscience because it allows the State to prescribe "acceptable" attitudes regarding controversial social issues and compels lawyers to listen to these prescriptions. State prescription of particular viewpoints is a violation of freedom of conscience in and of itself, whereas neither coerced affirmation of a belief nor actual agreement with a belief are essential elements of freedom of conscience violations. For instance, it was uncertain in *Barnette* whether the flag salute ceremony required the students to change their views, or whether the students could simply perform the ritual while retaining their opinions. In other words, the Supreme Court realized that reciting the Pledge would not necessarily change the students' views about the flag. Thus, even though the students in *Barnette* had the freedom to remain unconvinced, the Court still upheld their negative free speech rights. Likewise, although lawyers need only attend seminars and need not agree with the ideas the seminars express, they still suffer freedom of conscience violations due to the government prescription of orthodox views.

Furthermore, the Court has struck down regulations as violations of freedom of conscience even though the objecting individual did not have to utter potentially objectionable speech. For example, in *Lee v. Weisman*, the student only objected to having to listen to an invocation at her graduation ceremony. The Court rejected that requirement, even though the school did not compel the student body to join the recitation of the prayer. Thus, neither required recitation of objectionable speech nor required adoption of an objectionable idea are prerequisites for freedom of conscience violations. The mere existence of government prescription of "correct" attitudes violates lawyers' First Amendment rights.

The right to conscience extends beyond matters of religious faith to encompass matters of personal opinion. For example, although the coercion in *Barnette* dealt with personal religious issues, the Court broadened its holding to recognize that individuals who did not share the plaintiffs' faith could also raise legitimate objections to required participation in the ceremony. Freedom of conscience necessarily encompasses the subordinate

right of basing one's opinions on any foundation. An individual lawyer may therefore object to elimination of bias training on any freedom of conscience grounds; objections need not stem solely from an individual's religious beliefs. Matters of personal opinion are sufficient to trigger First Amendment violations.

The First Amendment violations of the elimination of bias rule are compounded by the fact that the seminars make lawyers a captive audience to Board-approved speech. Lawyers may only take approved elimination of bias courses and can only avoid the courses at great personal cost. Granted, individuals receive constant exposure to diverse messages simply by virtue of venturing out in public and cannot claim violations of constitutional rights every time they see or hear something they find objectionable. As the Court reasoned in *Erznoznik*, "[t]he plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.'" Lawyers do not find themselves at elimination of bias seminars by chance, however. Rather, they attend elimination of bias seminars because they need to keep their licenses to practice law. Thus, the rule's constitutionality is questionable because lawyers have no realistic option to avoid the training.

2. Freedom of Association

The elimination of bias requirement violates lawyers' freedom of association because third parties may link Board-approved ideas with individual lawyers, thereby denying lawyers the right to represent themselves to the world in the manner they desire. Lawyers are then left without any viable means to correct this misperception.

The Supreme Court's distinction in *Keller* between union dues and tax dollars illustrates why third parties might reasonably attribute Board-approved speech to lawyers, thus denying lawyers control of their public personas. The *Keller* Court ruled that California lawyers could opt out of funding their bar's political and ideological speech, noting that the California Bar resembled a labor union rather than an elected government. This distinction is important because the government serves the entire population. Government speech funded by tax dollars is unlikely to be attributed to taxpayers because the government serves people as a whole. Because labor unions serve narrow segments of the population, however, third parties will be more likely to attribute their speech to union members. In *Keller*, the Court solved this problem by allowing lawyers to refuse to pay dues to bar associations when the dues fund ideological activities unrelated to the regulation or improvement of legal services in the state. Although no financial issues exist in the controversy surrounding the elimination of bias requirement, the comparison with *Keller* applies in the

present case because the Minnesota court's order resembles the actions of the California Bar rather than those of an elected government. The narrower the organization, the more likely its speech will be attributed to its members. Third parties might attribute Board-approved speech to lawyers because the Board exclusively controls elimination of bias seminars.

In addition, the characteristics of the elimination of bias requirement demonstrate that the public is likely to attribute Board-approved speech to Minnesota lawyers. In *Keller*, the bar's most objectionable activities were lobbying and publicly supporting certain controversial initiatives. The bar did not encourage lawyers to agree with its positions. Instead of compelling lawyers to attend classes directing them to support nuclear freezes and gun control, the California Bar merely required lawyers to fund its speech in favor of these initiatives. The elimination of bias rule, on the other hand, not only compels lawyers' physical presence at sessions for the purpose of expressing approved views, it also encourages lawyers to agree with these views. When a group that represents a narrow segment of the population tells its members what to think, its speech is reasonably attributable to those members. This attribution results in lawyers losing their right to tailor their public images as they see fit.

The connection between Board-approved speech and individual lawyers is as strong as other connections the Court has found between coerced speakers and perceived objectionable messages. For example, even though all New Hampshire drivers had to display the state motto on their license plates, the *Wooley* Court still considered the motto traceable to each individual driver. Likewise, third parties may attribute Board-approved speech to individual lawyers even though the requirement does not single out certain lawyers as being in particular need of having their biases eliminated. In *Keller*, the Court found that California lawyers could refuse to fund their bar's non-germane, ideological speech despite the fact that the general public was likely unaware of the bar's activities. A general lack of public awareness about the elimination of bias requirement does not remove the danger of another lawyer attributing Board-sanctioned opinions to an associate who attended a seminar. Similarly, a prospective client could request that a lawyer provide a list of professional development activities he has attended and could thereby discover that the lawyer attended an elimination of bias session. The client could then attribute Board-approved views to the lawyer, consequently putting the lawyer in the position of having to correct the client's understandable misperception.

Lawyers who lose control over their public images have two avenues of recourse: remain silent, or publicly disavow the elimination of bias training. Neither option will restore autonomy to lawyers. The choice to remain silent undermines autonomy over speech because the public has already attributed the bar's speech to its members. Failure to correct the

misrepresentation will perpetuate it, thus depriving lawyers of the right to represent themselves to the world. Disavowal is not an appropriate solution because it is itself coerced speech. An individual must disavow the message out of necessity, not free will. The disavowal of elimination of bias training has negative consequences for attorneys because it places them in the vulnerable position of having others know their personal opinions when they would rather have kept them private.

Although the PruneYard Court held that disavowal was an appropriate remedy, PruneYard is a fact-driven case that does not apply to this situation. A mall such as the one in PruneYard is similar to an elected government in that both "represent" the public as a whole. The government represents the general public, and the mall caters to the general public. Because the mall was open to protestors of all messages and viewpoints, a disavowal of all protestors' messages would not trace the mall owner to any particular cause or initiative. On the other hand, if only one ideological group protested at the mall, then disavowal would expose the owner's personal biases.

The suggestion that an offended lawyer simply disavow all continuing legal education will not weaken the link between the lawyer and elimination of bias training. Unlike the presumably diverse ideological messages promulgated by protestors in the PruneYard mall, elimination of bias seminars are the only ideological component of the continuing legal education program. The elimination of bias seminars stand in stark contrast to the rest of the continuing legal education curriculum, which deals with non-ideological subjects like contracts, torts, or trial practice. It would be absurd for a lawyer to disavow training in trial practice techniques or recent developments in insurance law. As a result, the public will connect the lawyer's full-scale disavowal of continuing legal education with the elimination of bias requirement. The lawyer's opinions will still be publicly known.

Kari M. Dahlin, *Actions Speak Louder than Thoughts: The Constitutionality Questionable Reach of the Minnesota CLE Elimination of Bias Requirement*, 84 Minn. L. Rev. 1725 (June 2000) (footnotes omitted).

Despite these criticisms, First Amendment challenges to anti-bias continuing legal education requirements have so far been rejected. Courts in both Minnesota and California have rejected such challenges. In the most recent case, the Minnesota Supreme Court reasoned, in part, as follows:

We first consider whether the elimination of bias requirement violates Rothenberg's First Amendment right to freedom of speech. Rothenberg has framed this issue in different ways, arguing that (1) he is forced to pay for and attend courses presenting beliefs and ideas with

which he disagrees, (2) the elimination of bias requirement was designed on an ideological basis, and (3) the Board's approval of courses is ideologically based. We address each of these arguments in the context of the First Amendment's protection against compelled speech or association.

The United States Supreme Court has held that the First Amendment prevents the government from compelling individuals to pay subsidies for speech to which they object. See *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990). The Court has recognized that, though there is a need for compulsory dues in contexts such as a labor union or a bar association, it may violate the First Amendment to force a person to contribute money toward a cause with which he or she disagrees. *Id.*; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977). The "heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 234-35.

In *Keller*, lawyers challenged the use of state bar dues to fund "ideological or political activities" such as legislative lobbying of political issues. 496 U.S. at 4. The Supreme Court held that compelled association through an integrated bar was justified by California's interest in "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. The Court held that dues could be collected from all members to fund any activities germane to those goals. *Id.* at 14. But, the Court explained, members of the bar could not be compelled to fund activities that were not germane to the goals of regulating the legal profession or improving the quality of legal services and were of an ideological nature. *Id.* The "guiding standard" for whether expenditures are permissible is whether the challenged expenditures are "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)).

Rothenberg argues that the elimination of bias requirement is unconstitutional because the First Amendment protects him from being compelled to subsidize speech he finds objectionable. However, there is no evidence that Rothenberg is forced to pay for a course or courses discussing ideological or political ideas that he opposes. Rothenberg has identified courses that he disagrees with based on their titles and descriptive materials, but there are hundreds of courses offered to which he has not voiced any objection and that he could take in order to complete the elimination of bias requirement. Rothenberg conceded in oral argument that there are "a vast variety of courses" on the elimination of

bias. We conclude that the elimination of bias requirement does not force Rothenberg to pay for courses presenting ideas with which he disagrees.

Moreover, Rothenberg's statements at oral argument indicate that he agrees that eliminating bias in the legal profession and in the practice of law would improve the quality of legal services in Minnesota. Rothenberg concedes that there is prejudice and bias in society, that it ought to be combated at every turn, and that lawyers should ensure that their conduct does not hurt anyone and does not deny anyone's rights on the basis of bigotry, prejudice, or bias. We agree. Based on our review of the elimination of bias requirement, we conclude under the *Keller* analysis that this requirement is germane to the goals of regulating the legal profession and improving the quality of legal services in Minnesota.

Rothenberg also argues that the First Amendment's protection of an individual's freedom of conscience makes the elimination of bias requirement unconstitutional. First Amendment rights may be violated if a state infringes upon an "individual[']s freedom of mind" or conscience. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943); accord *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that New Hampshire could not punish an individual for blocking out part of his automobile license plate containing the state motto, "Live Free or Die"); see also *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (holding forced association violated the First Amendment when state law forced parade organizers to allow a group with beliefs with which the organizers did not agree to participate in the expressive activity of a parade). "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001).

As discussed above, however, there is no evidence that Rothenberg is forced to attend a course discussing ideas with which he disagrees. Moreover, the elimination of bias requirement is fundamentally different from the activities and behavior addressed by the Supreme Court in *Wooley*, *Barnette*, and *Hurley*. In those cases, individuals were forced to affirmatively express agreement with or pledge allegiance to particular beliefs. The grounds for a First Amendment violation in *Wooley* and *Barnette* were the right to protect autonomy over one's mind; in *Hurley*, the Supreme Court addressed the right of an individual to protect his image in situations where third parties will interpret expressive behavior as an expression of that individual's own beliefs. In contrast, the elimination of bias requirement does not force Minnesota lawyers to say "I believe in X" or manifest agreement with anything. It only requires that Minnesota lawyers be passively exposed to certain ideas by attending courses on the elimination of bias in the legal profession and in the

practice of law. For this reason, the California Court of Appeals, which appears to be the only other court to have considered a similar issue, held that a California requirement that lawyers attend classes on elimination of bias does not violate the First Amendment. *See Greenberg v. State Bar of California*, 92 Cal. Rptr. 2d 493, 496 (Cal. Ct. App. 2000) (stating that lawyers are merely “passively exposed to classes relating to these subjects, without being compelled to manifest any agreement or allegiance to their goals or other political agendas.”), *rev. denied* (Apr. 26, 2000) .

Rothenberg asserts that being forced to pay for a course would make him more than passively exposed to those ideas. However, having concluded that the elimination of bias requirement is germane to the goal of regulating the legal profession and improving the quality of legal services in Minnesota, we also conclude that requiring lawyers to pay for such a course does not raise such concerns.

Rothenberg’s other arguments, that the elimination of bias requirement was designed on an ideological basis or that the Board has approved courses on an ideological basis, also lack any support. Rothenberg has presented no evidence that the elimination of bias requirement was designed on an ideological basis or that the Board has approved courses on an ideological basis. In the context of Rothenberg’s argument, “ideological” appears to be shorthand for something with which he disagrees. Merely asserting that the elimination of bias requirement has ideological origins or is applied ideologically does not create a cognizable claim.

Moreover, we disagree with Rothenberg’s characterization of the elimination of bias requirement as necessarily seeking to inculcate beliefs. Courses approved for elimination of bias credit must be “directly related to the practice of law” and “designed to educate attorneys to identify and eliminate [bias] from the legal profession and from the practice of law.” Rule 2(I), RMBCLE. These courses must be designed to meet educational goals such as educating lawyers regarding barriers to hiring, retention, promotion, and professional development of lawyers of color, women, and others. Such goals illustrate that the elimination of bias requirement seeks to change behavior by informing lawyers how to identify and eliminate bias. For purposes of reference, a course presented in 2001 and discussed in the record before us was entitled “Understanding Deaf Culture and Working with Deaf Clients.” The materials for this course state that its objectives include identifying specific needs of people who are deaf with respect to communication and adaptive equipment and identifying ways of enhancing communication.

We conclude that the elimination of bias requirement serves the legitimate function of informing lawyers how to identify and eliminate bias in the legal system. We recognize Rothenberg’s disagreement with

the views expressed by some of the approved elimination of bias courses. However, our decision to prescribe rules allowing a broad array of courses that could qualify for elimination of bias credit was made after taking into consideration concerns by members of the bar who cautioned against having a limited view of what constitutes bias.

For the foregoing reasons, we hold that the elimination of bias requirement does not violate Rothenberg's First Amendment right to freedom of speech. We acknowledge, however, that Rothenberg's appeal highlights the need to have courses that are well designed to meet the goals set forth and the definitions provided by the Rules of the Minnesota Board of Continuing Legal Education. Accordingly, we urge the Board to exercise continued vigilance as it reviews and approves courses for the elimination of bias credit....

We next address Rothenberg's argument that the elimination of bias requirement violates the Establishment Clause of the First Amendment because the Board has approved courses that promote religion. The First Amendment prevents the government from making any law "respecting an establishment of religion * * *." U.S. Const. amend. I. A state law, though facially nondiscriminatory, may violate the Establishment Clause if it fails to meet a three-pronged test: (1) it must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Rothenberg does not appear to contest that the elimination of bias requirement has a secular purpose, but argues that the elimination of bias requirement violates the Establishment Clause because the Board has approved courses that give "special emphasis to propagating approval of or at least sympathy for Islam." Rothenberg argues that there are no courses on anti-Semitism, for example, but there are courses on Islam such as "Understanding Islam and Working with Muslim Clients" and "Enhancing Your Knowledge of Somali and Islamic Cultures." Materials for these courses illustrate that they do include discussion of the religious tenets and values of Islam in an effort to educate and inform Minnesota lawyers in order to allow them to better serve their clients. Rothenberg takes issue with the courses' lack of discussion of Islamic-based terrorism, but he fails to articulate why such a discussion would be appropriate in courses with the purpose of improving lawyers' ability to work with Muslim clients in order to eliminate biases in the legal system that Rothenberg acknowledges exist among lawyers. Based on the course materials and the record before us, we conclude that the Board's approval of these courses does not have the primary effect of advancing or inhibiting religion. *See Zelmon v. Simmons-Harris*, 536 U.S. 639, 683-84

(2002) (holding school voucher program enacted for valid secular purpose and facially neutral toward religion did not violate the Establishment Clause because it did not provide a preference for religion.)

Rothenberg concedes, and the record demonstrates, that lawyers have a wide variety of courses from which to choose to fulfill the elimination of bias requirement. It appears that only a few out of the hundreds of these courses discuss religious beliefs. We conclude that the fact that lawyers have the opportunity to take courses on the elimination of bias that discuss religion in the context of educating lawyers to better serve their clients does not excessively entangle the state in religion. *See School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 226 (1963) (holding that a state law requiring the reading of verses from the Bible and the recitation of the Lord's Prayer at the beginning of each school day was unconstitutional; distinguishing this activity from studying the Bible in a literature or comparative religion course, which would be permissible).

Accordingly, we hold that, when meeting the elimination of bias requirement, the Board's approval of certain courses that include a discussion of religion in the context of eliminating bias in the legal profession and in the practice of law does not violate the Establishment Clause....

Rothenberg also asserts that the elimination of bias requirement, as applied, violates the Freedom of Conscience Clause of the Minnesota Constitution. Article I, section 16 of the Minnesota Constitution provides:

Freedom of conscience; no preference to be given to any religious establishment or mode of worship. The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

In *State v. Hershberger*, we applied the Freedom of Conscience Clause to afford greater protection for religious liberties than the First Amendment. 462 N.W.2d 393 (Minn. 1990). We held that a state statute

requiring the display of a slow-moving vehicle emblem was unconstitutional as applied to Amish defendants because the statute violated the defendants' freedom of conscience. *Id.* *Hershberger* was decided on remand after the Supreme Court vacated our earlier decision holding that the statute violated the defendants' First Amendment free exercise rights. *Minnesota v. Hershberger*, 495 U.S. 901 (1990).

Rothenberg does not present any arguments why the elimination of bias requirement violates his freedom of conscience—he only asserts that the clause grants more protection than the First Amendment. Rothenberg cites *Rasmussen v. Glass*, in which the Minnesota Court of Appeals held that a city ordinance requiring a restaurant owner to deliver food to a medical facility that performed abortions, which the owner strongly opposed, violated the owner's rights under the Freedom of Conscience Clause. 498 N.W.2d 508, 516 (Minn. App. 1993). *Rasmussen*, like *Hershberger*, applied the compelling state interest balancing test to conclude that a state law burdened an individual's exercise of religion. It is not clear to us, however, how the elimination of bias requirement could burden Rothenberg's free exercise of religion. As we have already concluded, Rothenberg had numerous choices of courses to meet the elimination of bias requirement and he has not shown that he had no choice but to violate his freedom of conscience. Accordingly, we hold that, when meeting the elimination of bias requirement, the Board's approval of courses that include a discussion of religion in the context of eliminating bias in the legal profession and in the practice of law does not violate Rothenberg's rights under article I, section 16 of the Minnesota Constitution.

In re Rothenberg, ___ N.W.2d ___ (Minn. March 25, 2004) <<http://www.lawlibrary.state.mn.us/archive/supct/0403/opa030884-0325.htm>>. See generally, David L. Hudson, Jr., *Required Course on Bias Upheld: Minnesota Court Supports CLE in Freedom of Speech Challenge*, <http://www.abanet.org/journal/ereport/a2biascle.html> (April 2, 2004).

c. Disciplinary Rules Proscribing Bias or Prejudice.

Writing a disciplinary rule which prohibits bias, but which does not impermissibly impact the right to free speech of lawyers, has proven to be a challenge. In analyzing the scope and content of such a rule, the Tennessee Bar Association identified the following issues which must be addressed by the court or bar in drafting such a rule:

- Precisely define the prohibited act. (Should it be limited to the lawyer's conduct, or should it encompass words or, most broadly, anything that exhibits discrimination?)
- Carefully define the protected categories. (Should it be limited to discrimination based on race, gender, religion, and national origin? Or

should the list be more expansive, to include, for example, discrimination based on sexual preference?)

- Define the persons against whom the discriminatory attitude or conduct is exhibited. (Should it include litigants, jurors, witnesses, court personnel, opposing counsel, other lawyers, and clients?)

- Determine whether there should be a mens rea requirement? (Should it be limited *33 to intentional acts or conduct exhibiting reckless indifference?)

- Carefully evaluate the scope of the rule. (Should it apply to in-court conduct only or should it encompass law-related activities, including a lawyer's presentation at a civic club function or a lawyer's conduct in the law firm setting? Should it be a disciplinary offense only in the context of representation of a lawyer's client?)

- Determine whether there are any exceptions? (Should legitimate advocacy be exempt? Should comments and/or conduct in the context of jury selection be exempt?)

Edge, 39 No. 2 Judges J. 29, *supra*.

XIV. Conclusion

One of the many dramatic changes that swept the legal profession over the past 30 years is the growing number of women, minorities, and others with diverse backgrounds entering the practice of law. However, for these lawyers to succeed, it will take conscious sensitivity to the issues facing these groups, some of which they have in common, and some of which are unique to women, or the disabled, or people of color, or any other discrete group. While most legal employers are well-intentioned, they need to do more to recruit, develop, retain, and promote attorneys from diverse backgrounds so that they all can reach their full potential and contribute to the leadership of the profession. This program has suggested specific strategies to be employed both on the institutional and individual levels, to combat bias in the legal profession. Not all of these strategies are appropriate in every situation but, bottom line, each person must be respected and treated fairly.