# Diversity Committee Newsletter

Vol. 3, No. 3 — April 2017


## Diversity Matters: Two Years Later

*by Milagros Camacho, Diversity Committee Co-Chair*

In May 2015, the New Jersey State Bar Association's Diversity Committee launched its newsletter. The lead article, which I had the privilege of writing, was entitled "Diversity Matters: A Historical to Present-Day Look at the NJSBA's Commitment to Diversity and Inclusion." My article reflected at length on the incredible diversity that exists within our state and the NJSBA's commitment to acknowledging and giving value to each and every one of those differences. I wrote about my belief that our country, like our bar association, was moving toward a fuller understanding of who we are as a people, and that because of that fact we would inevitably embrace all of the diverse strands that define us.

The newsletter extoled the efforts of Mel Narol and Cynthia M. Jacob. It spoke at length about the recommendations of the General Counsel Executive Committee's "Blueprint for Diversity" and the creation of the diversity *ad hoc* committee turned task force turned standing committee, which further solidified the NJSBA's position on diversity. The newsletter reflected on the committee's annual awards ceremony, during which the Mel Narol Award is given to an individual whose work most fully embraces the NJSBA's ongoing efforts to achieve comprehensive diversity and inclusiveness. It commented on the Minority Judges Reception, which the committee hosts each year, and celebrated the creation (which we called "making the blueprint a reality") of the Leadership Academy. The newsletter also included information about the newly hired director of diversity, whose function is to bring cohesiveness to the efforts of our volunteers; the success of a recently held Diversity Summit; and the adoption of the NJSBA's updated "Statement of Diversity and Inclusion."

Overall, the newsletter acknowledged the importance of the NJSBA's commitment to these issues and concluded by noting that it was our hope that one day our efforts would no longer be required. Until that time, though, we committed ourselves to, "redoubl[ing] our efforts to achieve a diverse and inclusive bar association and legal profession."

Since last year's Annual Meeting, we held our first off-site retreat. The retreat, a day-long meeting filled with workshops, brainstorming and other activities, was held last June, and was attended by most of the Diversity Committee members. It allowed us the opportunity to comprehensively focus on the year ahead without interruptions. We have continued that planning throughout this year, holding and participating in several events, including our Distinguished Speaker Series featuring John Marshall Jr., Justice Thurgood Marshall's youngest son, and attending a play that commemorated the incredible life and accomplishments of Harriet Tubman. Also, as in past years, we began laying the groundwork for the selection of a new recipient for the Mel Narol Award during our Diversity Luncheon at the Annual Meeting. We will also hold a Diversity Summit on June 14, and, as importantly, we will continue with our high school outreach programs where we interact with students on a personal level.

The NJSBA Board of Trustees confirmed their commitment to our recommendations by formally reviewing their own individual progress as set forth within the Diversity Action Plan. Thereafter, we began formulating individual diversity action plans with some of the other NJSBA sections and committees. Clearly, we are moving forward, sometimes in what may seem to be an overly deliberative manner, but certainly in a way that will ensure our success in reaching our stated goals of cementing diversity and inclusiveness into our operating structure.

Regrettably, I believe, the current churning within our country compels me to repeat the opening sentence in the article I wrote for our first newsletter, and then comment on it. It reads as follows (quoting at length):

"In recognition of the fact that New Jersey is one of the most diverse states in the country, the New Jersey State Bar Association (NJSBA) has accepted the proposition that only by embracing diversity and working diligently toward creating an environment of universal inclusion can our association become the type of fellowship that truly reflects the needs of the greater community we represent and the ideals upon which the NJSBA was created."

The relevance of those words to current events is clear: One cannot be a member of a Diversity Committee or, for that matter, a state bar association that is as committed to the concept of inclusiveness as we are, and not have a visceral reaction to the seismic changes that are occurring each day within our society. Things are different. There is a pulse in today's environment that makes it impossible, with any degree of certainty, to understand what will happen from moment to moment, let alone where we will be, as a nation, by next year.

In full recognition of the fact that our board, our sections, our committees, our bench, our law enforcement agencies, our businesses, our public interest organizations and our private firms are among the most diverse in the nation, it is clear that the people of New Jersey, along with our profession, have internalized the need for universal inclusion. If it were otherwise it would be palpably apparent to even the most casual observer. Today's environment, and the obvious conflict it presents with what I wrote a year ago, takes on a new significance in an America that appears to be rapidly moving backwards like a speeding bullet.

- an America that some would say, and many are saying, does not welcome, and perhaps will not even tolerate, the arguments on behalf of universal inclusion or certain other rights
- an America where many blindly accept slander and blathering as if it were gospel
- an America that has forgotten the often-quoted words of the "Mother of Exiles," it's most poignant and universal symbol of hope, "Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!"
- an America that questions the rule of law and the judges who sit in protection of it, a free press, civil liberties and equality
- an America that challenges the belief that we should continue to be a beacon of freedom and hope for countless people striving to do what all of our forefathers did when they first came to America—raise their families in peace and prosper through hard work and sacrifice

In the light of everything that is going on, one cannot help but wonder if what the Diversity Committee and the NJSBA are in the process of doing will prove of value to our society, or will our beliefs and commitment eventually end up being overwhelmed by the tide of current events and history.

Although anything now seems possible, I believe that a force has been unleashed that will keep us committed to our ideals. The basis for this belief can be seen both within our own profession and the country at large—countless attorneys racing to airports to protect the rights of individuals who have flown into our country in the

face of an ill-conceived and poorly executed entry ban, attorneys throughout the country appearing in courts to challenge the underlying executive order itself, courts issuing injunctions in favor of those filings and, most of all, daily challenges to our elected officials by thousands of outraged individuals following in lockstep with a Women's March on Washington and all the worldwide companion marches that occurred either simultaneously with that march or shortly thereafter. Millions of Americans expending their precious time and energy in pursuit of the greater good.

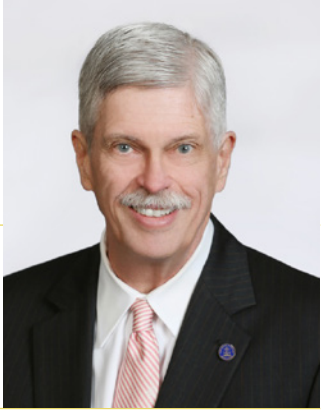
Previously, I left you with a hope that the Diversity Committee would no longer be necessary one day. This year, I leave you with a challenge—to re-energize and make a commitment of your time, your voice and your action to ensure that our Diversity Committee, our state bar association and our America continue to be what they were meant to be; rising up when some try to pull us down; and working to fulfill the promise of our creators so that we are truly capable of extending hope, freedom, equality and inclusion to all. ■

# Inside this issue



*The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Diversity Committee or the New Jersey State Bar Association.*

# An Interview with Miles S. Winder III, 2017 Mel Narol Award Recipient



Miles Winder III is a solo practitioner in Bernardsville, and a former New Jersey State Bar Association (NJSBA) trustee and president. He will be honored with the Mel Narol Excellence in Diversity Award at the NJSBA's Annual Meeting in Atlantic City in May.

***When did you join the NJSBA, and why?***

I probably joined the NJSBA even before I passed the bar in New Jersey in November of 1972.

***What is your greatest accomplishment as an attorney?***

I participated in something called the Death Penalty Study Commission, to which I was appointed by Wayne Positan. The commission met over a period of two years, and we came to the correct conclusion that the death penalty had no place in New Jersey law. We made that decision, and we presented our findings to the governor and the Legislature. Low and behold, the Legislature produced a bill that repealed the death penalty, bringing us to the forefront. I think there were five other states that had done that before us. You know, most of the things we do in New Jersey are at the forefront of the law. We've got one of the best judiciaries in the country.

***What prompted you to make increasing diversity and inclusion one of your goals as NJSBA president?***

The primary showcase goal of my presidency was to make sure that we got the Leadership Academy started, and having it thrive as much as possible. I got the Board of Trustees to agree to make a five-year experiment with the Leadership Academy. We're in year two. The purpose of the Leadership Academy is to provide an opportunity for diverse candidates to become leaders not only in the state bar, but also in their own communities. And that's really what we're trying to do. We're trying to make sure we pay forward all the good fortune we have. And that's really the underlying basis for the Leadership Academy.

The years 1965, 66, 67 and 68 were very fraught years for civil rights. We had the brand new federal law, but we also had the riots in Newark, Plainfield and Asbury Park that left lasting marks on the consciousness of people. I grew up in Monmouth County, in a small town that is two-and-a-half miles north of Asbury Park. In 1967, I was a junior in college and I was struck by what was happening essentially in my hometown.

So I have to say that it seems like it came together as something of a natural fit for me. It seemed like it was important to me to make sure that this association, for which I have a huge regard, is going to be as diverse as it can be, and will continue to make great strides in diversity and inclusion because we want to. It's the right thing to do.

***Why is involvement in the NJSBA important?***

Well as far as I'm concerned there are three reasons to join the state bar. One is networking. You'll network with some of the best and brightest legal minds—both lawyers and judges—that are probably in existence in the U.S. There is a social aspect; there are really nice people who are part of the bar association. Then there is learning. Over the 11 years that I have been on the Board of Trustees of the state bar, I haven't gone to one meeting where I haven't learned something about the practice of law, and that's a lot of learning over a period of time. I think that's true of sections. I know that every time I go to a section meeting I'm learning something. I've enjoyed it. And I'll continue to enjoy it for a long time to come.

***How do you describe the current status of diversity and inclusion in the NJSBA and legal profession as a whole?***

We have progressed a tremendous amount. We have done a lot. But it's a process… and it will continue. I think that it's grown some very strong roots. We have our first diversity officer, and I honestly believe that as a direct result of all the efforts of Ralph, Paris, Tom and me, this association will continue to fight for diversity and inclusion. I haven't said that we reached the final

goal yet. We haven't yet. We have to continue to work to do that. [In fact,] the Board of Trustees adopted an appraisal of diverse activities that each of the trustees is to complete on an annual basis.

***Since you joined the NJSBA in 1972, what changes have you seen?***

The greatest change was the advent of women as members of the state bar and in the bar of New Jersey. In my law school class I think we had 14 women out of a class of 170. And I think there are about 50 percent now, more or less. That does not mean that we have come to a conclusion on making sure that we have equal rights for women, because I know that there still is a glass ceiling in many places. The glass ceiling needs to be shattered so that women can become the CEO or the president of the United States or anything else they want to be. But I think that is one of the major differences that I can see. Both the bar association and the bar at large have many more women as part of their constituency.

***What direction would you like to see the NJSBA go in the future?***

I have had a lot of good fortune as a result of being a lawyer in New Jersey. I realize that I need to pay that good fortune forward, and I believe the association has the same responsibility.

We need to make sure our sections and committees are more diverse and inclusive than they are currently. And I know that Bob Hille has planned to make sure that occurs. I honestly believe that the ICLE program needs to be more diverse than it actually is presently. We need to have diversity and inclusion there too. There has to be a way that we don't have separate JPACs for the different bars. There's got to be a way to include those all under one roof. I'm not sure how, but I see that as being something we should accomplish in the future.

I think we're going to see a group of people who are well educated on how the bar association works and how life works coming out of the Leadership Academy. I'm virtually ready right now to hand over the reins of power to them. I think they're bright and have great ideas, and look forward to seeing them prosper and do well.

# Women's Marches Occur Worldwide, but New Jersey is No Closer to Equal Pay Between Genders

*by Mana Ameri*

On Jan. 21, the Women's March on Washington drew over five million participants worldwide, and about one million participants in Washington, D.C. alone.[1] The march was the largest single-day demonstration in U.S. history.[2] Participants came out to advocate legislation and policies regarding human rights, including women's rights. Although women's rights have made great strides, women still face discrimination and institutional barriers to equal treatment.

## Gender Wage Gap

In 2016, a woman working full time year round in the United States made, on average, 80 cents for every dollar earned by a man, a gender wage gap of 20 percent.[3] In the same year, New Jersey had a gender wage gap of 18 percent, a slight improvement on the nationwide average.[4] For women of color, these disparities are even greater.[5] Applying the rate of change in the gender wage gap seen in the United States since 2001, women will not reach pay equity with men until 2152.[6]

The gender wage gap is not only a matter of fairness. It impacts families (including men) nationwide, as mothers and wives increasingly become the primary or sole breadwinners. Currently, women fill this role in nearly 40 percent of families.[7] Lost wages also means families have less money to spend on basic goods and services, directly impacting the economy.

The gender wage gap itself is more complicated than a single number or percentage. Gender wage gap statistics represent an average of what all women earn, working full time and year round, compared to an average of what all men earn, working full time and year round.[8] However, the gap does not reflect a comparison of men and women doing identical work. Multiple factors drive the gender wage gap, including differences in occupation, education, seniority, work hours, experience, race and region.[9] Critics often argue these factors are the sole factors causing the gender wage gap and, after controlling for them, the wage gap is inconsequential. However, research shows that only 62 percent of the gender wage gap can be attributed to those factors. The remaining 38 percent of the gender wage gap is due to "unexplained reasons."[10]

Researchers attribute a portion of this unexplained percentage of the gender wage gap to discrimination and bias.[11] Unfortunately, it is difficult to precisely measure the extent to which discrimination and bias contribute to the wage gap. There is little transparency with respect to pay practices, and employees often have scant access to pay information. Further, some employers either formally prohibit or discourage the discussing of compensation. Although researchers struggle to precisely quantify the impact discrimination and bias have on the gender wage gap, most agree they undoubtedly have an effect.[12] A number of studies and statistics support this conclusion.

For example, each year thousands of cases are brought before the federal Equal Opportunity Employment Commission (EEOC) alleging gender discrimination. In 2016, 18 percent of these complaints were decided or settled in favor of the person who filed the charge; and this figure says nothing of the instances where these disputes are resolved or otherwise go unreported.[13] A recent study has shown that, one year out of college, women earned roughly 93 percent of what their male counterparts earned after controlling for hours, occupation, college major, industry and other factors.[14] Further, studies have shown that among identical résumés, where only the name differs, perceived gender affects whether the candidate is hired, the starting salary offered, and the employer's overall assessment of the candidate's quality.[15]

## Federal and State Equal Pay Legislation

Although discrimination is just one contributor to the gender wage gap, this does not diminish the need to address it. Currently, the legal recourse to eliminate and deter discrimination is the principal of equal pay for equal work. This principle has been established by federal laws, such as the Equal Pay Act of 1963[16] and Title VII of the Civil Rights Act of 1964.[17] These laws require

employers to pay employees equally for performing work that requires equal skill, effort, and responsibility, and is performed under similar working condition. Exceptions to equal pay for equal work under the Equal Pay Act exist where payment is made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any factor other than sex.[18]

While these federal laws have helped to erode discrimination, their full impact has not been realized given the way courts have interpreted the scope of these laws. For instance, courts have narrowed the Equal Pay Act's reach over time, applying a strict interpretation to what constitutes equal work.[19] At the same time, courts have broadly interpreted the defenses under the Equal Pay Act, such as the "any factor other than sex" defense.[20] Additionally, the Equal Pay Act does not specifically mention other issues, such as pay transparency and pay secrecy rules, even though such rules can shield discrimination and depress wages.

Momentum to pass more aggressive legislation has recently stalled in Congress. This has left the states with the responsibility of addressing gender discrimination in the workplace. While many states, like New Jersey, already maintain equal pay laws, most of them mirror federal law and, thus, contain the same shortcomings, such as a narrow interpretation of "equal work," broad application of the defenses, insufficient deterrence, and no requirement for pay transparency. States such as California, Maryland, New York, and Massachusetts have recently passed equal pay amendments expanding the protections afforded under their current laws.[21] These states currently have some the most progressive equal pay laws.[22] Some of the amendments aim to strengthen current equal pay standards, create pay transparency rules, expand equal pay protections beyond sex, and create a stronger deterrent for discrimination.

## New Jersey's Proposed Equal Pay Legislation

In early 2016, New Jersey introduced S-992, which proposed to expand the protections against employment discrimination afforded under the current New Jersey Law Against Discrimination and federal law.[23] Employers would be permitted to pay workers of different sexes doing similar jobs in an unequal manner only if they could demonstrate the unequal treatment was justified based on factors such as training, education, experience or job performance.[24]

The key amendments in the bill include: 1) a lower standard from "equal work" to "substantially similar work"; 2) a "restarting" of the statute of limitations each time wages are paid to the employee, but without any limitation of the amount of back pay an employee could recover; 3) a prohibition against employers taking reprisal against an employee for disclosing information about the job position and themselves; 3) the availability of treble damages awards; 4) a continual reporting requirement of employee demographics and compensation information for employers who are government contractors; and 5) a prohibition against requiring employees or prospective employees to consent to a shortened statute of limitation or to wave any of the protections provided by law.[25] Most of these amendments were modeled after those passed in California.

The bill passed by decisive margins in both the New Jersey Senate and Assembly. Governor Chris Christie then issued a conditional veto of the bill,[26] citing objections to each amendment proposed in S-992. Most of the objections were based on the fact that the amendments were an expansion of federal law or court precedent, which was the actual purpose of the amendments.[27] The purpose of lowering the stringent "equal work" legal standard to "substantially similar work" was to alleviate the known difficulties employees face in bringing suits in federal court under the current laws.[28] Christie called this "nonsensical," noting it would make "New Jersey business unfriendly," and further stating he did not want the state to be a "liberal outlier."[29] Making treble damages available, along with providing for back pay for the entire time period of discrimination, were to serve as key deterrents for discrimination. Christie objected to those amendments as well.[30]

The governor also took issue with the reporting requirement, arguing it would impose another burdensome reporting mandate on businesses and would not improve New Jersey anti-discrimination laws.[31] Transparency and the collection of pay data are significant tools to ensure compliance with the law. Advocates argue that this concern is an overused red herring, since such information can be provided without imposing extensive burdens on businesses. In fact, businesses are already required to submit some information to the EECO on race and gender. While uncertain under the current administration, businesses may also soon be required to collect and report compensation and job information to the EEOC.[32]

The bill went back to the Legislature, which unsuccessfully sought to override the governor's veto by a two-

thirds majority. While under Christie the adoption of the bill seems unlikely, it could be revived under the next administration. The efforts at eliminating the gender wage gap continue to gain momentum, and will undoubtedly be an important issue in the primary election in New Jersey.

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# New Jersey's Adoption of the Uniform Bar Exam

*by Sade C. Calin*

In 2016, the New Jersey Supreme Court decided it would adopt the Uniform Bar Examination (UBE). Summer 2016 examinees were the last to have the option of sitting for the state-specific exam used in previous years. As of the first bar exam this year, in Feb. 2017, New Jersey will exclusively utilize the UBE.

This move followed on the heels of New York's 2015 decision to become a UBE jurisdiction, creating an immediate issue for New Jersey's law students, split between two major legal markets. On the one hand, New Jersey's adoption of the UBE essentially means students who wished to seek admission to both the New Jersey and New York bars now only have to take one bar exam and achieve the requisite passing score for each jurisdiction, plus complete any supplemental requirements. On the other hand, the UBE's adoption has proven problematic for students who wished to be admitted to both the New Jersey and Pennsylvania bars.

The UBE is administered on the same dates in every UBE jurisdiction, and, this year, the exam dates make it impossible for test takers to sit for both the Pennsylvania bar exam and the UBE in New Jersey in the same testing period. Essentially, 2017 potential applicants will need to sit for either the UBE or Pennsylvania's state bar exam first, and then prepare and sit for another bar exam several months later, at the next offered testing date.

With Feb. 2017 being the first time all New Jersey applicants must take the UBE, it is still unclear what effect this will have on the state's own legal market and the two closely connected markets. With two law schools in the state of New Jersey, the reception of the UBE has been mixed—receiving great support from many law students in the North Jersey/New York market whose entry into both jurisdictions has been eased (*i.e.*, Seton Hall School of Law and Rutgers Law School's Newark campus) and great derision from many law students in the South Jersey/Pennsylvania/Delaware market, who are now unable to do all of their bar preparation and take all their intended bar examinations in one testing period (*i.e.*, Rutgers Law School's Camden campus).

## About the UBE

There are three parts of the Uniform Bar Exam: 1) a multistate bar examination (MBE)—weighted 50 percent, 2) a multistate essay examination (MEE)—weighted 30 percent, and, 3) a multistate performance test (MPT)—weighted 20 percent.

State bars determine what constitutes a passing score for admission to their jurisdiction. State bars are also responsible for grading the MEE and the MPT, and those scores are scaled to the national MBE.

## The Uniform Bar Exam: Potential Pros and Cons

One of the major arguments in favor of UBE adoption is the portability of the score and the flexibility that may provide for law students and employers. Test takers who sit for the UBE in any state will be able to take their score and apply for admission in any UBE jurisdiction. In this sense, it may be considered comparable to the Multistate Professional Responsibility Examination, wherein there is one exam administered nationally and each state bar sets its own minimum requirement regarding what score must be achieved for admission therein.

The portability of the score may help law school graduates who are having trouble finding employment in their home state, or who do not have solid job prospects before they take the bar. With the UBE, applicants can potentially practice in a variety of jurisdictions, which may open up their job opportunities.

For legal employers, the UBE's portability may widen the applicant pool and allow employers to consider a greater variety of applicants that may otherwise not have considered sitting for that particular jurisdiction's bar. Employers may also be more attracted to applicants with the potential to be barred in multiple jurisdictions relatively quickly.

As this is the first year New Jersey is administering the UBE alone, it is unclear what impact, if any, it will have on the state's legal community.

One concern about employing the UBE calls into question whether it may exacerbate the existing issue of

low bar passage rates for minority examinees. There is data showing that the MBE—used by all states except Louisiana—may have a disparate impact on minority test takers, particularly African Americans. With it constituting one-half of an applicant's total UBE score, this may suggest that the UBE will disproportionately affect the scores of minority applicants, and thus the possible jurisdictions where their scores may take them.

Additionally, potential concerns expressed by states who have refused to adopt, or who have not yet considered adoption, of the UBE include the possible flooding of their legal markets by out-of-state applicants, which would create more competition for legal employment for a state's resident law grads rather than alleviate pains of the employment search. Another concern is that lawyers may be admitted to a bar with a passing UBE score and yet be unfamiliar with the jurisdiction's law and practice.

## Applying for Admission with the UBE

Once examinees take the UBE, their score will tell them whether they are eligible to apply for admission to New Jersey's state bar, or any other UBE jurisdiction. New Jersey requires a score of 266 for admission. Further, applicants to the New Jersey bar who have taken the bar exam in any other UBE state can present their UBE score for admission. The New Jersey Supreme Court has adopted the following key provisions for application using a UBE score transferred from another jurisdiction:

The score attained on the UBE examination must meet or exceed 266, the minimum score requirement to pass the New Jersey bar examination.

A completed application must be submitted within 36 months of the date of the exam administration in which the UBE score was earned. Consistent with the standard practice of other jurisdictions that have implemented the UBE, New Jersey will accept UBE scores earned prior to New Jersey's first administration of the UBE (Feb. 2017), provided the transfer application is timely and complies with all other requirements.

Each applicant shall provide, in a manner prescribed by the board, certification by a duly authorized officer of the applicant's law school that it is approved by the American Bar Association and that it has awarded the applicant a juris doctor degree or its equivalent.

Each applicant must provide satisfactory evidence that the applicant is a member of the bar in good standing in every other jurisdiction that has ever admitted the applicant to practice.

While the UBE allows for one to gain admission to another UBE state's bar without taking a new bar exam, an applicant still must fulfill any additional requirements posed by the state's bar (which could include a separate, state-specific test) and be certified by the state's character and fitness committee.

Prior to 2017, the UBE was adopted in 20 states. New Jersey sits alongside two other states, Connecticut and South Carolina, solely administering the UBE for the first time in Feb. 2017. Maine, Oregon and West Virginia will be administering the UBE in the July 2017, and Massachusetts is the latest state to announce an impending adoption of the exam, slated for administration in July 2018. The following, in alphabetical order, is a complete list of current and soon-to-be UBE jurisdictions (and the 'passing scores' required for application for admission):

Alabama (260); Alaska (280); Arizona (273); Colorado (276); Connecticut (266); District of Columbia (266); Idaho (272); Iowa (266); Kansas (266); Maine (TBD—July 2017); Massachusetts (TBD—July 2018); Minnesota (260); Missouri (260); Montana (266); Nebraska (270); New Hampshire (270); New Jersey (266); New Mexico (260); New York (266); North Dakota (260); Oregon (284); South Carolina (266); Utah (270); Vermont (270); Washington (270); West Virginia (270); Wyoming (270). ■

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# HBA-NJ: Stepping Up When Things are Down

*by Milagros Camacho*

In Aug. 2008, a report written by a task force affiliated with Princeton University's Woodrow Wilson School of Public and International Affairs found that 27 percent of New Jersey children were foreign born or the children of foreign-born parents. This report stated that as of 2000, New Jersey had the sixth largest immigrant population in the United States, and that upwards of 20 percent of our population is foreign born, with as many as 10 percent not fluent in English. It went on to state that Hudson, Passaic, Bergen, Union, Middlesex, Somerset, Morris and Mercer counties had the highest percentages of immigrants in New Jersey. The report recommended that New Jersey create an Office of Immigrant Affairs.

A year earlier, in Aug. 2007, following a brutal triple homicide in New Jersey involving an undocumented immigrant who was out on bail, then New Jersey Attorney General Anne Milgram issued a reactive directive to law enforcement agencies throughout the state. In her directive, Milgram ordered that state law enforcement officers ask those arrested for any indictable crimes, including drunken driving offenses, about their immigration status. The directive further provided that law enforcement officers were to report the status of the arrestees to Immigration and Customs Enforcement, commonly referred to as ICE. Milgram defended the directive by asserting that it would create a certain uniformity in law enforcement that did not then exist.

The directive was met with wide criticism by special interest and victims' rights groups. The Hispanic Bar Association of New Jersey (HBA-NJ) was very vocal in opposing the directive and its enforcement aspects. By doing so, the HBA-NJ was able to illuminate many of the issues the directive created within the state's immigrant communities.

The New Jersey Immigration Policy Network called it "the law of unintended consequences." It was thought that many undocumented victims would hesitate to report crimes, especially domestic violence crimes, for fear of being deported, which would inevitably lead to a vicious cycle of re-victimization of either themselves or others. Milgram's response to this particular concern was to direct officers not to ask victims of crimes and/or acts of domestic violence about their immigration status.

But Milgram went further by authorizing the use of local law enforcement officers, pursuant to Section 287(g) of the Immigration and Nationality Act, as deputized federal immigration agents. She tempered this with strict instructions that deputized officers could only assist the federal government after indictment. Section 287(g), a delegated authority program, was added to the Illegal Immigration Reform and Immigration Responsibility Act of 1996. Deputized officers who participated in the program were given a four-week training orientation by ICE.

Nationwide, from 2006 through 2015, Section 287(g) agreements were entered into with 37 agencies, with the Department of Homeland Security (DHS) announcing in Dec. 2012 that it was not expanding its contact base beyond those agencies because other programs were believed to be more effective. The ICE website credits the Section 287(g) program with the identification of "more than 402,079 potentially removable aliens."

As this was occurring, in 2008, then-Governor Jon Corzine created a Blue Ribbon Advisory Panel on Immigrant Policy to study education, citizenship status, civil rights, fair housing, healthcare, language proficiency and employment training of the immigrant community in New Jersey. The panel consisted of 27 members, including Juan Cartagena, then general counsel for the HBA-NJ and a well-known civil rights lawyer, two legislative members (one from the Latino community and one from the African-American community), and seven commissioners. The panel was charged with "developing recommendations for a comprehensive and strategic statewide approach to successfully integrating the rapidly growing immigrant population in New Jersey," and to do so within 15 months. The panel met for months, held public hearings throughout the state and considered a number of studies and reports, including the one prepared by the Woodrow Wilson task force, before issuing its own report.

The HBA-NJ president testified and provided a state-

ment on behalf of its members before the advisory panel. HBA-NJ issued press releases and held public information sessions throughout the state (including Morristown, a Section 287(g) flashpoint at the time) regarding the issues created by Section 287(g) when local law enforcement officers were diverted from their primary responsibilities and charged with the additional task of enforcing immigration laws.

In New Jersey, despite its growing immigrant population, or perhaps because of it, the use of Section 287(g) expanded in the years that followed Milgram's directive.

Currently, three county entities participate in this program: the Monmouth County Sheriff's Office, the Salem County Sheriff's Office, and the Hudson County Deptartment of Corrections. The Monmouth County Sheriff's Office applied to participate in this program in June 2008. The Salem County Sheriff's Office applied in June 2016. The Hudson County Department of Corrections entered into a two-year extension of their agreement after the expiration of their original contract on June 30, 2016. It was renewed by Hudson County despite a letter signed by over 30 organizations urging that the county executive and county freeholders not renew it.

The Rev. Eugene P. Squeo, pastor at St. Patrick's and Assumption All Saints Church in Jersey City, called the renewal "a poor decision." Father Squeo, like many critics of the program, believes the program, which is supposed to prioritize undocumented individuals with serious criminal records, does not end up working that way. He believes that "what seems to be true more often than not is that those that get ensnared in the program are either those who have been involved in minor offenses or nonviolent crimes."

All existing Section 287(g) agreements, having now been superseded by President Donald Trump's Executive Order 13768, issued on Feb. 17, now include all immigrants, both undocumented and permanent residents, convicted of or charged with a crime, or whom ICE suspects of criminal activity. An implementation memo from DHS lists detention priorities and states that DHS will "no longer exempt classes or categories of removable aliens from potential enforcement."

The executive order, and the new homeland security enforcement directives that followed shortly thereafter, have brought out a number of national and local Latino advocacy groups in protest.

The Hispanic Bar Association of New Jersey has stepped up to the challenge. On Jan. 30, HBA-NJ President Arlene Quinones-Perez issued a press release promising to "continue to advocate for the protection of those that come to the United States for freedom and opportunity."

This release, which sets forth certain fundamental truths that have bound the Latino community to the various advocacy groups that have always represented their interests, is reflective of the deep and unwavering commitment of these organizations to the greater community they are a part of. The author believes it is clear that in the face of gross uncertainties regarding the full scope of the intended seizures and the manner in which they will be implemented, an entire community has been thrown into abject disarray for no ascertainable reason other than to make a political point.

The author believes these communities are in jeopardy of imploding beyond any possible benefit to the country because of an enforcement directive that is of unparalleled breadth and scope. It is now immigration policy that ICE, pursuant to the above-referenced DHS directive, will pursue all individuals who, "on the judgment of an immigration officer, otherwise pose a risk to public safety or national security."

In response, immigration activists and legal organizations have mobilized. The Hispanic National Bar Association (HNBA) has created an Immigrant Legal Defense Task Force to provide grants for low-cost expert legal representation in the defense of select immigration cases. The task force will provide grants consistent with the priorities established by the Executive Office of Immigration Review—detained removal cases, unaccompanied children in custody of the Office of Refugee Re-settlement and individuals granted a bond pursuant to *Rodriguez v. Robbins*.[1]

The HBA-NJ Board of Directors, under President Arlene Quinones Perez's leadership and in conjunction with HNBA, Region III, has rededicated its resources to this issue in light of current developments. Cognizant of its history and past efforts it did so in a deliberative manner. First, it created a committee to fully review all aspects of both the executive order, the directive and its application within New Jersey. After a full review, the committee will make recommendations to the HBA-NJ Board of Directors regarding effective responses to what is occurring. They know that in order to be effective it is imperative that educating the community be at the top of their agenda. Co-Chairs Ada Nunez and Cesar Martin Estela, both immigration practitioners, have been appointed to lead the effort.

One of the steps planned is a resource page for the HBA-NJ website, which currently is being prepared. It will list immigration attorneys throughout the state and links to other organizations that can assist immigrant communities and individuals.

The HBA-NJ will soon be holding "Know Your Rights" information sessions throughout the state in order to provide relevant information to non-citizens about their rights. According to Nunez, "the HBA-NJ hopes to expand these information sessions into both citizenship drives and voting drives. It is our hope to make this initiative a long lasting one that serves the needs of our immigrant community by focusing on increasing our database of qualified practitioners."

In order to make this effort a reality, the HBA-NJ is asking immigration practitioners to provide low-cost and volunteer services to non-citizen communities throughout the state. Furthermore, because of the overwhelming need for qualified professionals, the HBA-NJ hopes to soon be in a position to train additional attorneys in immigration procedures in order to expand the number of "Know Your Rights" sessions that can be offered. Nunez says the HBA-NJ has been flooded with requests for assistance and educational seminars by community centers, churches and city government agencies.

To volunteer, or for more information, please contact: Ada Nunez at nunez@adanunezlaw.com or Cesar Martin Estela at cme@estelaw.com.

By the time you read this article, down may have become up and up may have become down. Irrespective of whatever occurs, the HBA-NJ's and HNBA's efforts will continue. ■

*Milagros Camacho currently serves on the NJSBA Board of Trustees. She is a certified criminal trial attorney, a prior state and federal prosecutor and currently a partner at the law firm of Camacho Gardner & Associates, L.L.P. in North Bergen. She specializes in criminal and family law.*

## Endnote

1. 804 F.3d 1060 (9th Cir. 2015).

# Observations from Both Sides of the Glass Ceiling

*by Robyn B. Gigl*

Let me start with a disclaimer—this is not a sociological study of diversity or an examination of any legal issues impacting diversity. It is not based on empirical data or legal analysis. Rather, it is an opinion piece, based on the observations and experiences of one human being—me. Accordingly, it may be criticized for being filtered through my own inherent biases, and being based on a very limited set of experiences. To that, I can only plead guilty. But my purpose in writing is not to convince anyone of the correctness of my observations, or to target anyone, but merely to present my observations to you, as Rod Serling would say, "For your consideration." I do that because I have had a unique platform from which to observe. Having lived the first 50-plus years of my life as a heterosexual, white male and the last eight years as a woman (yes, you can insert the adjective transgender in front of woman if you choose), I have seen the world through two very different sets of lenses. Whether you agree with my observations or not, I ask you only to think about them and how they relate to your experiences.

My first observation is that when discussing any diversity issue the audience that most frequently needs to be part of the conversation feels left out of the conversation from the start. So, for example, if I had titled this piece, "Heterosexual, White Male Privilege," the very audience I want to speak to—heterosexual, white males—would probably have taken a pass on the article. I understand that reaction, because I have been a beneficiary of heterosexual, white male privilege.

Which leads to my second observation—a person living with privilege does not recognize it as such because they have never experienced life any other way.

I would love to be able to write that in my first 50 years I was a shining example of recognizing my privilege, and that I lived my life as an enlighten human being, rejecting the benefits afforded a heterosexual, white male. I can't; I didn't. But now, from my current vantage point, I can say in my defense—and in defense of most members of my former group—I didn't recognize my privilege. I was too busy trying to survive and make my way in the world to understand the inherent benefits I enjoyed based solely on how society perceived me.

I fear that too often when we use the term "heterosexual, white male privilege," it makes it appear that members of that group get a free pass in life. Certainly that is not the experience of most straight, white men. The coal miners in Appalachia certainly do not feel like they have experienced privilege. The same is true of the student graduating college with thousands of dollars in debt because it was the only way he could afford school. To them, the concept of privilege seems foreign. And while certainly we can debate whether the very disappointment they have with their financial situations is based on the perception that they should be doing better because they are straight, white men, my point would be lost if that is who I was directing this piece to. My intended audience is the men who have, or are, living lives much like my former life. I went to law school because my father saw it as a great opportunity for his son. I came out of law school with no debt because of my family's ability to pay for my schooling. I obtained an interview for my clerkship because of connections. When my children were born, I never struggled with whether I should leave my job to stay home with them. After all, despite the fact that my wife had a career as well, I was the 'breadwinner.' I worked hard, became an equity partner in a firm, and ultimately the firm's managing partner. Yet I never saw how being male, being white and being heterosexual impacted the trajectory of my life until I could view it from the perspective of someone who was not male and not straight. Would I have become a lawyer, had a legal career, become a managing partner had I been a cisgender female? Probably not. But at the time, I never thought about it.

My point is that for most people who enjoy privilege, it is unseen. There is no secret handshake that is passed down. Dedication and hard work are still required for success. The difference (and it can be a huge difference) is that most opportunities are open to you. You don't have to kick open doors because you're a person of color. You

don't need to worry if there is a limit to how high you can go because you're a woman with a family. You don't live in fear because the picture on your desk of your spouse shows someone the same sex. There are no 'artificial' barriers to your success.

My third observation (to women readers, I apologize in advance if this comes across as stereotypical and trite) is directed to the men who, despite all odds, are still reading this article. Whether you know it or not, your life is so much easier, on so many levels, than your female counterparts. This involves simple things, things I'm willing to bet you rarely, if ever, think about. For example:

**Vulnerability**—I have jogged (defined as moving slightly faster than walking) for the last 40 years. For more than 30 of those years, other than the fear of being struck by a car because more often then not I run at night, I never once thought about my physical safety. I jogged in every city I traveled to, often at night, and never worried about being assaulted. Now I think about it every time I go for a run at night. I don't know a man who worries about being sexually assaulted; I don't know a woman who hasn't worried about it.

**Appearance**—Leaving aside the president's apparent requirement that female staffers "dress like a woman," our society compels women to live up to a standard that is often unfair and demeaning. When I went through the gender affirmation process a female colleague told me that how I would be accepted would depend on how I appeared. In other words, would I present 'womanly' enough? "Welcome to our world, where how you look is more important than what you know," she told me. To my male colleagues I ask, when grabbing that navy blue, or black, or charcoal gray, suit out of your closet when you are going to court, how many of you have ever thought, "I can't wear that suit, because I wore it earlier in the week," or "Is this appropriate for where I'll be today"? For a woman, well let's just say it's different. As Tina Fey observed, "Steve Carrell's *Foxcatcher* look took two hours to put on, including his hairstyling and makeup. Just for comparison, it took me three hours today to prepare for my role as a human woman."

**Authority/Respect**—As a panelist on a diversity program with Michellene Davis, executive vice president, chief corporate affairs officer, RWJBarnabas Health and president, Executive Women of New Jersey, a brilliant African American woman, I listened to her reveal that when she was the acting treasurer of the state of New Jersey, she walked into a meeting with a group of businessmen from outside the state and asked them if they were ready to begin the meeting and she was told no, they wanted to wait until the treasurer arrived. If there is anyone who thinks that a white man would have met the same reception, they are sadly mistaken. Being a white male brings with it a certain sense of inherent authority/respect that does not need to be earned. Obviously, there are many diverse people who have risen to positions of authority, but they have always had to earn that authority, and then earn the respect that comes with that authority. It is not bestowed on them because of their appearance, but rather *despite* their appearance.

Having lived in a man's world as a man for as long as I did immunized me against many of the biases and prejudices that women of my generation endured in and outside of the profession. I also won't pretend to claim to have any appreciation for what men and women of color experience on a daily basis or what my gay, lesbian and bisexual colleagues have had to deal with. I don't blame heterosexual, white men for the privilege our society bestows on them. I understand that they never asked for it—it simply exists. But having freely confessed to being oblivious to that privilege, I am asking my straight, white male colleagues to consider what I can now see from the other side of the glass ceiling—privilege exists; it is real; it impacts our lives. I am not asking you to walk a mile in my shoes (that would be painful for you). What I am asking you to do is think about what I have to say, and if you dare, engage in conversations that deal with privilege and diversity. Women; people of color; lesbian, gay, bisexual, transgender and queer folk, to name but a few, can never achieve equality unless you join the discussion, until you engage, until you are willing to admit that perhaps, through no more than a fluke of birth, you have inherited certain birthrights that were not bestowed equally. As one who has been on your side of the table, I understand your reluctance. As one now on this side of the table, I understand how critically important it is that you be part of the discussion. ■

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# A Perspective on Diversity

*by Ayesha Hamilton*

In a 1790 letter to the Hebrew Congregation of Newport, in Rhode Island, George Washington wrote, "It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights, for, happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support."

Throughout the country, as well as in New Jersey, the racial and cultural landscape is very different today than it was in Washington's time. In fact, things are considerably different today than they were even 10 year ago, with growing numbers of immigrants and minorities moving into New Jersey. I live in a town that is one third Caucasian, one third Chinese and one third South Asian. This means more cultural/racial diversity in my clients and friendships. But it also means that I, as a South Asian woman and immigrant, am slowly transitioning out of a minority position. With this change comes the recognition that someone is moving into the minority role. In my town the incoming kindergarten class is 12 percent Caucasian.

Without question, there is strength in our diversity, and it is incumbent upon us, as officers of the court, to celebrate that strength responsibly. So what does this mean for us as residents of New Jersey and officers of the court?

As officers of the court, it means that we owe our allegiance to the United States and New Jersey constitutions, the living documents we pledged to support and defend when we were sworn in to practice law. Both focus on the establishment of justice as a means to enforce their word and spirit. Both direct us, as members of the legal profession, to stand as defenders and champions of the essence of the constitutions.

As citizens it means we have a responsibility to be 'racially literate.' While I have only recently become acquainted with the term, as women and minorities we have been living its concept. The term 'racial literacy' was originally coined by France Winddance Twine, and refers to "cultural strategies and practices designed and employed by parents to teach children of African and Caribbean heritage (1) detect, document, and name anti-black racist ideologies, semiotics, and practices; (2) provide discursive resources that counter racism; and (3) provide aesthetic and material resources (including art, toys, books, music) that valorize and strengthen their connections to the trans-atlantic culture of black people in Africa, the Caribbean and the United States."[1] Put simply, the term deals with how to recognize racism and micro-aggressions when they occur and how to respond in the moment.

Regardless of how you have responded to racism and micro-aggressions in the past, we are now in an era that may require us to *practice* patience and tolerance with a greater frequency than ever before.

In his book *Promoting Racial Literacy in Schools*, Dr. Howard Stevenson speaks extensively about practicing our response to racism and micro-aggressions. He talks about going home and re-telling the story of what happened, of talking through your response and practicing a different or better response. But above all, he speaks about taking the opportunity to educate the offender.

Learning more about racial literacy has given me a different perspective and response to the micro-aggressions we face on a daily basis. Questions such as "where are you from," "why do you speak English so well," and "are you actually eating beef," which used to irritate me, now pose an opportunity to educate. As women and minorities, we must now embrace every insensitive or obtuse comment as an opportunity to educate.

So as we experience these changing times, it is important to remain grounded with our allegiance to the words of our founding fathers and our constitutions. It is important for us to remember that we need to approach every situation as an opportunity to educate and provide our perspectives, and, finally, as an opportunity for us to see other perspectives.

*Ayesha Hamilton is an attorney licensed to practice law in New Jersey, New York and Pennsylvania, and focuses her practice in the area of employment and business law, with an emphasis on representing employees in claims against their present and former employers for unfair and discriminatory practices.*

## Endnote

1. Twine, *A White Side of Black Britain: Interracial Intimacy and Racial Literacy* (2010).

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# Reflections on *Hillbilly Elegy*: *A Memoir of a Family and Culture in Crisis*, by J.D. Vance, Through the Lens of the Law and Diversity

*Reviewed by Norberto A. Garcia*

A common suggestion in programs promoting diversity is that executive board members of organizations read at least one book a year by an author with a diverse background. Based on this suggestion (and because his book has received a lot of attention in light of Donald Trump's unprecedented ascension to the presidency), I read *Hillbilly Elegy,* by J.D. Vance. The book received a lot of press last year in light of the Trump campaign's appeal to red-state America.

Following is a review of the book through the prism of diversity in the legal profession.

At first blush, Vance does not seem ideally suited to be considered an author from a diverse background: He is white, straight, male and Protestant. On closer inspection, he comes from a background that does not generally yield Ivy League lawyers: He is Appalachian, Scotch-Irish and comes from a historically impoverished family.

Vance's story is compelling. He grew up in the Rust Belt city of Middletown, Ohio, and the Appalachian town of Jackson, Kentucky. (Middletown is home to the once-mighty Armco Steel.) He enlisted in the Marine Corps after high school and served in Iraq. He went on to graduate from Ohio State University and Yale Law School. He is currently a principal at a leading Silicon Valley investment firm.

The book is a personal reflection on what happens to a community when the industrial economy evaporates. The book reads like a novel more than a memoir. It is not an academic study, not a theoretical argument and not a survey of class in America. In that sense, it is not a book I found myself underlined numerous passages in for later reflection. Representing Vance's personal story, warts and all, it is anecdotal rather than comprehensive, yet still insightful.

The book tells the tale of how the scourge of drugs, the decline of the industrial economy in America, the break up of traditional family and the lack of religion have operated to create a disaffected class of white voters in middle-America.

Vance gets away with many complaints that might otherwise be labeled discriminatory, because he is criticizing his own background, which consists of what he affectionately calls "hillbillies." This is a group that has been among the working poor for a long time—first as day laborers in the slave economy, then as sharecroppers, later as coal miners and eventually as industrial workers.

Vance highlights the similarities between what poor blacks endure and what poor whites endure. He opines that the latter does not receive the attention the former does.

He speaks of the Appalachian whites being an immigrant group within the United States—transplanted whites from Appalachia (in his case from Jackson, Kentucky) were intentionally courted by the steel industry to move to industrial states such as Ohio, Michigan and Pennsylvania (in his case Middletown, Ohio), where they experienced culture shock. The broader community of Appalachians was thrust into a world that respected a different family structure than the one they came from. They experienced prejudice and discrimination from the local white families.

From the perspective of the law and diversity, if the book were describing poor African American or Hispanic communities, it would be ostracized as a racist polemic. Because the book criticizes the last politically safe target of public scorn or ridicule—poor whites—it has been accepted with limited protest. It helps that Vance is a product of the community he criticizes.

The book paints a bleak picture of Rust Belt America, and the impact the loss of industry has had on society. Vance describes the mentality of his peers as "learned helplessness." Many have given up on the idea of upward mobility. One friend quits a job because he is sick of waking up so early and then spends his time complain-

ing about the "Obama Economy" on social media. Another fellow worker with a pregnant girlfriend risks losing a good-paying job with great health benefits by constantly missing work. When he is finally terminated, he blames his employers for being heartless. The learned helplessness and cynicism leads to a sense that one cannot trust the news, politicians or academics.

When friends learn that Vance attends Yale, they ask if he marked off a minority category on his school application. Vance notes the lack of agency in his community, "a feeling that you have little control over your own life and a willingness to blame everyone but yourself." He believes this view is in stark contrast to the larger economic landscape of modern America.

A large part of the book focuses on how addiction has devastated his community—from alcoholism to opiate addiction to the current heroin crisis. In 2014, more people died from drug overdoses than from natural causes in Butler County, where Vance's hometown is located. In fact, his own mother was addicted to various drugs for many years.

The book stresses how the loss of a structured family can have debilitating effects on children. It is interesting that despite Vance's fractured family history (his mother married multiple times and had multiple boyfriends, which led to Vance having numerous step-siblings), both he and his biological sister seem to have done very well for themselves. He credits a loving, caring surrogate set of parents—his grandparents—with helping him succeed. They stepped in to raise him when his mother's addiction resulted in her absence from his life. In general, he notes, those who escaped his bleak background left town or married outsiders.

Vance attacks the perception that lower-income whites in Appalachia and Rust Belt states are particularly religious. He notes statistics show that whites in these communities attend church less frequently than more-affluent and better-educated whites. He claims this is based, in part, on lower-income whites seeing the church as an upper-crust institution looking for money, as opposed to a source of spirituality.

Vance criticizes poorly implemented social programs that allow a large minority of people in his community to live off "the dole" while breeding resentment among everyone else. He recounts how he could not afford a cellphone, yet saw people on government assistance programs with expensive ones. He writes, "Political scientists have spent millions of words trying to explain how Appalachia went from staunchly Democrat to staunchly Republican in less than a generation…I could never understand why our lives felt like a struggle while those living off government largess enjoyed trinkets that I only dreamed about."

From a legal perspective, while there will always be abuse, those who criticize welfare programs are often unaware of how much the government helps subsidize their own lifestyle.

There is a vivid description of how out of place Vance felt at Yale Law School; he was older, poor and had a military background. His recollections are similar to the stories I have heard from minority students who attend elite academic institutions.

The book highlights the dearth of military veterans in the halls of Ivy League academia. This allows for a glaring hole in the fabric of the national conversation on the topic of war, service and patriotism.

The overall theme of the book is that there is a segment of the white American population that is in deep trouble. The idea that the concept of "white privilege" does not provide immunity from the effects of poverty and family dysfunction seems obvious, but Vance gives this group a distinct voice. His solution is as follows: Stop blaming everyone else and ask what can be done to make things better, the old 'pull yourself up the bootstraps' answer to economic woe. Develop stronger families, supportive communities, more church connections and a more-positive attitude, a secular take on the prosperity gospel.

There are possible solutions to be drawn from the book when viewed from the perspective of the law and diversity programs. Vance notes that gifted students from his neighborhood were not properly steered toward more selective academic institutions because of poor counseling from family, friends and school officials. They were led to believe these schools cost too much, when, in fact, aid packages made them more affordable than local colleges and trade schools. Elites rely on parents and other networks to advise them on life choices. Isolated poor communities do not have access to such counsel. This is a problem that can, perhaps, be addressed through outreach and internet resources.

Another interesting aspect of Vance's message is how important his service in the Marines was in shaping his development. It would be interesting to research how many of society's ills, if any, can be traced to the abandonment of a universal draft in 1973.

My takeaway from the book and its ensuing public-

ity is that we have become too insular in our approach to certain topics. If an argument falls outside the accepted orthodoxy on a given topic, it is not addressed or debated. It is shouted down or excluded from the conversation. The opposing view is labeled racist, sexist, reactionary or worse. The person presenting the argument is likewise labeled a pariah, so someone with a moderate position ends up simply keeping their opinion to themselves. It's simply not worth the risk, and this creates a vacuum, which creates an echo chamber.

It is too easy to dismiss people with opposing views as racist or ignorant, without considering the genesis of their positions. And when an extreme view is presented, even if backed by mere sophistry, we may not be equipped with the proper weaponry to combat it. This seems to be where we are at the present time. It allows bullies with toxic viewpoints to take hold of the public debate, and public opinion is easily swayed by demagogues of all political stripes.

In interviews during the 2016 election cycle, Vance opined that the reason people he grew up with shifted from the Democratic Party to Trump was that he made them feel better about themselves. In an interview with National Public Radio's Terry Gross, Vance stated, "There's a recognition that Trump isn't going to solve a lot of their problems, but at the end of the day, he's the only person really trying to tap into this frustration…A lot of people feel that you can't trust anything Hillary Clinton or Barack Obama say, not because they necessarily lied a lot but because they sound so filtered and rehearsed. Donald Trump, if nothing else, is relatable to the average working class American because he speaks off the cuff. He's clearly unfiltered and unrehearsed."

Trump said things to the elites that people from Vance's background wished they could say themselves. He tapped into their frustrations. From the viewpoint of the law and diversity, I find this unfiltered discourse to be a short-term problem. There is a reason people should filter what they say—toxic speech, bigotry, prejudice and racism should have no place in society. Despite this, I am a firm believer in the idea articulated by Justice Louis Brandeis, that sunlight is the best disinfectant. Let the people who feel this way expose themselves so reasoned argument can defeat the errors in this type of thinking. This is slowly happening, but it is a painful conversation. It is sometimes not even a conversation—it is a white student body yelling 'build that wall' at opposing players from a visiting team from a predominantly Hispanic school. But the pain of this unpleasant conversation, rather than 'safe zones' that stifle speech, will hopefully lead to growth and progress.

As lawyers, the book informs us that we need to focus attention on the issues of addiction, unequal access to information and forming bonds across diverse communities. This can be done through litigation, political pressure and educational programs. There needs to be a search for commonality. We need to stop treating different communities as the foreign 'others' out there to take what should be ours. As a diverse community, we need to make an effort to reach out to other voices, even those we may find to be adverse to ours—perhaps especially those voices we find most repugnant. I believe our commonalities outweigh our differences.

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# Bringing the Fight Home: Environmental Justice Remains a Local Imperative

*by Jacob J. Franchino and Shawn M. LaTourette*

At the New Jersey State Bar Association's Annual Meeting, the Diversity Committee will co-sponsor a panel of private practice and nongovernmental organizational attorneys to discuss "Environmental Justice: Why Race and Class (Still) Matter." As much a movement as it is a legal concept, the notion of environmental justice (or EJ, as it is often called) materialized in the latter half of the 20th century, and has come to mean different things to different people. The U.S. Environmental Protection Agency's (EPA) website offers the following definition:

> Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.[1]

The EPA's conception of EJ is framed with a universality of ambition that some might argue—while not philosophically objectionable—ignores the uncomfortable reality that the concerns to which EJ efforts are most often directed affect the poorest communities, and that the people making up those communities tend, disproportionately, to be people of color.

This reality has been at the core of the EJ movement since its earliest days. Indeed, the movement is now commonly understood as springing from the civil rights movement.[2] While there can be little doubt that the raised-consciousness and spirit of social activism that fueled the broader civil rights movement also fueled EJ concerns, the EJ movement more accurately began as a series of discrete grassroots actions directed primarily at local environmental concerns. Together, these relatively isolated actions began to develop a collective trajectory and a shared momentum around their identification of a common reality: Environmentally undesirable facilities seemed routinely to be sited in poor communities of color, which bore a disproportionate amount of the negative externalities of industrial land use decisions.[3] It was this issue that, in the late 1970s and early 1980s, spurred protests against a PCB landfill by activists in Warren County, North Carolina, attracting national attention and leading some to mark it as the genesis of the EJ movement.[4]

On the heels of the protests in Warren County, and others like it, two key reports that would solidify the EJ movement were published. The first, issued by the United States General Accounting Office in 1983, focused on the Southeastern United States, and discovered that the majority of landfills were placed in poor and African-American communities.[5] The second, a more exhaustive study of the locations of commercial hazardous waste facilities across the entire country, was conducted by the United Church of Christ's Commission for Racial Justice and released in 1987. This latter study concluded that race was the key factor in determining where hazardous waste facilities would be located nationwide.[6] These two reports, along with a litany of other writings, protests, court battles, and even an executive order,[7] served to galvanize the fight against discrete industrial facility siting decisions into a cohesive EJ movement.

It was against this backdrop that Chester, Pennsylvania, a small, predominantly African-American city in Delaware County, would become ground zero of the EJ movement in the 1990s. In Chester, the movement found a community with not only high rates of poverty, crime, and unemployment, but also with higher than average blood-lead levels in children, a higher than average risk of cancer, a mortality rate higher than the rest of the county, and the highest child-mortality rate in all of Pennsylvania.[8] To EJ advocates, it was no coincidence that Chester also happened to be home to a disproportionate number of commercial hazardous waste facilities. In fact, between 1987 and the mid-1990s, five waste facility permits were issued for the city of Chester, with a total potential capacity of 2.1 million tons of waste per year. Meanwhile, in the rest of Delaware County (which

was apparently more than 91 percent Caucasian), only two such waste facility permits were granted, and their combined capacity was 1,400 tons per year.[9] Taking aim at the flow of waste and industrial facilities into the city, local citizens formed a group to give voice to the environmental concerns of the community. Eventually, through the involvement of public interest lawyers, the group, Chester Residents Concerned for Quality Living (CRCQL), began pursuing legal avenues to limit, or at least frustrate, attempts to locate additional industrial and waste facilities in Chester.

In 1996, CRCQL filed a suit in federal court against the state environmental agency alleging their issuance of a permit to a petroleum-contaminated soil remediation plant was a violation of residents' civil rights under Section 601 of the Civil Rights Act, Title VI, as well as a violation of EPA regulations promulgated under Section 602 of Title VI. The latter claim proved essential.

Under Section 601, there is an express private right of action for individuals, but succeeding on such a claim requires a showing of intentional discrimination. Since CRCQL (and indeed most plaintiffs alleging violations based on the discriminatory siting of waste facilities), could not demonstrate that the high number of such facilities in Chester was the direct product of intentional discrimination, their only hope was for the court to infer a private right of action under Section 602. In such an event, CRCQL would be able to succeed on a disparate impact analysis, based on a showing that the state's siting decisions disproportionately affected the African-American residents of Chester.

In 1997, the Third Circuit held that CRCQL could maintain an action under discriminatory effect regulations promulgated by the EPA pursuant to Section 602.[10]

While the Third Circuit's decision was a major victory for the residents and EJ advocates, it ultimately proved fleeting, as the underlying state permit expired after the ruling, leading the Supreme Court to declare the issue moot and vacate the Third Circuit's judgment before addressing its merits. In the years that followed, the Supreme Court cast further doubt upon the precedential value of the Third Circuit's earlier decision in Chester when it issued its decision in *Alexander v. Sandoval*,[11] seeming to foreclose the possibility of inferring a private right of action under Title VI based on federal regulations that target disparate impact.

While the Chester example proved anticlimactic with respect to the residents' civil rights claims against the state, it brought forth a critical acknowledgement, that industrial facilities have been routinely sited in poor, largely minority communities. The Chester example suggests that one potential cause is that industry was attracted to Chester, and cities like it, because it represented a path of least resistance. By organizing and resisting the siting of hazardous waste facilities in their city, the people of Chester altered the land use calculus of some industrial sectors, and inspired greater engagement in local decision-making.

Chester's fight typifies what the EJ movement has, at its center, done most effectively. It is a movement that continues, almost necessarily, to be fought most prominently at the local level. While prevailing notions of environmental justice have expanded over the years, taking on a broader range of issues, the outcomes that highlight the injustices at the core of the movement remain predominantly local.

The local nature of EJ concerns is manifest in the ongoing water crisis in Flint, Michigan. The crisis in Flint is one deeply grounded in governmental miscalculation, and, some would argue, indifference. In short, between 1967 and 2000, Flint's public water was supplied by the Detroit Water and Sewerage Department under the terms of a long-term contract. Prior to 1967, Flint's water was supplied by a city-owned system established in 1883, which drew from the Flint River and treated the supply at a waste treatment plant. This aged system served only as an emergency backup after 1967, and was run just a handful of times each year, solely for maintenance purposes. After the initial contract expired in 2000, the arrangement with Detroit continued on a year-to-year basis, subject to what turned out to be consistent rate increases each year. In early 2014, after failing to negotiate the terms of a renewal term with Detroit, the city began treating water from the Flint River, using the old system, and distributing it to residents.

Soon thereafter, residents began to complain about the smell, taste, and appearance of the water. Eventually, General Motors ceased using it in their plant entirely, noting its corrosive effect on its parts and machinery. What is now known is this: The water treatment was inadequate, leading to the distribution of corrosive water that, in addition to causing a number of independent health problems, eventually began leaching lead from the city's aging pipes; elevating blood-lead levels in residents, particularly children; and exposing them to a variety of health risks. Despite the rapidity with which these issues

began revealing themselves, it was not until late 2015 that there was even a basic recognition from authorities that Flint's water was problematic.

The decisions, failures, and neglect, which led to the water crisis in Flint, implicate a multitude of governmental agencies and actors. They are exhaustively detailed in a report commissioned by Michigan's governor.[12] But each of these decisions, failures, and instances of neglect might be seen to emanate from a single event: Flint's placement under emergency state control pursuant to Michigan's Emergency Manager Law. The economic and demographic conditions of Flint had, even before the water crisis, come to represent to many the type of industrial decline that has ravaged working-class communities since the late 20th century. As manufacturing jobs dwindled, so too did the population of Flint. By 2010, Flint's population was half of what it was in 1960, over 40 percent of its population was living below the federal poverty threshold, the median value of its owner-occupied homes was one-fifth of the national average, and the city was plagued by crime.

The importance of emergency control to the story lies not in the propriety of such a measure in principle, but in its practical effect on local control and its functional detachment from local concerns. As the governor-commissioned report on the crisis explains, the crisis in Flint occurred "when state-appointed emergency managers replaced local representative decision-making in Flint, removing the checks and balances and public accountability that comes with public decision-making."[13]

If the strength of the EJ movement is at its peak when directed locally, the tragedy in Flint presented a unique challenge, in the sense that the key decision makers operated externally, removed from the crisis and its victims. But while the challenge may have been unique, the lesson learned was less so. As the governor-commissioned report would go on to proclaim, the crisis in Flint is "also a story [ ] of something that *did* work," noting that were it not for "the critical role played by engaged Flint citizens, by individuals both inside and outside of government who had the expertise and willingness to question and challenge government leadership, and by members of a free press," the crisis may never have been exposed and mitigation efforts may never have begun.[14]

Today, the EJ movement is often viewed as a coherent, unified movement. Conceptually, this perception is not inaccurate; there is absolutely a shared understanding of the movement's existence as a wide-ranging phenomenon that is directed at protecting minority and low-income populations from absorbing negative environmental outcomes by virtue of their relative social, economic or political weakness. This broad view of the movement, however, is most useful in the abstract, as a point of reference. In practice, the EJ movement is most effective when it is operating at the local level, directed toward unique local concerns. It is this power to effect meaningful, practical change on the local level, often by supporting local actors, which drives the EJ movement, even today.

The broader understanding of the movement has no doubt served to compound the effectiveness of local action, strengthening mobilization, increasing attention, and increasing pressure on decision-makers. Just as it was in the beginning, however, the fight for environmental justice is most often a local one. ■

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## Endnotes

1. *Environmental Justice*, Environmental Protection Agency, https://www.epa.gov/environmentaljustice. This message has remained static on the EPA's website since at least 2008.
2. *See, e.g.,* Jonathan C. Augustine, Environmental Justice in the Deep South: A Golden Anniversary Reflection on Stimulus and Change, 47 *U.S.F.L. Rev.* 399, 433 n. 48 (2013)(listing a number of articles and commentators who have posited the environmental justice movement as a part of the broader civil rights movement).
3. *See e.g.* Sheila Foster, Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement, 86 *Cal. L. Rev.* 775, 788 (1998).
4. Augustine, *supra*, at 410.
5. U.S. General Accounting Office, Siting Hazardous Waste Landfills and Their Correlation with Racial Status of Surrounding Communities (1983), http://archive.gao.gov/d48t13/121648.pdf.

6. United Church of Christ, Commission for Racial Justice, A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites (1987), available at https://www.nrc.gov/docs/ML1310/ML13109A339.pdf.
7. In 1994, President Clinton signed an executive order directing, among other things, that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Exec. Order No. 12898, 59 F.R. § 7629 (1994), available at https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf.
8. *See* Foster, *supra*, at779 and 782.
9. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 928 (3d Cir. 1997), *vacated*, 524 U.S. 974, (1998).
10. *Id.*, at 937.
11. 532 U.S. 275 (2001).
12. Flint Water Advisory Task Force, Final Report (March 21, 2016)(emphasis in original), available at https://perma.cc/4REX-3HSV.
13. *Id.*
14. *Id.*

Commentary

# Bail Reform and the Immigration Dilemma: The First Unknown Hurdle

*by Michael Noriega*

Sweeping changes are often touted as a remedy to some deficiency or harm that has purposefully or systematically corrupted a process, and the recent revisions to New Jersey's money bail system are no exception. Defendants have been spending inordinate amounts of time in custody awaiting trial or court appearances, solely because they could not afford to pay nominal bail amounts. The state undertook the behemoth effort of overhauling the bail system by choosing to focus on a defendant's danger to the community rather than on his or her financial resources when determining bail. But like so many sea changes, it is likely to have unintended consequences. One unexpected pitfall is faced by non-citizen defendants, and it will require substantial attention once its adverse effects on the criminal justice system are fully recognized.

## Criminal Justice Reform

Criminal justice reform went into effect on Jan. 1, 2017. A monumental shift in the criminal justice system, it has its roots in an attempt to address a disparity between the economic means of low-risk defendants and their success in achieving pre-trial release. Signed into law on Aug. 11, 2014, the legislation redefined the pretrial release process. With it, judges wield authority to order the release of an 'eligible' defendant subject to defined conditions after the individual is screened via a risk-assessment scheme.[1] The release will be ordered in lieu of monetary bail. In addition to the new rules, departments, and procedures following implementation of Criminal Justice Reform, new complexities have now come to light. The author believes the intersection of immigration and criminal justice reform is creating a new host of problems that must now be addressed as the new system takes hold.

## Under Prior Law

It is common knowledge that today criminal defendants who are not United States citizens can face dire immigration consequences as the result of their charges. As of March 2010, criminal defense attorneys are responsible for properly informing their non-citizen clients of the immigration ramifications of criminal charges.[2] In the six years since the Supreme Court mandated that criminal defense attorneys take on the added work of understanding and advising on immigration law, the exact process of what happens to the criminal defendant after sentencing still remains somewhat mysterious. Currently, the precise moment when an open criminal charge begins to impact the immigration status of a non-citizen is not easily identifiable. Clearly, once a disposition is reached and the charges are resolved, immigration issues will absolutely surface, but, in reality, the analysis regarding these issues should begin much sooner, potentially at the time of arrest.

At present, the moments in which a police officer is authorized to issue a summons or warrant may change the entire outcome for someone's path through the immigration system, as a warrant may lead to an Immigration and Customs Enforcement (ICE) detainer being issued, while a summons may not, since the defendant will never reach the jail in those circumstances.[3] Once the ICE detainer exists, the person will have to face immigration authorities before his or her ability to post a bond can be determined.[4]

Therefore, under the previous bail system, a criminal defendant faced a difficult choice: bail out and confront the immigration authorities for a chance to receive a bond or face time in the county jail while his or her criminal case wound its way through the criminal justice system. In most instances, there was no real choice, as the only defense to their removal hinged entirely on the proper resolution of their criminal charge. For some, who unwittingly or hastily posted their criminal bail without

investigating the consequences, they would have to enter the gauntlet of removal proceedings from custody, while simultaneously attempting to accelerate and positively resolve a pending criminal matter if they were to have any chance of remaining in the country.

The immigration consequences of these cases can be bleak. Under the Immigration and Nationality Act (INA), immigration judges wield greater authority to deny a bond than their state court counterparts. Under the provisions of mandatory detention, the immigration judge need only determine that an individual is a danger to the community to decide that no bail is appropriate. Such a determination can come from a variety of offenses in the state system, from petty theft to non-violent drug offenses.[5]

Once an individual is deemed subject to mandatory detention, he or she must face the removal process from within custody. This is problematic, because most remedies to removal require proof that any conviction record does not disqualify the individual from the relief sought. If a defendant in a criminal case was released during the preliminary stages of the criminal process, and the somewhat more expeditious removal process has begun while the person is mandatorily detained, there is little chance of a positive outcome on the criminal case that would favor the removal proceedings. Defendants will either accept removal for lack of any other available options, or will plead guilty prematurely in the hopes of favoring their removal case. Either way, critical decisions were being made for the wrong reasons.

Instead, criminal defendants were better served investigating the immigration impact of their criminal charges and their chances of success. Otherwise, defendants who may have otherwise qualified for relief and a life in the United States were unceremoniously removed, leaving behind a pending criminal charge lodged as an active bench warrant, with little hope of it ever being addressed.

## Under Criminal Justice Reform

Now the question becomes: What can a criminal defendant do when he or she is being unwillingly evicted from the county jail on a third-degree criminal charge and forced into removal proceedings? Non-U.S. citizen defendants will now have to wait a minimum of 24 hours for a decision to be made about their pre-trial release. In that time, ICE detainers will be issued, and if they are deemed eligible defendants and released, they will be taken into immigration custody, where an entirely new process will take hold. A new problem then arises because defendants facing removal proceedings with open criminal charges could find themselves ineligible for bond.[6] Thereafter, they may be found ineligible for relief from removal without the disposition for their criminal charge.

For those with particularly serious offenses, in the first- or second-degree range, the reform will have secured their custody and assured that they face prosecution for their offenses. Upon conviction, they will likely face a limited menu of options to overcome removal, and they will eventually be deported. However, the distinction between offenders the criminal justice reform act considers low-level offenders and those the immigration court considers a danger to the community are drastically different. Therefore, the system now faces an inordinately large number of defendants who face merely third- and fourth-degree charges and are being released from county jails, detained by ICE, and removed before the prosecution of their case is underway. This unexpected consequence will find defendants and their attorneys in the position of advocating for mandatory detention in criminal courts, where it would not otherwise be required, if only to avoid initiating removal proceedings.

## Immigration Enforcement Memorandum

Adding to the unearthed chaos will soon be the ripples of the just-announced 'immigration enforcement instruction memos' issued by Department of Homeland Security (DHS) Secretary John Kelly. The pair of memos outline the government's aggressive plan to implement President Donald Trump's Jan. 25, executive orders on immigration enforcement. The orders do not change the law as it currently exists, but do change the policy of DHS and the enforcement priorities.

This, in and of itself, is not a novel feat. It is the particulars of the approach President Trump has taken which are unprecedented. The executive orders seek to enforce every immigration law on the books to the furthest extent possible. While all of these laws have existed since being signed by President Bill Clinton in 1996, they have never been executed upon as fiercely as this administration intends to act. By relying on the language of the statute, the order and memo target anyone who is convicted of a criminal offense, is charged with a criminal offense, or has committed acts that constitute a chargeable criminal offense.[7] The volume of individuals arrested and charged who will suddenly be targeted by ICE will soon begin to rise, and those indi-

viduals will have to face the new gauntlet of criminal justice reform before they face immigration authorities.

Jan. 1, marked a red letter day in furtherance of an effort to correct the longstanding bias against economically disadvantaged defendants. A new and unexpected consequence of this reform is the sudden transfer of criminal aliens to ICE custody earlier than has been seen previously. Jan. 25, now signals a new facet of this emerging hybrid of cases where the intertwined issues of immigration and criminal law will begin to blur. The net effect will be the removal from the United States of low-level, non-violent offenders, a new backlog of open criminal matters, and victims unable to achieve closure. Attorneys need to be vigilant in these matters, as their unsuspecting clients, thrilled at the prospect of being released after 48 hours or less in detention, are now demanding answers from counsel as to why their detention persists, but now under ICE custody.

Stemming from the decision in *Padilla,* and its New Jersey progeny, counsel will be responsible for making clients aware of the consequences, or at least advising their client to secure the appropriate advice.[8] Distressed families are becoming wary of the additional custodial maze, frustrated by the lack of answers as their family members are suddenly missing for hours or days, as they are transferred to one of the numerous ICE detention facilities throughout the state.

State criminal courts should now be fully familiar with the process of securing a criminal defendant who happens to be in ICE custody. Perhaps defense counsel, prosecutors and the courts should take up the task of identifying these matters in order to deal with them outside of the path criminal justice reform has carved out for them. Fair, just, and final conclusions benefit everyone involved in the process, and awareness of this immense problem and direct action on it will go a long way toward achieving that goal.

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## Endnotes

1. *See New Jersey, Judiciary,* Joint Committee on Criminal Justice Reform: *Report to the Legislature on Criminal Justice Reform*, Dec. 2015.
2. *Kentucky v. Padilla*, 559 U.S. 356 (2010); *State v. Nunez-Valdez*, 200 N.J. 129 (2009).
3. *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014)(holding that the "ICE detainer" triggering the commencement of removal proceedings was not a command, but a request.).
4. *See Id.*
5. *See Matter of Melo*, 21 I&N Dec. 883, 886 (BIA 1997) (holding that distribution of drugs is a danger to the safety of persons.).
6. Immigration and Nationality Act § 236.
7. AILA/Council Summary and Analysis of Trump Executive Order on Interior Enforcement, Jan. 25, 2017 AILA Doc. No. 17012506.
8. *State v. Gaitan*, 209 N.J. 339, 37 A.3d 1089 (2012) (holding that *Padilla v. Kentucky* is not a new rule and denying retroactive application in New Jersey.).

# Did You Really Say That? Ethics Violations for Discrimination Under ABA Model Rule 8.4(g)

*by Kenneth E. Sharperson*

*This is where the party ends*
*I'll just sit here wondering how you*
*Can stand by your racist friend*
*I know politics bore you*
*But I feel like a hypocrite talking to you*
*You and your racist friend*
They Might Be Giants, *Your Racist Friend*[1]

In Aug. 2016, the American Bar Association (ABA) voted to amend the ABA Model Rules of Professional Conduct by adding language that makes it professional misconduct for a lawyer to engage in harassment or biased conduct in the practice of law.

ABA Model Rule 8.4(g) (as amended) provides:

> it is professional misconduct for a lawyer to...(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[2]

After a comment period, the original proposal was revised as follows:

1. A knowledge requirement was incorporated. The rule now prohibits conduct a lawyer "knows or reasonably should know" is harassment or discrimination. This responds to concerns expressed by some regarding the scope of the prior proposal. The terms "knows" and "reasonably should know" are defined in the Model Rules, and this dual standard—"knows or reasonably should know"—is widely used throughout the Model Rules. *See* Model Rules 1.13(f), 2.3(b), 2.4(b), 3.6(a), 4.3 and 4.4(b).
2. Jury selection concerns were directly addressed. The revisions also include inserting into new Comment [5] what some have called "the Batson Sentence" from current Comment [3] to Rule 8.4. The sentence reads: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."
3. The "legitimate advocacy" exception was moved into the rule itself from the comments, and expanding it to also cover "advice." In addition, the "legitimate advocacy" exception has been moved into the black letter of the rule. It provides that new paragraph (g) does not preclude legitimate advice or advocacy consistent with these rules.
4. The "perceived" language was eliminated. The revisions include deleting from the definition of discrimination references to "membership" and "perceived membership" in one or more of the listed groups, as such language was unnecessary and some found it confusing.

New Jersey has implemented a lesser version of 8.4(g), which provides:

> it is professional misconduct for a lawyer to...(g)engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

Although New Jersey recognizes that the profession will not tolerate harassment and discrimination in the practice of law,[3] in contrast to the ABA rule, New Jersey's rule includes an exception for employment discrimination, which dilutes the rule. For instance, a comment to New Jersey's rule expressly provides that employment discrimination is not covered by the rule unless it has resulted in an agency or judicial determination of discriminatory conduct.[4] The rest of the comment explains the New Jersey Supreme Court's thinking regarding this requirement:

> The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

The comment section further notes:

> Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct.

New Jersey's rule is troubling because it fails to consider that discrimination in the employment context is harmful to the ultimate goal of diversifying the legal profession. There can be no doubt that discriminatory conduct on the part of a lawyer—whether in the employment context or in the course of representing a client—is particularly troublesome. Moreover, increasing diversity within the legal profession requires eliminating, or at least reducing, instances of actual employment discrimination. And, employment discrimination lawsuits by lawyers suing law firms are rare and lawyers suing their law firms are relatively rare. Thus, by New Jersey requiring a finding of discrimination as a condition precedent to disciplinary action, there are likely to be few disciplinary actions.[5]

A new rule of conduct addressing these issues could be used to encourage legal employers to reevaluate and monitor their firms' practices as part of a comprehensive attempt to eliminate bias and employment discrimination, promote equal access to justice, and increase diversity. While the threat of professional discipline will provide some limited encouragement, the more realistic objective will be for the rule to raise awareness concerning these issues, thereby encouraging voluntary compliance, including elimination of bias continuing legal education courses.

The NJSBA Diversity Committee believes ABA Model Rule 8.4(g) should be adopted by New Jersey because it makes it professional misconduct for a lawyer to harass or discriminate while engaged in "conduct related to the practice of law," including employment discrimination.[6] The rule responds to a real problem faced by members of the groups it aims to protect.[7]

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## Endnotes

1. When asked about the song, John Flansburgh of They Might Be Giants explained: "I think everybody in the world has had an experience kind of like that. It's really about the problem of just getting through the world and understanding how prejudice exists in the world." https://www.youtube.com/watch?v=Oglu7-5BT9I.
2. Jurisdictions with a similar rule have had no trouble with its interpretation and may provide some guidance here in New Jersey. *See, e.g., In re Thomsen*, 837 NE 2d 1011 (Ind. 2005)(during representation of a husband in a dissolution of marriage proceeding, lawyer continually made negative comments about the wife associating with a "black male" and "black guy." Because the parties agreed that the man's race had no relevancy to the dissolution proceedings, the court disciplined the lawyer, finding the legitimate advocacy exception did not apply.)
3. *In re Geller*, No. DRB 02-467, 1, 43 (N.J. 2003), http://njlaw.rutgers.edu/collections/drb/decisions/02-467.pdf (reprimanding a lawyer for, inter alia, making discriminatory remarks about a judge); In re Pinto, No. DRB 00-049 at 14 (disciplining a lawyer for making crude sexually explicit comments to client). *See also In re Walterschied*, Nos. DRB 00-234 and DRB 00-235 (2001), http://njlaw.rutgers. edu/collections/drb/decisions/00-235.pdf (disciplining a lawyer for, *inter alia*, engaging in sexual harassment of a client).
4. *In re Gourvitz*, Docket No. DRB 05-117, 1, 1 (N.J. 2005), http://njlaw.rutgers.edu/collections/drb/decisions/05-117.pdf (in which a lawyer licensed in New Jersey faced possible discipline for employment discrimination. This case involved alleged employment discrimination against a lawyer's secretary, not another lawyer.
5. Those laws also require people to bring individual lawsuits or agency actions to obtain any relief, a process that can drag out for years and cost a significant amount to pursue.
6. *In re Dempsey*, 986 N.E.2d 816 (Ind. 2013) (disciplining a lawyer under Rule 8.4(g) after he made various anti-Semitic statements about opposing parties); *In re Kelley*, 925 N.E.2d 1279 (Ind. 2010) (reprimanding lawyer who asked company representative if he was "gay" or "sweet"); *In re McCarthy*, 938 N.E.2d 1279 (Ind. 2010) (suspending a lawyer for thirty days for making racist statement to third party).
7. *In re Charges of Unprofessional Conduct Contained in Panel Case No. 15976*, 653 N.W.2d 452 (Minn. 2002) (disciplining lawyer who sought to have judge's disabled law clerk removed from the courtroom); *Fla. Bar v. Martocci*, 791 So.2d 1074 (Fla. 2001) (disciplining lawyer who engaged in "sexist, racial, and ethnic insults" during depositions). *See also* Mass. Rules of Prof'l Conduct R. 3.4(i) (2015) (prohibiting a lawyer from engaging in conduct manifesting bias or prejudice while appearing in a professional capacity before a tribunal). The comment to the rule itself expresses a concern about the discriminatory use of peremptory strikes. Model Rules of Prof'l Conduct R. 8.4 cmt. 3.