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Identifying and Exposing The Many Faces of Bias in the Legal Profession

INTRODUCTION

This paper serves as the basis for a one hour discussion of a dirty little secret of which our entire profession is already in on. Thus, it may not be so little and it is not always considered dirty. However, it meets the definition of a true secret because no one likes talking about it especially when we might be viewed as one of the characters in the secret. Yet, not talking about it does not lessen its impact or cause its undesired problems to vanish with the passage of time. *Of course, the secret to which we refer is the existence of unacceptable bias in our profession and workplace.* Yes, this secret continues to exist in 2009 despite layers of legislative enactments to stamp it out.

During the presentation of this paper, the focus will be on identifying, owning and eliminating our biases. We have them, you have them and everyone in the entire profession has them. They are sometimes acceptable but never when they adversely impact human relations, especially in the profession and in the workplace.

We've found the best way to deal with this secret is to quickly recognize and expose bias immediately upon it rearing its ugly head. We should do so in such a manner that the person who exhibits it becomes uncomfortable acting in a similar manner in the future. In fact, the person should be so uncomfortable that he or she instantly realizes the error of his or her ways and demonstrates a willingness to promptly and permanently work on turning over a new leaf. Taking immediate corrective action requires a personal and total commitment to be involved and to speak up in a firm, unequivocal but non-confrontational manner, when we hear those inappropriate off-color jokes about gender, race or national origin, sexual orientation and the like.

More often unconsciously than consciously, we contribute to and feed biases simply by our silence, even when we do not like or agree with what we are hearing or seeing. We do so consciously by rationalizing that our friendship, business relationship

or other status with the speaker or actor is more important than the hurt or harm that might result from his or her bias conduct. How many of us have been afraid, on one or more occasions, to say to a friend, 'you are too inebriated to operate your motor vehicle safely?' Better yet, how many of us would knowingly go along for the ride with a friend we know is too inebriated to drive? The answers are VERY few. We should take the same approach when it comes to setting our friends straight about the biases they exhibit. Unfortunately, it is much more comfortable for us to go with the bias flow than to put forth little effort to take corrective action. We rationalize that he or she will be self-enlightened one day; one day someone will put him or her in their place; I am not like that; and/or it didn't do much harm this time, I'll wait until it's important to say something.

In almost an equal number of situations, if not more, we unconsciously follow or subject ourselves to the lead of others in a number of areas. We follow that same pattern when we witness bias. We hear what we wish to hear, see what we wish to see, do what we wish to do and believe what we wish to believe even when the clear facts before us suggest that we think before we jump to conclusions.

We simply ignore whether biases we witness are inappropriate, perhaps because we have witnessed similar things so many times previously that we have become desensitized to its inappropriateness. When we tune out on inappropriate bias, we may be sanctioning it subconsciously. Just as ignorance of the law is no excuse for violating it, unconsciously fostering biases is not acceptable either. We can and must be more in tune to what we hear and observe in terms of bias.

Definition of Bias

In this paper and during the accompanying presentation, when we reference "bias," we are concerned only with the actual or potential adverse impact it has on the legal profession and in the workplace as it relates to human relations or interactions.

The American Heritage Dictionary defines bias as: A preference or inclination that inhibits impartiality; prejudice.

Webster's New Collegiate Dictionary defines bias as: To give a settled and often prejudiced outlook to a situation.

Webster's Desk Dictionary defines bias as: A predisposed point of view; partiality, preconception, prejudice.

Wikipedia, the free encyclopedia defines bias: A term used to describe the tendency or preference toward a particular perspective, ideology, or result, especially when the tendency interferes with the ability to be impartial, unprejudiced or objective.

The Lectric Law Library defines bias as: Any mental condition that would prevent a judge or juror from being fair and impartial is called bias; A particular influential power which sways the judgment; the inclination or propensity of the mind towards a particular object.

Black's Law Dictionary defines bias as: A preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction; a condition of the mind, which sways judgment...

Webster's New World Medical Dictionary defines bias as: When a point of view prevents impartial judgment on issues relating to the subject of that point of view. In a clinical trial, bias refers to effects that a conclusion that may be incorrect as, for example, when a researcher or patient knows what treatment is being given. To avoid bias, a blind study may be done; Deviation of results or inferences from the truth, or processes leading to such systematic deviation. Any trend in the collection, analysis, interpretation, publication, or review of data that can lead to conclusions that are systematically different from the truth.

Two Components of Undesirable Biases

Inappropriate bias generally consists of a mental aspect and a physical (action) aspect. The former may exist absent the latter but the latter cannot exist without the former even if the former is subconscious. Each of the above referenced definitions, focus only on the mental aspect of bias. And based upon those definitions alone, there is nothing illegal, inappropriate or even immoral about owning a bias. You might recall that all too common expression in your criminal law course in law school - You may hate your mother-in-law as strongly as you wish. You may even consciously wish harm befall her. However, the moment you commence to take action toward harming her, that conduct could turn criminal (an assault or attempted battery or conspiratorial in nature if you act with others). Similarly, actions we take based upon biases we hold could result in sanctionable conduct. We find many instances of such prescribed actions in our code of professional conduct and in employment laws. Accordingly, it is this physical (action) aspect of bias that commands much of our attention in this paper.

As we stated previously, we all have biases. It is an almost natural occurrence in the journey of life. For example, when we are placed in a new environment with persons of backgrounds different from ours, it is natural to view this difference as an unwanted barrier or to some even a burden to interaction. But differences could also easily be viewed as a learning experience or challenge. Viewed in this way, differences become a win for you and others in the environment.

Many of you will form biases about us as authors and presenters of this paper. Many of you know Sam but there are quite a few who do not. And most have never met Stephanie. Yep! This is an environment that affords the opportunity for you to form some biases about us. And there's almost a 100% chance that many of you have formed biases of which it will take us a bit of work to undo. Those biases are likely based upon the following: We are new faces or we are not regulars at these bi-annual conferences; the men may not identify with Stephanie and the women may not identify with Sam; some may identify with or against Sam because of his race and with or against Stephanie because of hers; some have formed biased opinions regarding what we might know or not know on the subject of bias; etc. Whatever the biases are, without a doubt, most of you have formed them.

We (people generally) accept, encourage or foster certain biases. DOES ANY ONE HAVE AN EXAMPLE OF A BIAS THAT SOCIETY GENERALLY ACCEPTS OR FOSTERS WITHOUT MUCH OBJECTION FROM ANYONE? How about religion and

religious worship? We shall share more later in this paper regarding the best known most acceptable bias.

Because no one is free of biases, it is impossible to legislate or regulate them completely out of existence. When we make attempts to do so, those in charge of the legislative process always seem to carve out exceptions, generally for biases they or special interests own. Nonetheless, we have countless pieces of legislation and regulations in place at the Federal, State and Local government levels to provide for the imposition of sanctions when action on our biases result in harm to another or disrupts the workplace. As previously stated, while these legislative efforts are helpful, they do not constitute a silver bullet for bringing an end to undesirable biases and resulting discrimination.

The hallmark of jurisprudence is the civilized resolution of disputes and settling differences. In the criminal and civil tribunals, we do not attempt to regulate away the existence of bias. We simply insist that the final arbiters of fact (the Civil and Criminal Jury respectively) engage in their duties fairly by admonishing them as follows: *“Do not let bias, sympathy, prejudice or public opinion influence your verdict.”* and *“Do not let bias, sympathy, prejudice or public opinion influence your decision. Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant(s) or alleged victim(s) based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation age or socioeconomic status.”*¹ In other words, we do not tell them that they are not supposed to possess biases. However, we do expect them not to be influenced by any biases they might possess. You will note that while the instruction to the jury in criminal cases is much more detailed in its explanation regarding bias, neither the criminal nor the civil instruction actually defines bias for the jury.

Justice requires that the juries not be influenced by bias in favor of or against any individual subject to the particular cause before the court and that they be perfectly free to act only as the law and facts dictate. A juror may be removed or disqualified from service if bias in favor or against an involved person or the justice system, as a whole, can be properly shown.

In addition to a host of Federal, state and local laws and regulations prohibiting bias that results in discrimination, the California Rules of Professional Conduct also preclude bias and resulting discrimination. The language of these rules, in pertinent part, reads:

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client.²

When we engage in harmful action as a direct result of a bias, we refer to such conduct as discrimination. As we shall see later, biases and resulting discriminatory action manifest themselves in many forms. Bias and discrimination may be demonstrated by action or inaction; they may manifest themselves overtly or covertly;

they could be obvious or subtle, explicit or implicit, or verbal or non-verbal. Regardless of the form, if discrimination is the result of bias, sanctions may attach.

Recognizable Forms or Types of Bias

Some biases are more recognizable and more prevalent in the profession and the workforce than others are. Below, we have identified and divided some biases based upon whether they are more or less common than others are.

More commonly recognized biases - these are biases we witness or hear about frequently in the profession, in the workplace, and in other walks of life. These are not necessarily listed in a particular order.

Age - Age bias and resulting discrimination now has the dubious distinction of being in the top spot among forms of bias and discrimination in the workplace.³ Accordingly, we devote more attention to this area than to others referenced in this paper. A recent workplace survey conducted by Adecco USA⁴ found that most workers surveyed (61%) feel that diversity in their workforce makes their company more successful. Yet nearly half of all employees surveyed (47%) reported experiencing discrimination and 52% of those named age discrimination as the form that impacted them. Age bias in employment negatively impacts the old and the young alike. For example, some employers tend to paint all generation X'ers with the same brush as lacking in loyalty, lacking good work ethics and as being all about themselves. Thus, many employers do not wish to take a chance on employing X'ers. This is the flip side of the bias we usually see, that against the over 40 group. However, the over 40 worker is still the recipients of the vast majority of age discrimination. Employers tend to generalize that they have low productivity as a result of being too slow; having too few technical skills; getting injured easily and are ill too often. Below are some astounding statistics regarding ageism and the U.S. workforce which underscores why we need to change our bias attitude against the older worker, underscores why we need to change our bias attitude against the older worker.

By 2012, nearly 20% of the total U.S. workforce will be age 55 or older, up from just under 13% in 2000. ("Labor force projections to 2012: The Graying of the U.S. Workforce," Monthly Labor Review, February 2004)

The number of U.S. workers between the ages 55 and 64 will grow 51% to 25 million by 2012. At the same time, the number of workers between ages 35 and 44 is expected to shrink by 7%. (Wall Street Journal, Sept 20, 2005)

Nearly 7 in 10 workers expect to continue to work full or part-time following retirement from their career, including 15% who expect to start their own business. (John J. Heldrich Center For Workforce Development, Rutgers University, 2005)

The Bureau of Labor Statistics estimates that between 2002 and 2012, the number of workers 55 and older is expected to grow by nearly 50% and be

the fastest growing component of the workforce. (John J. Heldrich Center For Workforce Development, Rutgers University, 2005)

The job search is considerably longer for older job seekers. The average duration of unemployment for older job seekers in 2004 was 25.8 weeks, compared to only 18.9 weeks for younger job seekers. (AARP, Public Policy Institute, 2005)

What occurred at the National Maritime Museum in Greenwich, England when the mandatory retirement age was abolished is worth noting.⁵ The productivity among older workers increased as competition for upward mobility opportunities increased and a more loyal, stable and dedicated workforce also increased with several 71 year olds going strong with no plans of retiring. In fact, an organization in the UK has drafted a job application form (which is in wide use) that excludes any mention of age (such as date of birth), education or career history (in a manner that signals age) in an effort to tackle UK's endemic ageism in recruitment. The form was drafted in 2006 by solicitors for the Employers Forum on Age (EFA) in response to the European Union (EU) Employment Directive. Some of the above-referenced type of information would be available to the employer after the completion of the initial screening for hire process.

Also worthy of consideration is what we discovered regarding Finland's efforts to attract and retain the older worker rather than discriminating against and chasing them out of the workforce.

Finland has one of the more rapidly aging populations in Europe, easily outstripping the UK. By 2030, Finland is projected to have 26% of its population over 65. Until recently this concern was coupled with a low level of employment of older workers meaning the country was heading for a severe labor shortage. Then between 1998 and 2004, Finland saw the employment rate for 55-64 year olds rise from 34% to over 50%. That was due, in major part, to the advent of a new concept called "work ability" which has dramatic results and has seen governments from Europe to Australia inquiring about its success.

The small industrial town of Valkeakoski in Western Finland, located approximately 90 miles North of Oslo is at the leading edge of a workforce revolution. In just one of the town's several paper industry companies, UPM-Kymmene Tervasaari, a quiet but steady change in the age of its workforce is taking place. Four years ago UPM employed approximately 260 workers with almost 40% of the workforce over the age of 50 but rather than winding down for retirement, the older workers are being encouraged to stay at work. In 2009, UPM employs 840 workers and despite significant numbers of young hires in recent years, it maintains an average workforce age of 44 years.

The company is giving the older worker extra training and moving them to more appropriate jobs where possible and treating them like senior and seasoned company elders. In addition, workers who remain in the workforce after age 63 are given the carrot of a 4.5% increase in their pensions for every year they stay until the age of 68. In just three years, between 2000 and 2003, the company's average retirement age rose from 57 to 59. Since the work ability program was introduced, the employment rate of Finns aged 55-64 has jumped more than 13% (the highest in the EU) with no adverse impact on productivity. Simple but radical reasoning gave rise to the "work

ability” program. According to Professor Juhani Ilmarinen, Finnish Institute of Occupational Health, who studied the aging change in the Finnish workforce, “We have been blaming the wrong source - the human beings - saying ‘you are poor’ although really it’s the job that is poor.” It is this philosophical change that is behind this positive shift in the Finnish workforce - “Naturally you decline physically but a lot of cognitive functions improve with advancing age” continued the professor. If employers do not understand that their workers are changing as they age and change the work accordingly, he said, then all they (the employers) see is decline in productivity.⁶ It seems Finland has a book on improving ageism in the workforce from which the U.S. could take another page, namely, a major shift in our attitude toward the older worker.

Gender - For the last two decades gender bias and discrimination was listed as the fastest growing form of bias and discrimination in the workplace. In the above-referenced survey by Adecco USA, consistent with other studies and surveys on the subject of gender bias, found that gender bias and discrimination was listed as the second most prevalent form of workplace bias and discrimination at 43%, followed by race at 32%.

Some think the recent economic crisis has hit women more harshly than men. A recent article in Forbes Magazine addressed concerns that women in the financial services and insurance industry are being laid off in disproportionate numbers.⁷ According to Forbes, 72% of the 260,000 jobs cut at financial services and insurance firms have been women, even though women made up 64% of employment before the economic meltdown. Financial giants like Citigroup and Bank of America are seeing a rise in claims for gender discrimination.

The chair for the American Bar Association's Commission on Women in the Profession has recently echoed these concerns for women in the legal profession, noting that law firms are laying off part-time attorneys, 75% of which are women. A November 2007 survey by the National Association of Women Lawyers ("NAWL") found that women are about six times more likely than men to work part-time. In the average law firm, 1 in 8 women work part-time, as compared to 1 in 50 men.⁸

The most recent study by NAWL found that only 16 percent of equity partners at large law firms are women and they earn almost \$90,000 less than their male counterparts. Fewer than 10% of managing partners at large firms are women.⁹ The public sector is closer to reflecting the percentages of women coming out of law schools.¹⁰ In fact, women are more attracted to government practice for a number of reasons, including more control over their work schedules. It is believed that women experience less gender inequality in the public sector, than in private firms.¹¹

A report by the ABA Commission on Women in the Profession said that stereotypes may be the reason women lawyers are more likely than males to report bias in job interviews. For example, assertive women lawyers are rated poorly for interpersonal skills while male lawyers are praised for the same behavior.¹²

Pregnancy (sub-set of gender but distinctly different) - In 2009, in the United States and in many other countries, pregnancy discrimination is still so prevalent that it remains a distinct sub-category of gender bias and discrimination worthy of individual discussion. Can we do without them in the workplace? Can we do without them giving birth to new workers who will be responsible for our care and well being tomorrow? The answer to both is no. Then what’s all the fuss about when it comes to

being flexible in the workplace as to hiring them and preparing to share their work responsibilities while they are away for child birth? Sadly, the legal profession and U.S. employers, in general, are not alone in how they view child-bearing women in the profession and the workplace. We reviewed two articles on the subject (one from *management-issues.com* and the other from the *Times OnLine*).¹³ Both articles carried the same message - women of child-bearing age need not apply for jobs with small businesses. Those of us who secretly join that line of thinking could take a page from the book on how the country of Norway treats the subject. In Norway, women are entitled to 12 months off work with 80% pay, or 10 months with full pay. Mothers are required to take off at least the first six weeks after birth as maternity leave. The husband of a pregnant woman is entitled to take almost all of the 12 or 10 months off instead of the pregnant mother and he must take off at least 4 weeks of that time off or it will be lost for him and the mother.¹⁴

Ethnic or Racial - In the United States, we notice race quicker, more often and generally form stronger opinions about it before we process any other information about another person. If the other person is of our race, we tend not to notice it or we tend to give the benefit of any doubt in favor of persons of our own race. Despite the accuracy of this, there are instances where the wrong assumption feeds bias. Example, recall the allegations regarding President Obama and the Black vote. The prevailing opinion in the U.S. was and is that the only reason he received such a high percentage of the Black vote was because he identified with Blacks and vice versa. That fostered the idea that Blacks were so emotionally tied to race that they would vote for another Black regardless of qualifications. Yet none of the news media that promulgated this idea took the time to analyze or question why three other Black Democrats, Shirley Chisholm (ran once), Jesse Jackson (ran twice) and Al Sharpton (ran once) and one Black Republican, Alan Keyes (ran three times), failed to gain the same or similar vote percentages during the primaries when they also ran for the Presidency. This is but one example of how we unconsciously and consciously hold on to preconceptions and stereotypes that foster racial bias and promotes more of the same in the profession and the work force.

National Origin - The United States and the United Kingdom are the greatest melting pots in the world in terms of differences in the faces of their inhabitants. The differences in these faces are what make these countries unique. The people of these countries have come from many places with their variety of talents, cultures and determination to better themselves and their countries. Yet, these are two countries where we find the greatest internal strife between the people. And much of it is based upon the very things that make these countries great. Yes, we find disharmony among the inhabitants of other nations but it generally centers on issues other than differences in national origin. This is due, in some part, to the fact that most of the other countries are practically homogeneous. While we non-indigenous looking visitors to homogeneous countries are items of curiosity, we are generally treated much better than members of their country are treated while visiting long term or residing in the United States. This adverse treatment escalates after immigration and assimilation into the U.S. workforce. There is generally no reason for this other than they appear to be of a national origin we hold in low esteem and we often cannot articulate a sound reason for doing so.

Skin Color - While this sounds like race, it is far different. However, similar to pregnancy being a sub-category of gender bias, skin color bias could easily be

classified as a sub-category of racial or national origin bias. Yet, as is the case with not all women being subjected to bias and discrimination in a particular organization, some persons of the same race or national origin may be subjected to bias and discrimination while others are not. For example, fair skinned Native-American, East Indians, Latinos and even African-Americans generally face much less skin color bias and discrimination than darker skinned members of these ethnic groups. There have been many studies regarding the treatment of pale whites vs. whites w/ some skin tone; light complexion blacks vs. dark complexion blacks, dark complexion East Indians vs. lighter complexion East Indians, etc. All such studies reveal disparity in acceptance and or treatment, especially in the workplace.

Religious - Far too many people are the subject of bias and discrimination simply because of their religion. When it comes to biases and discrimination, nothing is sacred and no one is truly safe from one group or another. Despite knowing this, the world's people generally accept the world's greatest bias - difference based upon our respective religions. Because of differences in our religious beliefs, we self-segregate. Some care little about learning why the religious tenants of other groups are different than ours or whether such knowledge would be useful in removing bias barriers. We are comfortable with hearing only the teaching of our beliefs, even in cases where different groups hold to the same concept that there is one supreme being and those groups worship that same supreme being. Our religious teachings are supposed to guide our daily existence and interactions with others. Again, we generally hold that religious bias is off limit if it does not result in outward manifestation of harm prohibited by the law. For example, it is not unlawful and acceptable not to associate with members of a particular religious group. However, it is unlawful to adversely impact a person's employment opportunities because of membership in that religious group.

Sexual Orientation - California and other jurisdictions have slowly enacted laws over the past decade and a half to include sexual orientation among the basis on which discrimination shall not exist in education, employment, professions, public accommodations, and the like. Yet we continue to witness bias and discrimination against gays in the profession and in the workplace. We leave the discussion of Proposition 8 for another day. There is one bright spot in this area, reports of bias and discrimination against gays are far fewer in the legal profession than in the workplace generally. And reports of the same are fewer in relation to public employment than in private employment.

Disability - There was a time in the not-too-distant history of this country and others when those with disabilities (mental and physical) were hidden away as if they were a source of embarrassment to those close to and responsible for their care. They had absolutely no rights and took the brunt of all sorts of ills. Prior to 1992, in American jurisprudence, we recognized medical conditions (permanent and temporary) as affording limited protections to the American worker. However, these laws were not consistent from state to state or even from one local jurisdiction to the next in the same state. Private business had one set of regulations which governed them and the public sector had another with some similarities between the two. Then the American with Disabilities Act (ADA) was passed. Not only did the ADA level the playing field for those with disabilities, in many cases, public and private business began claiming that the field was turned upside down and given to the disabled on a silver platter. Among the classes of persons who have long been the subject of wide-spread, intentional and overt bias and discrimination, those with disabilities seem to be the best protected today

as a result of the enactment of ADA. This is an instance where legislation has gone the farthest in reversing bias and discrimination. But we still see far too many instances where discrimination against persons with disabilities exists in the workplace.

Sources of Biases

We probably start learning biases prior to birth from the words and acts of our parents. That learning process continues as we venture out into the world; we learn them during our education process (both secondary and post secondary education); we learn them from friends; we learn them from our social and cultural environments; from the news media; We continue to learn biases until we die. We shed some and sometimes replace them with others. We find them throughout life's experience for good or bad and they will always be with us regardless of how much we wish them away.

As was stated previously, there are good (or least acceptable) biases. For example, there are biases in favor of distancing ourselves from those who we know are bent on a life of crime and destruction; and there are negative biases that are acceptable provided they do not color our appreciation for other individuals. The religious bias of self-separation falls into this category. We refer to this as viewing of the world through those proverbial rose-colored glasses and that cannot be legislated, regulated or rewarded out of existence. Thus, we just accept this as part of life's journey.

How to Identify Bias

There is no magical answer to the question of how does one recognize bias. Sure, we have definitions and examples that explain bias. However, we know it comes in many forms, which seems to make it difficult to recognize at times. But recognizing it just isn't difficult at all. We need only remember and apply **Justice Potter Stewart's Definition of Obscenity, The Casablanca Test**: ". . . I know it [obscenity/pornography] when I see it." In Casablanca, as a Navy lieutenant in World War II and watch officer for his ship, Justice Stewart had seen his men bring back locally produced pornography. He knew the difference between that hardest of hard core and much of what came to the Court. He called it his "Casablanca Test." In 1964, Justice Potter Stewart explained his understanding of "hard-core" pornography, or what is obscene, in a case before the court, by saying, "I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it."¹⁵

We too know bias when we see or hear it. We need only choose to recognize it rather than continuing to turn a blind eye to unacceptable bias.

What Should We Do Upon Recognizing Bias

Here we refer to both the mental and physical aspects of bias because if we witness the unacceptable mental part and do nothing, we give tacit approval for the physical part and resulting harm to follow within or outside of our presence.

After we recognize and accept that biases are a part of life, we can move more effectively toward devoting meaningful time and attention to changing or eliminating those that are doing the greatest harm in the profession and the workplace.

Again, as was stated previously, it is not unlawful and is acceptable to own one or more biases. But it is always a best to reexamine one's biases and to work on changing those that do more harm than good in human relations. We can and we do change to lessen or eliminate the negative impact of our biases, especially the most offensive one. You might recall Governor George Wallace's apology to Blacks for his biases and inappropriate actions he took against them. And more recently, in February, 2009, Former Klansman, Elwin Wilson, appeared on international TV (CNN) and apologized to Congressman John Lewis for inappropriately beating him nearly 50 years prior during the latter's exercise of his right to peacefully demonstrate at a South Carolina bus station against racism. As CNN commented, this "demonstrates the capacity of people to change" negative biases.

Every member of the legal profession and all who are connected with the administration of justice in the U.S. have an obligation to do all that is legally within their power to promote positive changes in the unlawful biases we hold and the actions we take upon them. This does not mean that we should simply become tolerant or more tolerant of others. It means we must be more accepting of one another and make a better effort at understanding our differences. In fact, we should strive to delete from our vocabulary the term "tolerant and tolerance" as it relates to our social interactions with other human beings because more often than not it means to put up with others.... We should all want others to do more than put up with each other and we should take the steps to initiate this acceptance rather than wait for someone else to do so.

The Honorable Dennis Archer, former Michigan Supreme Court Justice and former Mayor of Detroit, while serving as the first African American President Elect of the American Bar Association in 2002, delivered a speech entitled "The Value of Diversity: What the Legal Profession Must Do To Stay Ahead of the Curve" to law students at Washington University. In that speech, he made some profound and memorable comments regarding diversity which are also applicable to discovering and confronting biases. Speaking of the defiance of Rosa Park to an unjust Alabama law requiring Blacks (regardless of gender, health or medical condition) to give up their seats on public transportation to Whites (regardless of the gender, health or medical condition), Justice Archer said, *"Think about that the next time you witness or experience an injustice. Your refusal to perpetuate, participate in or stand idly by something you know is not right - be it law or not - could inspire a champion (such as Martin Luther King Jr.) who might change the world because of your tiny action. You might even be that champion. It is a great risk, and though it may bring great costs, the alternative is far costlier."* Then he quoted Dr. King as stating, *"[t]he ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy."*

Although Justice Archer quoted from a speech, on race relations and diversity, delivered by Dr. King many years previously, those quotes are still true today and are fully applicable to the elimination of bias in the legal profession and the workplace. We are governed by the rule of law and the legal profession is viewed as the keeper of the same. We must cease being afraid to speak up when we hear, see or otherwise come upon unlawful bias in words or deeds. If there is no more reasons for doing our part to

eliminate bias, and we hope we all believe there are, we should feel compelled to do so for the good of the profession and because it would be good for business.

The world is rapidly changing. None in the U.S. know this better than Californians. It is projected by the year 2056 that people of color will constitute a majority of the U.S. population. We are only a few years short of this population shift in the State of California. Yet we still find that ethnic minorities and women (combined and based upon their race and gender) are 60% more likely to be the subject of bias and discrimination than any other group.¹⁶ As these population shifts occur so does the norms of our way of life.

Undesirable biases in our profession and the workplace that go unchecked today will be waiting to confront us tomorrow. Now is the time for action by each of us. We should not tolerate or accept expressions of bias or action that foster them.

Efforts to Reduce Negative Biases, Especially in the Workplace

We should not take offense but be ready to listen when an apparent improper bias is exhibited in the workplace and some one has pointed it out to us. It is the recognition that growth and positive change occurs only when we are made aware that we might be engaging in improper bias conduct and we accept that fact. "It is always easier for us the look at the speck in our brother's eye than to consider the plank in our own eyes. We must, first, remove the plank from our own eye, and then we will see clearly to remove the speck from our brother's eye."¹⁷

We should never be afraid to extend apologies for perceived bias conduct. We have become such a litigious society that we equate extending an apology with the creating the first cause of action in a lawsuit. As a consequence, we lawyers, universally advise our clients to say nothing because it might be used against their position later. While continuing to protect the rights of our client, we need to also consider whether our action sometimes add fuel to the flames or does more harm than good to possible early resolution.

Finally we should seek out others (for purpose of growth and change) to get a better understanding of why certain words or conduct are considered bias. Most of the time, we should have a clue that we are exhibiting inappropriate bias. However, there are many occasions when ones cultural, geographic habits or other aspects of our growth do not readily indicate to us that certain words or actions are deemed to be biased and offensive to others. For example, the use of the phrase, "he welshed on me" or "they were engaged in a Mexican stand-off" are offensive to the groups referenced therein. But some of us use these phrases meaning no harm or disrespect to members of those groups. We'll see other examples of this in hypotheticals below.

You will note that all of the above recommendations for reducing negative biases in the profession and the workplace suggest looking inward to one's self. The reason is

it is much better to start looking at yourself than to receive mandates to do so from those in positions of authority. And you can't help others until you have placed yourself in the best position to do so. If you approach another with an offer to help him or her with a bias and that person is able to instantly list your offensive biases, perhaps a few of which he or she picked up from you, your credibility for promoting change is reduced to zero.

After one has focused inward to reduce possible negative impacts of bias in the profession and the workplace, the next step is to review what policies the employer has in place to address bias. These should include sound (substantive, understandable and achievable) policy objectives which are applied and enforced fairly. This should include a fair, objective and serious complaint process; adequate training which is updated and repeated with some degree of frequency to ensure new hires know what is acceptable; and a fair and objective mechanism of monitoring compliance.

Finally, select the best time, place and approach to raise the subject of bias; discuss what it means to work on eliminating bias; what you did to eliminate your own bias; how you feel after doing so; and what it would mean to other individuals and the workplace, as a whole, to reduce biases. Recruit that person to work on his or her own biases and then join you in approaching others to do the same.

Relevant Bias and Discrimination Statistics

- One in six U.S. employees complained of discrimination in 2008.
- 15% of all U.S. workers perceived that they were the target of bias in 2008.
- 31% of Asians, 26% of African Americans, 22% of white women, 18% of Hispanics and 18% workers over 40 complained of some form of bias treatment.
- Religious discrimination involving Muslims has doubled since 9/11/01.
- In 2005, the Council of American-Islamic Relations received more discrimination complaints in California than any other state, 378 or 19% of all complaints that year.
- Gender was the number one bias in the workplace for the past two decades.
- Age is the current number one bias in the workplace.
- Women make up 50% of the current law school grads but only 17% of partners in private law firms.

- In a 2006 survey conducted by The Women in Law Committee of the State Bar of California, 85% of the women surveyed perceived a subtle but pervasive gender bias within the legal profession.
- Assertive, demanding women in law are scored as too aggressive during performance reviews while their male counterparts are given high marks for the same behavior.
- 53% of workers surveyed in a 2008 workplace survey stated that they believe their companies would become more productive if it had greater appreciations for diverse backgrounds.
- And if none of the above gives rise to great concern for bias and discrimination in the workplace, try this: Workplace bias costs companies \$64 billion annually.

Bias and Discrimination Hypotheticals

We shall briefly examine and discuss as many of these hypotheticals as time permits to determine what, if any, bias is readily apparent and what course of action could the attorneys have taken to diplomatically but directly address them.

1. All counsel (four male counsel for plaintiffs; one female and three male counsel for defendants) and their clients are present for a settlement conference, the presiding female judge says to the female lawyer, *“Ms. Counsel I’ll hear from you first because the women always go first in my courtroom.”* And then in a clearly joking manner, she says, *“besides we women have to stick together.”* All counsel just smirk as the female attorney proceeds to explain her client’s position.

2. A Hispanic Attorney had been serving in the City of Las Vegas City Attorney’s office for more than 15 years when he was appointed City Attorney. The office is comprised of 30 attorney and 65 support staff members. The new City Attorney was the only attorney of color in the office at the time of his appointment. At the initial staff meeting following the appointment, staff comprised of attorneys and support personnel asked whether the future hiring criteria would include race as a factor. There are no Prop 209 laws in the Federal territory where Las Vegas is sited.

3. Upon recognizing that the short list of qualified applicants for a recent vacancy consisted of three Republicans and one Democrat candidate (an educated assumption based upon their resumes). The hiring authority, a Democrat, hired the one with the Democratic affiliation despite the fact that at least two of the Republicans demonstrated qualifications far superior.

4. A female attorney is assigned to work on a case with a more senior male attorney. The female attorney does the majority of the work in the case, including handling depositions and law and motion matters. A mediation is scheduled in the case. The female attorney appears for the mediation with her client, the defendant’s representative, who is another female in her mid-30’s. The plaintiff’s attorney, a male in

his 50's, states at the mediation that the Defendant must not be taking the case seriously because of the representatives it sent to the mediation.

5. The City Attorney of the City of Alpha and Omega is a Black male. His four Assistants consist of three white males and one Hispanic female. At a meeting at the City Attorney's office to discuss a major litigation matter with outside counsel (three white males), the City Attorney had a prepared list of detailed questions which were propounded to outside counsel. Each response given by outside counsel was directed to the three white male Assistants.

6. The City Attorney had a bouncy habit of entering the office each morning greeting the staff (attorneys and support alike) "good morning men and ladies." Would the response differ if the greetings were made to a group of females all of whom were superior to the greeting attorney? For example if he greeted the mayor and council members in the same fashion and a substantial majority of the council was composed of females.

7. The City Attorney was a devout Christian. He frequently wrestled with differences in his religious teachings and the secular laws that governed how he should interact with others in the workplace. During the hiring process, he learned that one of the finalists is gay, something that his religious tenants disfavor. He talks to his religious leader, not about the specifics of the individual applicants but about the fact that he might be faced with the prospect of going against the teachings and laws of God if he hires a gay but against the secular laws if he factors the person's gay status into his decision not to hire her.

8. A female attorney appears at a court reporting firm to take the plaintiff's deposition in a sexual harassment case. The plaintiff is a male who alleges sexual harassment by a female manager. The plaintiff's attorney, a middle aged male, introduces his client to the female defense attorney. The plaintiff responds by stating that "at least I have something good to look at during the deposition".

9. A white male law and motion judge has a policy of reserving the jury box for female lawyers (who he refers to as the gals) to sit until their matter is called while requiring male lawyers to sit on the first two rows behind the bar.

10. An Assistant City Attorney has provided impeccable legal work to the City of Logos for 12 years. He has a gift of gab and considered himself a *ladies* man. He frequently tells off-color gender and race based jokes (some in mixed company and other while he is with the boys). Those present when he tells the jokes just laugh at them because they know that he does not have a prejudice bone in his body. However, some staff consider themselves the brunt of some jokes and are increasingly complaining to each other that something should be done.

11. Apparently intending to be complimentary, a white male judge frequently states to municipal clients who appear in his court with a Deputy City Attorney, "You know you have one of the best Black attorneys around representing you."

12. City Attorney for the City Fairness is interviewing for the position of DAC. The City has an extremely tight budget. The top applicant for the position is legally blind. She utilizes the service of a guide dog and needs the assistance of another

person to assist with reading materials. Since the City Attorney has no funds available to hire an aid for the candidate, he hires the next best candidate.

13. A male attorney is starting trial in a complicated, multi-party lawsuit. A young, female attorney in his office has assisted him in all pre-trial proceedings and trial preparation. The male attorney tells his superior that he really wants the female attorney to try the case with him, but he thinks she is "too attractive" to take to trial.

14. Maria Chin, assigned to the misdemeanor prosecution unit, was given all cases involving Chinese-speaking citizens. This assignment was disfavored by most prosecutors.

15. Melinda Davis, a Deputy City Attorney, was assigned to the asset seizure unit which required an unusual amount of note taking and record keeping. She was assigned by her supervisor to take notes at all team meetings because she had typing skills which she acquired as a legal secretary prior to becoming an attorney and because she has good handwriting.

We are fully appreciative that much of this paper and the accompanying presentation was preaching to the choir. We are hopeful that something written here or discussed during the presentation has and will continue to be a source of encouragement for you to reach out and bring others into the fold of those who are committed to the never-ending task of stamping out negative bias, especially in our profession and the workforce. If you know of other matters we should include in similar discussions of this topic in the future, please do not hesitate to send us an email. On behalf of our firm, RANDOLPH CREGGER AND CHALFANT LLP, it has been our distinct pleasure to share some information on the subject and a few of our thoughts with such a distinguished group of cutting-edge lawyers in the field of municipal law.

We leave you with this thought - We will get the upper hand on bias, and discrimination in the profession and the workplace and everything will be alright if we all treat (and expect those with whom we work and associate to treat) everyone the way we would like to be treated if we were in their shoes because one day, if we live long enough, we will be in at least one group where we will be on the other side of the bias and possible discrimination issue.

Remember to live each day as if it is your last - and one day you'll be right and happy that you lived it that way.

¹ Revised Judicial Council of California Civil (CACI) and Criminal (CAL CRIM) Jury Instructions, 2008 - Instructions 100 and 200 respectively

² California Rules of Professional Conduct, Rule 2-400

³ Diversity Jobs.com Network, July 15, 2008

⁴ Adecco USA Workplace Insights Survey, Diversity Jobs.com Network, July 15, 2008

⁵ Management - Issues - The Shape of Things to Come, February 11, 2005

⁶ BBC News, Finland, June 2005

⁷ "Terminated: Why the Women of Wall Street Are Disappearing," by Anita Raghavan, March 16, 2009, Forbes Magazine.

⁸ 2007 National Association of Women Lawyers Survey on the Retention and Promotion of Women in Law Firms, can be found at www.nawl.org/Assets/Documents/2007+Survey+Report.pdf

⁹ 2008 National Association of Women Lawyers Survey on the Retention and Promotion of Women in Law Firms, can be found at www.nawl.org/Assets/Documents/2008+Survey.pdf

¹⁰ "The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?" by Judith S. Kaye and Anne C. Reddy, Fordham Law Review, March 2008 Vol. 76, No. 4) can be downloaded at <http://law.fordham.edu/lawreview.htm>

¹¹ *Women in the Law*, by Shimon Shetreet, Kluwer Law International, 1998, Chapter 8, "Perspectives on Women in Public-Sector Law," by Deborah S. Katz

¹² "Fair Measure: Toward Effective Attorney Evaluations, Second Edition," August 2008, can be purchased as www.abanet.org

¹³ *Management-Issues*, August, 2006; *Times OnLine*, July 2004

¹⁴ *BBC News*, Norway, March 2006

¹⁵ *Jacobellis vs Ohio*, 378 U.S. 184, 197 (1964)

¹⁶ *Management - Issues*, December 9, 2005, citing results of a Gallop Poll conducted to mark the 40th Anniversary of the EEOC

¹⁷ *Book of Matthew 7:3 and 5*