MCLE Self-Study Article

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DISCRIMINATION AND BIAS: STRATEGIES FOR PREVENTING AND RESPONDING IN THE INTELLECTUAL PROPERTY BAR

(See end of this article for information on receiving 1.0 hour MCLE self-study credit in elimination of bias.)

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INTRODUCTION

This article provides strategies for reducing bias within the intellectual property bar in particular, as well as in professional working environments such as law offices in general. We begin with an overview of the applicable laws to help provide a better understanding of the complexity of discrimination and bias. We then turn to a discussion of mechanisms for identifying both implicit and explicit biases and discrimination in the field of intellectual property law. The article concludes with a list of concrete strategies for combating or preventing the manifestation of these biases and discriminatory actions. This article is not intended to provide an exhaustive coverage of the existing discrimination laws. Rather, it seeks to build on the relevant laws that are in place to protect lawyers with diverse backgrounds.

LEGAL STANDARDS

There are a number of federal and state laws that address discrimination in the employment context. For instance, Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination based on membership in a "protected class."[1] Classes that are protected by Title VII include: race, color, religion, sex, and national origin.[2] Employment discrimination is defined as applying different terms or conditions of employment to one individual as compared to another, because of that individual's membership in a protected class.[3] The comparison must be made between individuals who are "similarly situated" in terms of their job titles, positions or duties.

If similarly situated individuals have different terms or conditions of employment, then it would be appropriate to examine the reason for the differential treatment. For example, where two employees of different races are treated differently, then a *prima facie* case of discrimination may be made against the employer.[4] In litigation, upon establishing a *prima facie* case, the burden shifts to the employer to prove that the basis for the differential treatment is due to a legitimate business purpose,[5] which if proven would then shift the burden back to the claimant employee. To succeed in an unlawful discrimination case, the employee will then need to demonstrate that the allegedly legitimate business purpose is in fact a pretext for the differential treatment.[6]

In addition to Title VII, certain statutes have been promulgated to provide more specific protections or rights to individuals in minority groups or those with special needs. For instance, the Equal Pay Act of 1963 ("EPA") protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.[7] As another example, the Americans with Disabilities Act of 1990 ("ADA") prohibits employment discrimination against qualified individuals with disabilities.[8] Further, the Age Discrimination in Employment Act of 1967 ("ADEA") protects individuals who are 40 years of age or older from age-based discrimination.[9]

It should be noted that Title VII, the ADA and the EPA cover all private employers and state and local governments, as well as educational institutions that employ fifteen or more individuals.[10] These laws also cover private or public employment agencies, and labor organizations.[11] The ADEA covers all private employers with twenty or more employees, state and local governments (including school districts), employment agencies, and labor organizations.[12]

There are several California laws that specifically address employment discrimination. The Fair Employment and Housing Act ("FEHA") provides coverage for race, ethnicity, gender, and sexual orientation, in the procurement of housing and public accommodations as well as employment.[13] The Unruh Civil Rights Act ("Unruh Act") applies to business establishments of every kind, which provide services, goods, or accommodations to the public.[14] The Unruh Act prohibits all types of "arbitrary discrimination" and not just discrimination based on the categories covered by the FEHA above.[15] Discrimination based on personal characteristics, geographical origin, physical attributes and individual beliefs, including family or marital status and sexual orientation, are also protected by the Unruh Act.[16]

A crucial point about the Unruh Act is that it covers perceived characteristics that may or may not actually exist.[17] Accordingly, a law firm can be liable for unlawful discrimination for treating a person differently as though that person were gay or lesbian, for example, regardless of whether that person actually is gay or lesbian. This broader mandate of the Unruh Act opens up potential discrimination claims by patrons and not simply by employees, and thus is an important statute to understand.

DEFINING AND IDENTIFYING DISCRIMINATION

The first step in preventing discrimination is to identify it. While most people think and say they have no race-, ethnic-, or gender-based anima, all people have biases. To the extent that any of those biases are *implicitly* based on racial, ethnic or other individualized characteristics, they can lead to discrimination.

By definition, bias is the pre-judging of a person based on his or her (perceived or actual) status of being a member of a particular group. Bias can be explicit, implicit or even unconscious. It is important to understand that *bias begins in the brain and often manifests itself as a generalization in one's thought process*.[18] And, it is more important to recognize that beyond one's thoughts, bias often morphs itself into a person's words, conduct and actions, very often in the subconscious.

Biases can be in favor of one group, or against another group. A "preference" is when bias operates in favor of a group. Many of us have biases in favor of those who belong to our various "in-groups," which can include members of our sorority or fraternity, fellow alumnae of our *alma mater*, and those who share our beliefs and preferences. In comparison to the traditional biases, today, the in-groups for a particular individual are more likely defined along the lines of the "class" to which the individual belongs. In other words, in a contemporary progressive society, the traditional racial and ethnic boundaries are typically replaced with socioeconomic or privilege-based attributes with which a person identifies. As an example, someone with a high educational or socioeconomic stature (*e.g.*, a Harvard graduate or a popstar's daughter) may receive more favorable treatment or preference when applying for a position, regardless of his or her race, ethnic background, or capabilities.

Moreover, it is noteworthy that a preference for a group can give the impression of bias against another group (*i.e.*, the "out group"). For example, in a law firm, a preference for working with female associates may give the appearance of a gender bias against male associates. Whether a bias is in favor of, or specifically against a group, it operates as discrimination when workplace actions are taken that are detrimental to those in the out-group, and particularly if the out-group involves members of a protected class.

Even when preferential acts are based on merit, minor issues can add up over time to produce a feeling of exclusion and a sense of being less valued than those who are included. For example, in a team of IP litigators, the associate with a particular technical background may be invited to work on more interesting matters over the associate who has a different technical background or no technical background. While such acts may have merit, these slights, referred to as "micro-inequities,"[19] have long-standing effects on people, particularly those from marginalized groups.[20] For example, consider a situation where the disfavored associate happens to be a female associate who may be overlooked as a part of a team of attorneys working on a technical patent litigation matter, based on the bias that women generally are not adept at dealing with technical issues.

Among intellectual property lawyers, other types of biases may also be prevalent. For example, those who are members of the patent bar may deem themselves to be smarter, and technically savvier, than the so-called "soft-IP" lawyers who practice other areas of IP law such as trademarks or copyrights. Typically and fortunately, this sense of grandeur among such members is immediately replaced with a more humble and modest exchange, when they are quizzed on the "soft-IP" issues!

Kidding aside, the negative impact of bias in the workplace is that one might assume that all people who hold a certain job position or are members of a certain group are the same and act the same. As such, using generalizations inappropriately often manifests biases that can lead to misunderstandings and erroneous judgment calls in the workplace, and even to actionable discrimination claims. For instance, some consider patent prosecutors to be awkward or less social, and therefore they may be less likely to be invited to an informal gathering outside the office. Whether this perception is true or not, the point to be made is that generalizations that are based on an immutable characteristic can be the basis for unlawful discrimination claims when employment conditions suffer based on a perceived lack of collegiality.

Aside from social and collegial settings, bias and discrimination may also creep into internal affairs of a law firm in the following six areas: (1) recruiting, (2) retention, (3) promotion, (4) management, (5) compensation and (6) competency. In the area of compensation, for instance, billable hours, seniority, and client base are often thought to be objective measures of competency, diligence, and hard work. While hours do not reflect race or ethnicity, to the extent that attorneys with diverse ethnic backgrounds are asked to do more of the non-billable work by participating in diversity programs on behalf of the firm, this participation makes it more difficult for that attorney to accrue the much-valued billable hours. While participation in such programs are important for the firm, some sort of accounting needs to be made, to ensure the bias that is implicated by reliance on billable hours is not harming the careers of those whose diversity is in demand to help boost the firm's reputation.

The same scenario can also apply in a different setting to IP attorneys with technical backgrounds who are often pigeon-holed to do a certain type of work (*e.g.,* prosecuting patent applications) exclusively, where the nature of the technical work is very time-intensive but often difficult to bill. In comparison, other types of IP work may be assigned to a non-technical associate (*e.g.,* IP licensing transaction, IP litigation, etc.) where the non-technical work by its nature is less intensive but involves a higher number of billable hours, thus making it easier for the non-technical associate to meet the billable hour targets with arguably less effort. Most savvy IP firms recognize this disparity and justifiably allocate a slightly lower billable hour requirement for the hard-to-bill types of legal work, or try to balance the attorney's docket with a mix of various types of billable tasks.

CONCRETE STRATEGIES FOR ADDRESSING BIAS

Below are some specific strategies that may be employed in a law firm environment to combat discrimination and bias or the appearance of such conduct.

First, identify "transparent privileges" or systemic biases in the six internal areas noted above. Are women and people of color being excluded from travel or training opportunities because they conflict with childcare obligations or from client lunches because the partner forgets to ask them? Does the focus on certain "credentials" rule out whole classes of people at the employment application stage? Is the billable hour requirement fairly attributed to the different legal practice groups?

Second, survey whether there are barriers that affect diverse attorneys more profoundly than other attorneys. Set up an *ad hoc* "reduction of bias committee" and include members from the staff and professional sides of the office to identify issues of potential bias, or situations of potential bias in hiring, retention, promotion, client interactions, and in relations with staff and other support personnel.

Third, determine which preferences or biases are job-related (such as those involving technical expertise) and which are not. For instance, is patent bar membership or other technical educational background a requisite for all junior attorneys? It may be that your office can be more open about opportunities than is currently the case.

Fourth, model inclusive behavior, including mentoring and affinity group meetings designed to disperse opportunities, for a diverse group of lawyers. Use monetary incentives, which may be client-driven in some cases, to promote diversity goals and objectives. Such small steps as ensuring the senior management knows the name of each diverse attorney (and for example does not confuse one attorney of color with another) go a long way towards increasing feelings of inclusiveness.

Fifth, if you encounter discriminatory or biased behavior exhibited by an individual, call the person on it. Typically, ignoring or going along with such behavior promotes it and fails to remedy the situation. A calculated confrontational approach may be used at first discreetly and if continued, more firmly—not only to deal with peers and colleagues who are within the same firm environment, but also to address the unacceptable conduct of opposing counsel, when proper. For example, many clients or patent office Examiners are often of diverse ethnic backgrounds and have overt accents or less than perfect English language skills. Any comments or behavior that may make a client or an opposing party feel embarrassed or ridiculed may not amount to discrimination under the pertinent laws, but would surely tarnish the reputation of the attorney and the firm involved.

CONCLUSION

The bar's collective self interest, whether in the field of IP or otherwise, can only be served if lawyers prepare for the increasing globalization and the demands of a multi-cultural society in the international marketplace of products and ideas. Recruiting, training, and retaining a diverse group of attorneys and paying attention to how each individual contributes to the common goals and objectives of the organization are the best ways to augment diversity in a

law practice, and are also the crucial components of any long-term business development plan.

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MCLE Self-Study Information

The California Bar will offer one (1) self-study MCLE credit in elimination of bias for a small fee for California Attorneys interested in answering a set of True/False questions. Simply log onto the website www.calbar.org/self-study.

The views expressed in this article are personal to the authors and do not necessarily reflect the views of the authors' firms, the State Bar of California, or any colleagues, organization, or client.

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Endnotes

1. 42 U.S.C. § 2000e.
2. *Id.*
3. *Id.*
4. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
5. *Id.*
6. *Id.*
7. 29 U.S.C. § 206(d).
8. 42 U.S.C. § 12101.
9. 29 U.S.C. § 621.
10. *See,* 42 U.S.C. § 2000e; 29 U.S.C. § 206(d); and 42 U.S.C. § 12101.
11. *Id.*
12. *See* 29 U.S.C. §621.
13. Cal. Gov. Code §§ 12940–12956.2.
14. Cal. Civ. Code § 51.
15. *Id.*
16. *Id.*
17. *Id. and see In re Cox*, 3 Cal. 3rd. 205 (1970).
18. John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias, in* Handbook of Social Psychology 1089 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010).
19. *See, e.g.,* Debra Cassens Weiss, *'Micro-Inequities' Have Big Workplace Impact,* ABA Journal available at http://www.abajournal.com/news/article/micro_inequities_have_big_workplace_impact/ (2008).
20. *See, e.g.,* Virginia Valian, Why So Slow? The Advancement of Women 3 (1999).