

# MCLE Self-Study Article



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## PROMOTING INCLUSION AND DIVERSITY IN THE INTELLECTUAL PROPERTY BAR AND BEYOND

**(SEE END OF THIS ARTICLE FOR INFORMATION ON RECEIVING  
1.0 HOUR MCLE SELF-STUDY CREDIT IN RECOGNITION AND  
ELIMINATION OF BIAS IN THE LEGAL PROFESSION AND SOCIETY.)**

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### Introduction

IN 2012, WHEN PROFESSOR GOODMAN AND I co-wrote an earlier version of this article, the “Me Too” movement and the pioneering California law (SB 826), which mandates inclusion of women in publicly-held corporate boards, were not even on the horizon. Most large law firms had very few female or minority partners, and while there was some talk about further diversifying the ranks, I cannot remember many firms that had fully developed or set in place specific plans to promote inclusion of attorneys with diverse backgrounds and orientations. Nor were there any internal or external compliance measures that were strictly enforced towards that end.

Fast forward to today, year 2020 by the time this article is published, almost every major law firm in the United States is actively seeking to hire and promote more diverse candidates. Many firms have dedicated personnel and committees that are in charge of promoting diversity or providing programs on the importance of inclusion and the negative effects of bias. It seems like, we are finally at an age where all kinds of differentiating factors, in addition to gender and



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pre-classified races and orientations, are being more seriously considered as diverse. Also, diversity and inclusion is substantially more important in the legal and the business worlds, and especially to corporate clients, whereas in the past such considerations and evaluations had been mainly reserved to institutions of higher education for the purpose of student admissions.

While the legal profession, as well as the society at large, has made great strides to combat discrimination and bias by promoting diversity and recognizing the importance of inclusion, we still remain short of fully embracing the ideology as a whole. For example, in a seminar I attended on diversity a few weeks ago, there were female and minority attorneys from reputable law firms that, first confidentially and then openly, discussed scenarios in which they were passed over, belittled or excluded from formal meetings with clients or participation in certain client activities, even in cases on which they were actively working. On the opposite end, there were many examples of very successful diverse people in the room who had been appointed to high ranks in both corporations and law firms.

It goes without saying that significant advances in social justice and equality do not happen overnight and require deliberation, planning and persistence on the part of those who wish to achieve it. That said, financial incentives help, and have helped, clear the way and set expectations. For example, many corporate clients now require a law firm, or the point partners handling a matter, to provide a list of supporting attorneys sometimes with an overt directive that

a certain percentage of the group should consist of attorneys with diverse backgrounds who will actually do the work on that matter. Accordingly, much credit and recognition also goes to industry leaders who have acknowledged the importance of promoting diversity and combating bias from the top with ear-marked financial incentives.

In addition to providing a legal background on discrimination, this article will also provide strategies for reducing bias within the intellectual property bar, as well as in professional working environments, such as law firms. We begin with an overview of the applicable laws to help provide a better understanding of the complexities 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.

### 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.”<sup>1</sup> Classes that are protected by Title VII include: race, color, religion, sex, and national origin.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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,<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> As another example, the Americans with Disabilities Act of 1990 (“ADA”) prohibits employment discrimination against qualified individuals with disabilities.<sup>8</sup> Further, the Age Discrimination in Employment Act of 1967 (“ADEA”) protects individuals who are 40 years of age or older from age-based discrimination.<sup>9</sup>

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.<sup>10</sup> These laws also cover private or public employment agencies, and labor organizations.<sup>11</sup> The ADEA covers all private employers with twenty or more employees, state and local governments (including school districts), employment agencies, and labor organizations.<sup>12</sup>

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.<sup>13</sup> The Unruh Civil Rights Act (“Unruh Act”) applies to business establishments of every kind, which provide services, goods, or accommodations to the public.<sup>14</sup> The Unruh Act prohibits all types of “arbitrary discrimination” and not just discrimination based on the categories covered by the FEHA above.<sup>15</sup> 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.<sup>16</sup>

A crucial point about the Unruh Act is that it covers perceived characteristics that may or may not actually exist.<sup>17</sup> 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.

In recent years, California has enacted or revised several statutes that more specifically address gender, racial, and ethnic discrimination. The California Fair Pay Act broadens existing protections to prohibit paying employees less than those of the opposite sex for “substantially similar work.” This applies to even those with different titles or work sites, and puts the burden on employers to show that differences are due to other factors, such as merit or seniority, job-related, or reasonable.<sup>18</sup> It also bans employers from retaliating against employees who discuss pay. The Legislature added the grounds of race and ethnicity in 2017.

That same year, a new statute prohibited employers from asking about, or relying upon, salary histories for new employees. Although the statute has since been revised to explicitly permit employers to ask applicants about “salary expectations,” and to rely upon salary history information “an applicant voluntarily and without prompting discloses,” it still provides greater protection to applicants than under the former law.<sup>19</sup>

### 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 animus, all people have biases. To the extent that any of those biases are

at least *implicitly* based on racial, ethnic or other individualized characteristics, such biases 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.*<sup>20</sup> It is more important to recognize that beyond one's thoughts, bias generally morphs itself into a person's words, conduct and actions, and 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. Also, increasingly in the United States, political views and party affiliations affect motivations and behavior. As an example, someone with a high educational or socioeconomic stature (e.g., an Ivy League graduate, a politician's son or a pop-star's granddaughter) may deservingly, or not, receive more favorable treatment or preference when applying for a position, regardless of his or her race, ethnic background, or capabilities.

Another example of unconscious bias involves non-native speakers. When listening to accented speech or expressions that do not follow the regular idiomatic or grammatical patterns, a native-speaker's brain has to work harder to decipher and understand the non-native speaker. This extra level of effort may result in the native speaker subconsciously deeming the other party as less educated or less intelligent. In the IP bar especially, many clients and federal employees who are in charge of examining patent or trademark applications are often of diverse ethnic backgrounds and may 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 may tarnish the reputation of the attorney and the firm involved.

Lack of tolerance for a group's innate attributes, or a preference towards a group with perceived finer characteristics can give the impression of bias against the unfavored group or "out group." For example, in a law firm, a preference for working with female associates only, may give the appearance of 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,"<sup>21</sup> have long-standing effects on people, and particularly on those from marginalized groups.<sup>22</sup> 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 technically savvy than the so-called "soft-IP" counterparts 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 often assumes that all people who hold a certain job position or are members of a certain group are the same and act the same, while such assumption is typically farthest from the truth.

Using inappropriate generalizations often manifests biases that can lead to misunderstandings and erroneous judgment calls in the workplace, and even to actionable discrimination claims. For instance, in a law firm, patent practitioners and transactional lawyers, or older attorneys, may be considered by some as socially awkward or less personable. Based on this bias, such people may be less likely to be invited to a formal client pitch or even an informal gathering outside the office. The point to be made is that generalizations, whether appropriate or not, based on an immutable characteristic can be the basis for unlawful discrimination claims when employment conditions suffer based on a perceived lack of collegiality.

Bias and discrimination can easily 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 the respective attorneys to accrue the much valued billable hours. Since participation in such programs are important for the firm, many law firms now provide some sort of credit for participating in diversity programs. Such firms have correctly recognized that those whose diversity is in demand help boost the firm's reputation.

In some law firms, IP attorneys with technical backgrounds may concentrate on specific types of work (e.g., prosecuting patent or trademark applications). By nature, some technical work is very time-intensive but is often difficult to bill. In comparison, other types of IP work (e.g., IP licensing, IP litigation, etc.) may be assigned to a non-technical associate where the non-technical work can be less intensive but involve a higher number of billable hours, thus making it easier for the non-technical associate to meet the hourly targets.<sup>23</sup> 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

First, identify transparent privileges or systemic biases and define action plans to overcome or eliminate them. For example, are women being excluded from travel or training opportunities because of perceived or actual conflicts with childcare obligations? Are minority attorneys who are pitched as working on a matter later excluded from client meetings or working on the matter after the firm has retained the client? Does the focus on certain "credentials" rule out whole classes of diverse candidates at the employment application stage?

Second, survey whether there are barriers that affect diverse attorneys more profoundly than other attorneys. Recent legislation, effective January 2022,<sup>24</sup> requires the State Bar to adopt regulations requiring training on implicit bias in the MCLE curriculum. Does your law firm offer training to eliminate bias in the work environment? Is the billable hour requirement fairly attributed to a legal practice group, the majority of which is made up of diverse attorneys? Are professional members and staff encouraged to identify issues of potential bias, or situations of potential bias in hiring, retention, promotion, and client interactions?

Third, determine which preferences or biases are a matter of perception rather than based on skill and capability. For example, is patent bar membership or other technical educational background a necessary requisite for an attorney to participate in a patent-related matter? On the other hand, does an attorney's technical background or expertise in one specific area hinder his or her ability or chances to work on IP matters that do not require such expertise? Can your firm be more open about creating new opportunities for diverse attorneys based on their diverse backgrounds?

Fourth, model inclusive behavior, including mentoring and affinity group meetings designed to disperse opportunities, for a diverse group of lawyers. Do you recognize monetary incentives, which may be client-driven in some cases, to promote diversity goals and objectives in your firm? Does the senior management know the name and capabilities of the diverse attorneys in the firm and takes actions that increase feelings of inclusiveness?

Fifth, if you encounter discriminatory or biased behavior exhibited by an individual, call the person on it privately, if feasible. 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. Does your firm have an established means of recourse and plan of action to address unacceptable discriminatory conduct when recognized within the firm environment, or by an opposing counsel?

The above exemplary strategies may be employed in a law firm environment to combat discrimination and bias or the appearance of such conduct. Please note that this article is not intended to provide an exhaustive coverage of the existing discrimination laws or scenarios, but seeks to build on common sense and a dignified approach to promoting inclusion based on relevant laws that are in place to protect people of diverse backgrounds.

### 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 crucial to 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 Recognition and Elimination of Bias in the Legal Profession and Society for a small fee for California Attorneys interested in answering a set of True/False questions. Simply log onto the website [cla.inreachce.com](http://cla.inreachce.com).

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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, *et seq.*
14. Cal. Civ. Code § 51.
15. *Id.*
16. *Id.*
17. *Id. See also In re Cox*, 3 Cal. 3rd. 205 (1970).
18. Cal. Lab. Code § 1197.5.
19. Cal. Lab. Code § 432.3.
20. 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).
21. *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/](http://www.abajournal.com/news/article/micro_inequities_have_big_workplace_impact/) (2008).
22. *See, e.g.*, Virginia Valian, WHY SO SLOW? THE ADVANCEMENT OF WOMEN 3 (1999).
23. As an example, an IP litigator can generally bill for his travel time or the time spent copying documents, whereas an IP prosecutor typically cannot due to stricter budgets.
24. Bus. & Prof. Code § 6070.5.

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