

LOOKING IN THE MIRROR: REFLECTIONS ON THE ETHICAL
DILEMMAS POSED BY BIAS IN THE LEGAL PROFESSION

James W. Lewis and Samuel G. Jackson, Jr.
Jackson & Associates
11400 W. Olympic Blvd. Suite 600
Los Angeles, CA 90064
(310) 473-3100
e-mail – sjackson@jacksonandlewis.com

TABLE OF CONTENTS

I.	GENERAL ETHNIC AND GENDER COMPOSITION OF THE LEGAL PROFESSION	4
	A. Bias in Legal Education	4
	B. Bias in the Courts	4
	C. Bias in Legal Employment	8
II.	RELATIONSHIP BETWEEN IN-HOUSE AND OUTSIDE COUNSEL	13
	A. What can a Corporate In-house Attorney do to Help Eliminate Bias in the Legal Profession?	14
	B. Problems Created By "Unintentional" Bias or Discrimination	15
III.	RELATIONSHIPS BETWEEN ATTORNEYS WITHIN A LAW FIRM	16
IV.	DISCRIMINATION, LEGAL LIABILITIES, AND ETHICAL RULES OF PRACTICE	18
	A. Hypothetical Situation	18
	B. Potential Legal Liability for the Firm and the Senior Partner	18
	C. Potential Legal Liability of the Client	20
	D. Senior Partner's Ethical Responsibilities	21
V.	INFLUENCE OF RACE/GENDER ISSUES IN THE PRACTICE OF LAW	22
	A. Effects of Race	22
	B. Effects of Gender	23
	C. Perceptions of Sexual Harassment	23
VI.	CONCLUSION	24
VII.	REFERENCES	27

Bias in the legal profession can occur in a variety of circumstances, each of which is subject to its own set of legal or ethical constraints. This presentation will focus on different situations in which bias may occur, and will discuss the attorney's ethical and legal obligations under those circumstances.

I. GENERAL ETHNIC AND GENDER COMPOSITION OF THE LEGAL PROFESSION

By the very nature of our profession, attorneys are sworn to uphold justice, including the principles of equal opportunity. Statistics suggest, however, that the legal profession, like all other segments of society, suffers to some extent from racial and gender bias. The apparent inequalities are not likely due to overt racism or sexism; rather they probably are rooted in long standing stereotypes about who is an attorney. Imagine, if you will, that you are in court with a serious legal problem. The bailiff shouts, "All rise: and the judge takes the bench. What does the judge look like? In all likelihood, you conjured up the image of an older white male judge: this is the image that has long stereotyped the legal profession. Is this a "stereotype" or is it an accurate assessment of the legal profession?

A. Bias in Legal Education

Enrollment of minorities in law school has shown significant increases over the past two decades (See Table 1).

TABLE 1 - LAW SCHOOL ENROLLMENT

YEAR	TOTAL	MINORITY	PERCENTAGE
1976-77	112,401	9,503	8.4%
1986-87	117,813	12,550	10.6%
1995-96	129,318	25,553	20.0%

While these numbers are encouraging, recent successful challenges to race-based affirmative action programs signal reason for serious concern about a significant retrenchment. For example, as a result of Proposition 209 in California, no new African American students enrolled at the University of California, Boalt Hall School of Law School for the 1997 Fall Semester. Similarly, after the decision in Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert denied, 116 S.Ct. 2581 there were only 10 African Americans among the 944 law school admittees this year at the University of Texas, compared to the 44 admitted in 1992, the class at issue in the Hopwood decision (Gibeaut, 1997). Anti-affirmative action lawsuits are currently pending against several other major institutions, including the University of Michigan.

B. Bias in the Courts

In 1991, the California Supreme Court appointed a judicial advisory committee to study racial and ethnic bias in the state's courts. Thereafter, the

committee compiled data on employees, including both judicial (e.g., judges) and non-judicial positions (e.g., clerks, bailiffs, research attorneys), from all of the trial courts (including superior, municipal, and justice courts) in the state (A Report to the Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts). The findings of this committee included the following racial/ethnic distributions for Superior courts:

Judicial personnel:	89% White 4.5% African-American 4% Latino 2% Asian-American.
Non-Judicial personnel:	58% White 12.5% African-American 19.7 % Latino 9.3% Asian-American.

"Judicial personnel" includes judges and commissioners. "Non-Judicial personnel" includes, for example, court clerks, research attorneys, and clerical workers.

In order to analyze these data for possible indications of bias, the employment numbers were compared to the racial/ethnic distribution of the California population as revealed by the 1990 census. This analysis revealed:

1. Judicial positions: Whites are over-represented, all minorities are under-represented (See Figure 1); and,
2. Non-Judicial positions: Whites and Asian-Americans are proportionally represented, African-Americans are over-represented, and Latinos are under-represented (See Figure 1).

African-Americans, Latinos, and Asian-Americans are found predominately in office and clerical positions (See Figure 2). The committee also found several gender distinctions to be noteworthy. For example, among Superior court judges, 77% were white males. Also, white females represent a majority of courtroom clerks, research attorneys, and court reporters. Minority females are more likely to be in office, clerical, or interpreter positions.

This disparity in the racial composition of courts appears to extend to the highest Court in the land. Of the 36 clerkships for the U.S. Supreme Court for the 1997-98 term, there are no African Americans and only two minorities (one Asian and one Indian). Women hold 33% of the clerkships. Justices typically have four clerks, but Justice Kennedy has no female clerks and Justices Rehnquist and Thomas had no female clerks last term (Pike, 1997). Service as a judicial clerk, particularly for the United States Supreme Court, is thought to be a stepping stone to employment at a prestigious firm or a major teaching position.

Figure 1. Racial/Ethnic Composition of Judicial and Non-Judicial Positions for California Superior Courts

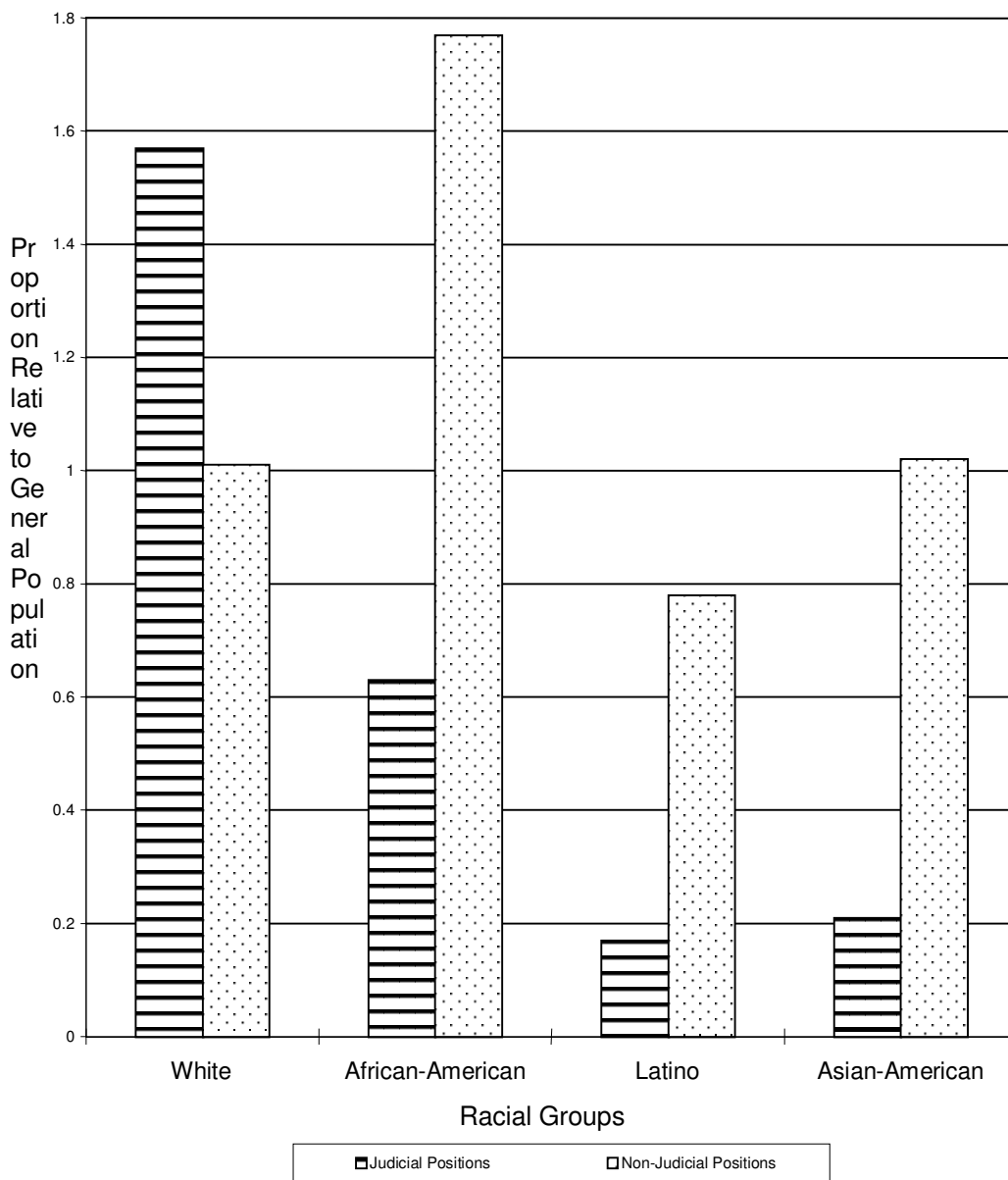


Figure 1. This figure depicts the breakdown of various racial groups in judicial and non-judicial positions and compares the percentages to the corresponding data from the general census. If the percentage of a particular racial group is the same as the percentage of that racial group in the general population, the proportion depicted will be 1.0 (e.g., if Whites make up 80% of the non-judicial positions and 80% of the general population, the proportion depicted will be 1.0). If a particular racial group is over-represented in a job category, the proportion will be greater than 1.0; if under-represented, the proportion will be less than 1.0.

Figure 2. Racial / Ethnic Composition of Various Positions for California Superior Courts (1993 - 1994)

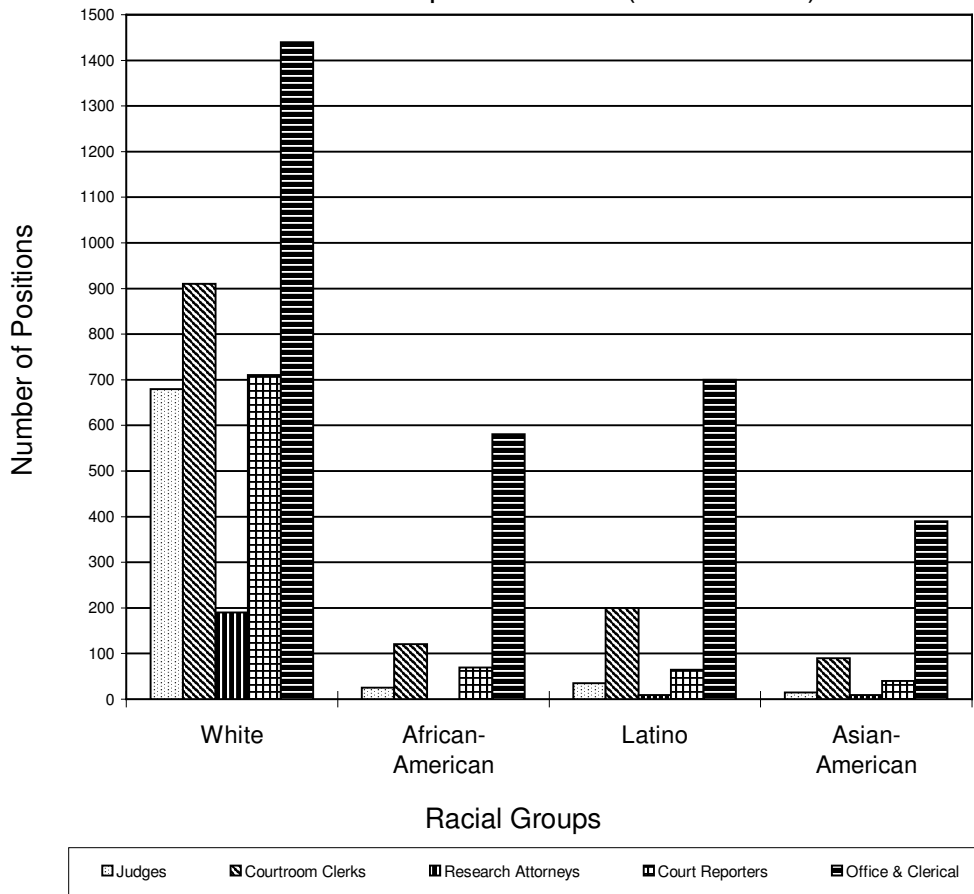


Figure 2. This figure depicts that absolute number of individuals of various racial/ethnic groups that hold positions of judges, courtroom clerks, research attorneys, court reporters, and office/clerical positions in the California court system.

Perhaps the courts could do more to promote diversity in the legal profession. For example, in November of 1997, twenty-four federal judges gathered at New York Law School to urge local area minority law students to apply for judicial clerkships (Klein, 1997). According to the NALP, minority attorneys from the class of 1996 comprised 14% of judicial clerkships (up from only 7% in 1986). Despite the judges' efforts, minorities remain underrepresented as clerks. Minority attorneys comprise 16% of the total number of attorneys employed in the class of 1996.

Finally, although approximately 23% of practicing attorneys are women, they are under-represented on both the federal and state benches, but are making significant strides. For example, in 1991, 9% of state judges and 12% of intermediate appellate judges were women; at least for trial court judges, this number is up from only 4% in 1980. At the federal level, in 1991, only 7% of

federal judges were women. By 1995, however, women were 22% of the sitting U.S. Supreme Court Justices, 13% of U.S. Appellate Court justices, and 12% of District Court judges. As of January 1995, 31% of President Clinton's judicial appointments were women (American Bar Association Commission on Women in the Profession, 1995).

C. Bias in Legal Employment

Despite apparent gains in law school enrollment (i.e., 20% of law students are minorities), employment figures for minorities are not as encouraging. For example, in 1996, in the 250 largest firms in the country, minorities accounted for 10% of associates, but only 3% of partners. The partnership percentage was up only slightly from 2.4% in 1991 (Gibeaut, 1997).

A recent analysis of data reported by law firms in the 1996-1997 National Directory of Legal Employers revealed the following (Collins, 1997):

1. Nationwide, slightly more than 10% of associates and 2.93% of partners are minorities;
2. Approximately one half of the law firms (45.9%) had no minority partners and over one fifth (22.4%) had no minority associates; and,
3. Of the firms surveyed, those with fewer than 100 attorneys were most likely to have no minority representation, whereas those with more than 250 attorneys had the highest representation.

There are, however, significant regional variations in these statistics. See Table 2 which is a summary of the data broken down by size of firms and geographic location.

Employment statistics for women in the law are better than those for minorities, but still reveal disparities. For example, although since 1985 approximately 37 percent of all lawyers admitted to the bar are women, the percentage of women who have attained partnerships is in the low teens (Anonymous, 1996). The analysis of data reported by law firms in the 1996-1997 National Directory of Legal Employers revealed the following concerning female attorneys (Collins, 1997):

1. Nationwide, approximately two fifths (39.79%) of associates, but only 14.19% of partners are women;
2. Approximately 10% of the law firms had no women partners and 26.2% reported that women made up less than one third of the associates; and,

3. As with minorities, those firms with less than 100 attorneys tended to have fewer female partners than those with more than 250 attorneys.

TABLE 2
REPRESENTATION OF MINORITIES AT LAW FIRMS
(percent of offices in each range of representation)

	MINORITY PARTNERS AS PERCENT OF TOTAL					MINORITY ASSOCIATES AS PERCENT OF TOTAL				
	None	Up to 2.5%	2.51 – 4.99%	5% or more	# of offices	None	Up to 8%	8.01 – 12.99%	13% or more	# of offices
Nationwide:	45.9	17.8	17.3	19.1	892	22.4	26.4	22.9	28.2	878
By Firm Size:										
100 or fewer	58.4	12.0	14.8	14.8	209	29.5	26.1	15.0	29.5	207
101 - 250	40.5	25.4	15.8	18.3	279	22.6	31.5	20.7	25.2	270
More than 250	42.5	15.6	19.8	22.2	334	16.6	23.5	27.7	32.2	332
By City:										
Atlanta	26.3	31.6	31.6	10.5	19	5.3	42.1	42.1	10.5	19
Boston	42.9	38.1	19.0	0.0	21	20.0	35.0	35.0	10.0	20
Chicago	40.9	31.8	15.9	11.4	44	15.9	43.2	22.7	18.2	44
Cleveland	18.2	36.4	27.3	18.2	11	18.2	63.6	9.1	9.1	11
Dallas	37.0	22.2	22.2	18.5	27	22.2	33.3	22.2	22.2	27
Denver	53.3	6.7	26.7	13.3	15	40.0	13.3	13.3	33.3	15
Houston	45.5	18.2	18.2	18.2	22	18.2	27.3	27.3	27.3	22
Los Angeles	35.2	4.2	14.1	46.5	71	11.3	8.5	22.5	57.7	71
Miami	23.1	0.0	0.0	76.9	13	7.7	0.0	15.4	76.9	13
Minneapolis	46.7	46.7	0.0	6.7	15	20.0	33.3	33.3	13.3	15
New York	36.2	20.2	28.7	14.9	94	7.6	22.8	31.5	38.0	92
Philadelphia	12.5	50.0	37.5	0.0	16	0.0	75.0	25.0	0.0	16
Phoenix	38.5	46.2	7.7	7.7	13	23.1	30.8	30.8	15.4	13
Portland	66.7	33.3	0.0	0.0	9	22.2	33.3	11.1	33.3	9
San Francisco	28.1	9.4	21.9	40.6	32	0.0	12.9	22.6	64.5	31
Seattle	33.3	9.5	28.6	28.6	21	19.0	4.8	23.8	52.4	21
Washington, D.C.	46.8	11.0	24.8	17.4	109	18.5	25.0	28.7	27.8	108
By State:										
Florida	48.8	2.3	9.3	39.5	43	30.2	4.7	18.6	46.5	43
Michigan	59.1	18.2	4.5	18.2	22	56.3	6.3	18.8	18.8	16
Missouri	41.7	41.7	16.7	0.0	12	25.0	41.7	8.3	25.0	12
New Jersey	57.9	26.3	5.3	10.5	19	36.8	42.1	15.8	5.3	19
Ohio	38.7	29.0	22.6	9.7	31	25.8	51.6	19.4	3.2	31
Pennsylvania	37.0	37.0	25.9	0.0	27	14.8	66.7	18.5	0.0	27
Texas	47.2	18.1	13.9	20.8	72	22.5	28.5	22.5	26.8	71
Virginia	66.7	20.0	13.3	0.0	15	21.4	28.6	35.7	14.3	14

Note: The Associates category includes senior attorneys and staff attorneys. The Partners category includes counsel. Analyses are based on offices providing complete minority information in the appropriate staff category.

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As is the case with employment of minority attorneys, there are significant regional variations in these statistics (See Table 3 in “Figures & Tables” section; reprinted with permission from NALP shows a more comprehensive breakdown of the data by size of firm and geographic location.)

TABLE 3
REPRESENTATION OF WOMEN AT LAW FIRMS

(percent of offices in each range of representation)

	WOMEN PARTNERS AS PERCENT OF TOTAL					WOMEN ASSOCIATES AS PERCENT OF TOTAL				
	None	Up to 12%	12.01 – 16.99%	17% or more	# of offices	Less than 33%	33.01 – 39.99%	40.0 – 46.99%	47% or more	# of offices
Nationwide:	9.9	32.8	28.8	28.5	912	26.2	22.5	24.9	26.4	889
By Firm Size:										
100 or fewer	7.5	38.5	28.2	25.8	213	32.7	24.5	16.3	26.4	208
101 - 250	10.1	29.4	29.0	31.5	286	21.7	17.7	30.3	30.3	277
More than 250	12.1	29.5	28.9	29.5	339	27.5	25.4	24.2	23.0	335
By City:										
Atlanta	5.3	47.4	47.4	0.0	19	15.8	26.3	21.1	36.8	19
Boston	0.0	18.2	45.5	36.4	22	0.0	15.0	55.0	30.0	20
Chicago	6.7	33.3	35.6	24.4	45	27.3	29.5	25.0	18.2	44
Cleveland	0.0	63.6	36.4	0.0	11	18.2	27.3	36.4	18.2	11
Dallas	7.1	32.1	39.3	21.4	28	46.4	10.7	17.9	25.0	28
Denver	12.5	0.0	25.0	62.5	16	20.0	13.3	26.7	40.0	15
Houston	0.0	13.6	36.4	50.0	22	22.7	27.3	31.8	18.2	22
Los Angeles	9.9	16.9	28.2	45.1	71	32.4	21.1	19.7	26.8	71
Miami	15.4	23.1	38.5	23.1	13	23.1	15.4	23.1	38.5	13
Minneapolis	0.0	29.4	23.5	47.1	17	20.0	13.3	33.3	33.3	15
New York	6.2	48.5	32.0	13.4	97	19.4	30.1	29.0	21.5	93
Philadelphia	0.0	37.5	37.5	25.0	16	6.3	12.5	50.0	31.3	16
Phoenix	22.1	15.4	53.8	7.7	13	38.5	38.5	7.7	15.4	13
Portland	11.1	33.3	33.3	22.2	9	55.6	22.2	11.1	11.1	9
San Francisco	5.9	17.6	26.5	50.0	34	9.7	25.8	22.6	41.9	31
Seattle	9.5	19.0	23.8	47.6	21	0.0	19.0	28.6	52.4	21
Washington, D.C.	10.8	26.1	27.0	36.0	111	20.2	22.0	33.9	23.9	109
By State:										
Florida	20.9	32.6	18.6	27.9	43	34.9	18.6	18.6	27.9	43
Michigan	18.2	45.5	22.7	13.6	22	42.9	4.8	14.3	38.1	21
Missouri	0.0	53.8	15.4	30.8	13	15.4	7.7	46.2	30.8	13
New Jersey	5.3	47.4	26.3	21.1	19	21.1	36.8	21.1	21.1	19
Ohio	6.1	51.5	27.3	15.2	33	37.5	31.3	15.6	15.6	32
Pennsylvania	10.7	39.3	32.1	17.9	28	29.6	14.8	37.0	18.5	27
Texas	4.1	21.9	37.0	37.0	73	33.3	19.4	23.6	23.6	72
Virginia	13.3	60.0	20.0	6.7	15	14.3	57.1	21.4	7.1	14

Note: The Associates category includes senior attorneys and staff attorneys. The Partners category includes counsel. Analyses are based on offices providing complete gender information in the appropriate staff category.

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Clearly, there appears to be a steady rate of attrition, for both minorities and women, along the path from law school admission to partnership in a law firm. These trends are illustrated graphically in Figure 3. This figure depicts the percentage of minorities and women who are found in the various stages of professional development and shows a clear decline for both groups as they move "up the ladder." If there were no bias operating in the legal profession, one would expect to see comparable percentages of law students, associates, and partners for all racial groups; however, this is not the case. Because we are not aware of any data to suggest that minority or women attorneys are not "qualified" to achieve

partnership status in large law firms, we must assume that it is the culture and environment of law firms which cause this phenomenon.

Figure 3. Stages of Professional Development
(1995 - 1996)

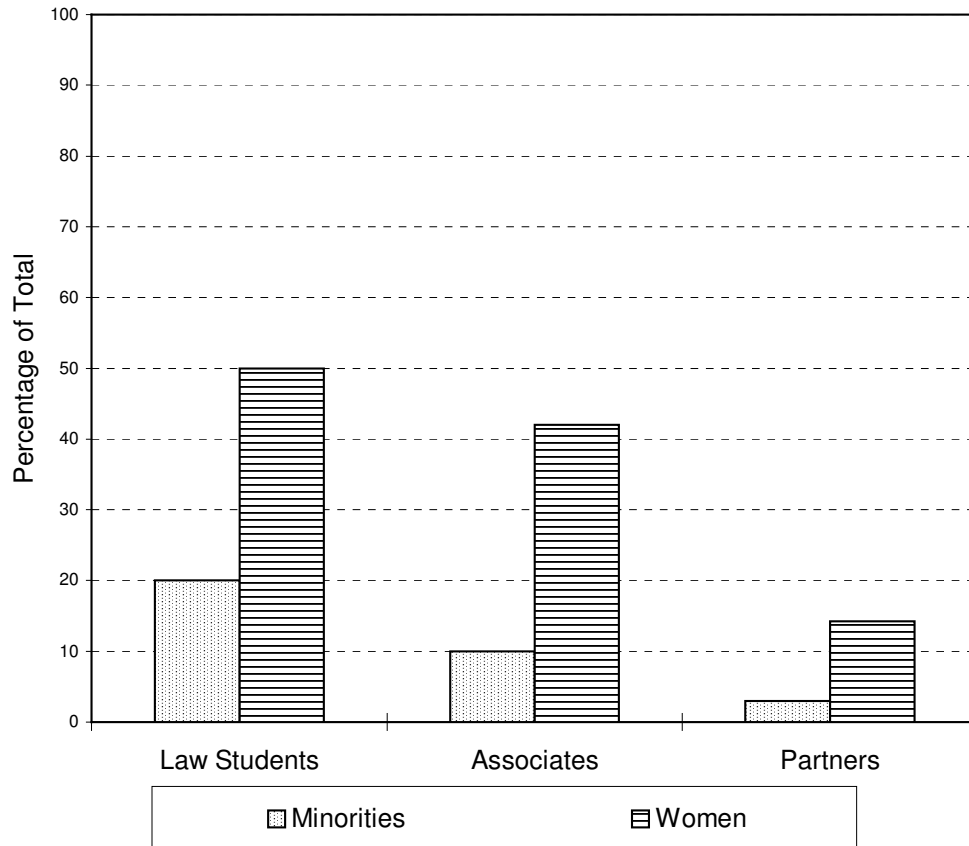


Figure 3. This figure depicts the percentages of minorities and women in various stages of legal development. Percentages of both groups decline with the progression from law student to associate to partner.

What steps can be taken to stop the attrition? The Boston Law Firm Group, a consortium of 26 large firms, was formed to increase opportunities for minority attorneys. Even amongst these firms, however, 6.8% of associates and only 2.3% of partners are minorities. These statistics are in spite of concerted efforts by these firms to recruit minority attorneys. For example, in the fall of 1995, 16.4% of all offers were made to minority attorneys (offers to minority attorneys have increased by 176% over the past ten years). According to Verna Myers, Executive Director of the Boston Law Firm Group, "retention and advancement of minority attorneys are affected by the unique and subtle challenges they face in the firm environment, including racial and cultural insensitivity, isolation and differential treatment" (Myers, 1995).

The American Bar Association Commission on Women in the Profession has developed an evaluation procedure called "Fair Measure." Fair Measure provides guidance on how to develop and implement an evaluation process that: eliminates bias; establishes objective criteria for successful performance; recognizes the value of diverse models; communicates expected goals and skills; and, evaluates lawyers based on fair measures of their skills. Evaluation of attorneys using this objective merit system, rather than stereotypes based on race and gender, may facilitate the proportionate advancement of both women and minority attorneys. A copy of Fair Measure can be ordered from the American Bar Association, Publication Orders, P.O. Box 10892, Chicago, IL 60610-0892.

Additionally, law firms, like all other businesses, would be well advised to take affirmative steps to train their employees, including partners and management, on sensitivity to race and gender issues. Larger firms, with their own human resource professionals on staff, may be able to conduct training using this personnel. Alternatively, there are a variety of private consultants who can be retained for training purposes. Topics that are typically covered in such training sessions include:

1. Discussion of the firm's policies regarding discrimination or harassment;
2. Avenues available within the firm to submit complaints and the procedure by which they will be handled;
3. General discussion of the laws prohibiting discrimination and harassment; and,
4. Importance of respecting co-workers and understanding cultural/gender differences;

These types of training sessions are often conducted in small groups and include discussion of hypothetical situations presented by the trainer and/or role playing among the participants. Often it is a good idea to give the participants a short test at the conclusion of the training to insure and document the fact that they have received the training and understand the basic principles (for sample educational materials, please see the Appendix).

In addition to minimizing the possible occurrence of discrimination and/or harassment in the workplace, a firm's history of sensitivity or anti-bias training and implementation of policies prohibiting discrimination or harassment may be of significant benefit if the firm is ever sued over such allegations. Although under most anti-discrimination statutes, an employer may be held strictly liable for the discriminating or harassing acts of its supervisors, the employer's actions attempting to prevent such situations, and its response when they arise, may very well be relevant if the issue of punitive damages arises.

II. RELATIONSHIP BETWEEN IN-HOUSE AND OUTSIDE COUNSEL

Generally, an attorney retained by a client is not an employee of the client, but is an independent contractor and, therefore, Title VII, Age Discrimination in Employment Act, and Americans with Disabilities Act, as well as state antidiscrimination statutes (e.g., California's Fair Employment and Housing Act; Government Code sections 12940 et seq.) that regulate discrimination in employer/employee relationships do not apply. Sistare-Meyer v. YMCA of Metro. Los Angeles, 58 Cal.App.4th 10 (1997). Therefore, the in-house corporate attorney's behavior, with regard to the selection of outside law firms to represent the corporation, does not come within the ambit of anti-discrimination statutes. What influences the behavior of corporate attorneys to make "hiring decisions" that include minority/female owned law firms?

1. Social Pressure/Publicity

Image is an important and valuable asset for any corporation. In the increasingly diverse marketplace, no corporation can afford a reputation for discriminating against women or minorities. Certainly, no corporation would want to be known for maintaining a policy of, for example, not purchasing any supplies from minority vendors or for not using any minority/female contractors to provide any services to the corporation (e.g., distribute or sell its products). Corporate good will may be enhanced by the use of minority and female counsel.

2. Economic Efficiency/Positive Results

These are probably the single most important factors considered by in-house counsel: How much will it cost? Will there be a positive result? Minority/female owned law firms tend to be smaller and charge lower fees than do large firms that typically supply legal services to major corporations. With developments in computers and other forms of technology, however, many of these smaller firms are fully capable of providing the same services as their larger counterparts, and often at a reduced cost. Additionally, for a variety of cases, such as employment matters or personal injury claims, it is not typically necessary for a firm to have a large number of lawyers on staff to competently handle these matters.

As discussed below, there may be advantages to the use of minority attorneys in cases concerning discrimination, and of women attorneys in matters involving sexual harassment/discrimination. Diversity encourages creative problem solving.

3. Diversity in Problem Solving

A variety of social science studies have indicated the importance of group diversity in problem solving. If a particular problem, a legal issue for example, is confronted by a homogenous group of individuals, it is likely that their proposed

solutions will all be similar. If the problem is analyzed by a diverse group, bringing a variety of perspectives to bear, it is more likely that a range of potential solutions will be devised, some of which may be better than, or not even considered by, those suggested by the homogenous group. Specifically, a diverse group of attorneys will be able to provide the client with a spectrum of ideas concerning such topics as: settlement discussion with minority clients, presenting information to women on a jury, juror perception of fairness and fair play, etc., that may not be available if only white male attorneys are consulted.

4. Diversity Improves Community Relations

Given the ethnically diverse marketplace, particularly in California and the Pacific Rim, corporations have an opportunity to enhance their image with the community by employing a diversity of vendors, including for legal services. Attorneys representing corporations often find themselves interfacing with corporate clients and customers in non-litigation settings. Minority/female clients may well develop a more positive feeling toward the corporation if they feel that the corporate workforce reflects their community.

5. Elimination of Potential Liability for Discrimination

As will be discussed in more depth below, under some circumstances, clients can be found liable to individual attorneys if it can be shown that the client encouraged "discrimination" within the law firm where the aggrieved attorney was employed. See Plessinger v. Castleman and Haskell, a Partnership, Lorin Castleman, a Professional Corp., William Haskell, a Professional Corp., Allstate Ins. Inc., 838 F.Supp. 448 (N.C. Cal. 1993); Commonwealth of Pennsylvania and Pennsylvania Human Relations Comm'n v. Thorp, Reed & Armstrong, 361 A.2d 497 (1976).

A. What can a Corporate In-House Attorney do to Help Eliminate Bias in the Legal Profession?

As set forth in the California Minority Counsel Program Corporate Award Criteria, the in-house attorney is in a position to assume a leadership role in advancing the corporation's commitment to a diverse legal profession by:

1. Assuming a leadership role in the advancement of minority attorneys;
2. Demonstrating a strong commitment to the advancement of minority attorneys within the company, including providing mentoring and networking opportunities;

3. Demonstrating a strong commitment to the advancement of minority attorneys at outside law firms;
4. Providing opportunities -- for legal work, networking, learning, etc. -- to minority attorneys in settings historically closed to minorities;
5. Having executive management of the company actively support assignments of legal work to minority attorneys;
6. Providing opportunities for minority attorneys to take on more complex, high exposure representation;
7. Providing meaningful opportunities for minority attorneys within a specific substantive area of the law;
8. Developing or sponsoring programs or events to raise awareness and address barriers to the advancement of minority attorneys;
9. Advancing the opportunities for minority attorneys within the judiciary or other areas of the legal profession;
10. Creating and executing a plan that enables the corporation to partner with minority attorneys thereby establishing a stream of steady referrals for the attorneys, and a source for the corporation of reliable and responsive outside legal assistance that mirrors the diversity of the markets to which the corporation wishes to sell its products or services; and,
11. Encouraging and rewarding in-house attorneys who make the extra effort to locate and become familiar with minority attorneys, and who take the untraditional step of retaining minority attorneys/firms to represent the corporation.

B. Problems Created by "Unintentional" Bias or Discrimination

It would be the rare circumstance indeed when a corporate counsel's selection of outside counsel was based on overt racism or sexism. Nevertheless, even well intentioned in-house counsel who are seeking to increase diversity by the use of women or minority owned firms may inadvertently present obstacles that prevent or hinder the development of effective partnership relations. For example, corporate counsel must be aware of factors, such as those set forth in the California Minority Counsel Program 1997 Corporate Award Criteria, which can place additional burdens on minority attorneys/firms, namely:

1. Contracting for fees that are significantly below the going rate for the type of business referred;
2. Retaining minority/female attorneys on only low level matters with little chance of billing significant hours;
3. Retaining minority attorneys/firms for only one or two assignments even though they have performed satisfactorily;
4. Failing to upgrade the level of complexity of assignments even after the minority attorneys/firms have demonstrated their abilities;
5. Asking the small firm to advance the expenses of litigation including expert fees, costs of depositions, investigation and records copying;
6. Retaining minority attorneys/firms for only token presence on cases in courtrooms;
7. Limiting minority attorneys/firms to work only in the minorities communities or in courtrooms located in minority communities;
8. Retaining minority attorneys only when the plaintiff is a minority or when plaintiff is in pro per; and,
9. Failing to explain why referrals stop -- [e.g. bills too high, bad results, new relationship entered into with another outside firm for a volume of cases or for an exclusive on certain types of cases in exchange for fee discounts, etc.] -- so minority firms can improve in the future and not be left wondering why there is no new business from the corporation.

III. RELATIONSHIPS BETWEEN ATTORNEYS WITHIN A LAW FIRM

Bias against particular attorneys, or classes of attorneys, within a law firm may be actionable discrimination. Law firms, like most other "employers," are subject to regulation by both state and federal anti-discrimination statutes such as: Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act ("ADA"), the Equal Pay Act ("EPA"), and the Family Medical Leave Act ("FMLA"). For example, an international law firm in Los Angeles, California recently settled with a former African-American associate for \$505,000 in compensatory damages, plus attorneys' fees, when confronted with allegations of racial discrimination (Andagachew v. White & Case, Case No. BC084162, 1994).

Following are some of the questions that have arisen in the application of anti-discrimination statutes which are somewhat peculiar to law firms:

1. Can a "Partner" be considered an "employee" for purposes of Title VII protection?

Yes. In Rosenblatt v. Bivona & Cohen P.C., 969 F.Supp. 207 (S.D.N.Y. 1997), a white former partner brought action against the firm alleging that his termination was due to his interracial marriage. He asserted causes of action based on Title VII and state claims. The court held that the former partner was an "employee" entitled to the protection of Title VII.

2. Is "denial of partnership" one of the "terms and conditions of employment" covered by Title VII?

Maybe. In Masterson v. LaBrum and Doak, 846 F.Supp. 1224 (E.D. Penn. 1993), a female attorney brought a sex discrimination action against the law firm. The court held: (1) plaintiff established a prima facie case of discrimination in denial of partnership; and, (2) plaintiff established that the employer's proffered reason, lack of development of business, was pretextual. See also, Ezold v. Wolf, Block, Shorr and Solis-Cohen, 983 F.2d 509 (3rd Cir. 1992).

However, in Hishon v. King & Spalding (11th Cir. 1982) 678 F.2d 1022, the plaintiff alleged that she was discriminated against based on sex when she was not invited to become a partner. The court held that Title VII does not apply to decisions regarding partnership. According to this court, freedom of association protects the right to select business partners on the basis of personal prejudices.

3. Are "shareholder-employees" of professional associations "employees" for purposes of protection by Title VII?

Yes. In Johnson v. Cooper, Deans & Cargill, 884 F.Supp. 43 (D. New Hampshire 1994), a former associate sued her law firm for pregnancy and sex discrimination under Title VII. The court held that shareholder-employees of professional associations are, in law, "employees" not only for purposes of bringing their own Title VII claims, but also for purposes of determining whether the requisite number of people have been employed to bring employer within Title VII.

4. Are "partners" considered "employers" for purposes of liability? Can a managing partner be held personally liable?

Sometimes. In Caplan v. Fellheimer, Eichen, Braverman and Kaskey, David Braverman, 882 F.Supp. 1529 (E.D. Penn. 1995), claims of a hostile work environment were brought against a law firm and its managing partner. The court

held that the managing partner was not an "employer" within Title VII and, therefore, was not subject to personal liability. See also, Yaba v. Cadwalader, Wickersham & Taft, 931 F.Supp. 271 (S.D.N.Y 1996), for individual liability under Title VII or ADA.

Individual general partners, however, may be considered "employers" for purposes of the ADEA. In Lettich v. Kenway, et al., 590 F.Supp. 1225 (D. Mass. 1984), individual general partners of a law firm were found to be "employers" within the meaning of the ADEA.

IV. DISCRIMINATION, LEGAL LIABILITIES, AND ETHICAL RULES OF PRACTICE

A. Hypothetical Situation

Consider the following "hypothetical" situation: the client, a male defendant in a case alleging sexual harassment, is concerned about his upcoming trial and meets with the senior partner of the firm handling his defense. During this meeting, he tells the senior partner that he has every confidence in the male trial attorney who has been handling the matter, but that he still has some "issues" to discuss about the actual trial. The client believes that jurors may be more sympathetic to his position if he is represented by a female attorney. Additionally, he is aware that the jury panel is likely to contain a large number of minorities and he believes that it is important that the "trial team" include a minority attorney as well.

With the trial only a month away, the senior partner is understandably taken aback by these revelations. He attempts to assuage the client's concerns by recounting the accomplishments of the assigned trial attorney and pointing out the difficulties of bringing in a female and a minority attorney at this late date. The client, however, is not persuaded and remains adamant in his position. The conversation concludes with the senior partner acquiescing to the client's wishes.

After the meeting, the senior partner informs the trial attorney that he will no longer be the lead attorney at trial; rather, he will be second chair to a female lead attorney. The trial attorney is infuriated, claims that this has always been his case, and that a victory in this trial would have greatly enhanced his chances at becoming a partner and generating revenue for the firm. The senior partner admonishes the trial attorney to be a "team player" and that they have an "ethical responsibility" to provide the client with the defense he desires.

Did the senior attorney handle the situation appropriately? What are the legal and/or ethical ramifications of his acts? This hypothetical situation is analyzed, in part, using the California Rules of Professional Conduct which are similar in large part to analogous rules adopted in other jurisdictions.

B. Potential Legal Liability for the Firm and the Senior Partner

As discussed above, both federal law and state law (e.g., the California Fair Employment and Housing Act ("FEHA"); Government Code section 12940,

et seq.) prohibit discrimination by an employer based on race or sex that affects the "terms and conditions" of an individual's employment. In our hypothetical, the employer is, without question, discriminating against the white male trial attorney based on sex and race. The question is, does this discrimination affect the "terms and conditions" of the attorney's employment.

If the attorney is simply transferred from one case to another within the office and his pay and bonuses, etc., are unaffected, the discriminatory behavior of the employer would not be actionable. On the other hand, if as the trial attorney suggested to the senior partner, being removed from this particular case will significantly affect his opportunity to become a partner with the firm or a year-end bonus, then he may well have a cause of action under both state and federal law. If the attorney prevails, he may be entitled to recover compensatory damages (including loss of earnings and emotional distress), reasonable attorneys' fees and punitive damages, from the firm. Indeed, if the senior partner is a managing agent of the firm, the firm may be found liable for ratifying the alleged discrimination and be put at risk for an award of exemplary damages under applicable employment discrimination statutes.

In California, the potential legal liability of the senior partner, as an individual, is currently in flux. According to the case of Janken v. Hughes Electronics, 46 Cal. App.4th 55 (1996), a supervisor may not be held personally liable for the type of "discriminatory" conduct described in the hypothetical. However, the court in Reno v. Baird, 57 Cal. App.4th 1211 (1997) reached a contrary result; and the California Supreme Court has now granted review of this case. Both Janken and Reno agree, however, that an individual supervisor may be held liable for "harassment" of employees. In any event, the individual supervisor may not be held liable if the trial attorney's claims are made pursuant to Title VII. Miller v. Maxwell's Int'l, 991 F.2d 583, 587 (9th Cir. 1993); but see Griffith v. Keystone Steel and Wire Co., 858 F.Supp. 802 (C.D. Ill. 1994)).

More broadly, when a law firm yields to a client who uses race to dictate the staffing of his case, liability may be had against the firm based on long-lived civil rights legislation. In particular, the Civil Rights Act of 1866, 42 U.S.C. § 1981(a) proscribes racially motivated interference with an individual's right to make and enforce contracts, whether or not in the employment context. As with Title VII and state fair employment statutes, both compensatory and exemplary damages are available under Section 1981 claims. Whether Section 1981 covers attorney-client relationships, however, is complicated by the fact that many states seem to afford clients the unfettered right to discharge their attorneys for any reason and at any time. Whether Section 1981 covers attorney-client relationships, however, is complicated by the fact that many states seem to afford clients the unfettered right to discharge their attorneys for any reason and at any time. (E.g., In Re Cooperman, 83 N.Y.2d 465, 468 (1994). However, in Mass v. McClenahan, 893 F.Supp. 225 (S.D.N.Y. 1995), the court held that a client's right to terminate its contract with its attorney cannot be based on discriminatory reasons in violation of Section 1981. In the more general employment context, courts have also held that there is not an "at will" defense to a federal discrimination complaint. Campbell v. AT&T, 1994 WL 380620 (N.D.Ill. 1994).

Irrespective of attorney-client considerations, the bottom line for employers is that employment discrimination in the name of client demands is generally no defense with respect to workplace assignments. Further, discrimination cannot be justified on the grounds that a firm's failure to acquiesce in a client's preferences could have severe financial ramifications for the firm.

C. Client's Potential Legal Liability

Under some circumstances, the client's wish to select his attorney based on gender and/or race may subject the client himself to liability. Because the attorney is not the "employee" of the client, his "discriminatory" actions are not made illegal by either Title VII or the FEHA. However, if the law firm abides by the client's wishes and that causes a detrimental effect on the "terms and conditions" of the original trial attorney's employment, the client may be liable to that attorney on a theory of tortious interference with business relationships.

For example, in Plessinger v. Castleman and Haskell, a Partnership, et al., and Allstate Insurance Inc., 838 F.Supp. 448 (N.D. Cal. 1993), a former associate sued the employer law firm for age discrimination and sued the client, Allstate Insurance Inc., for tortious interference with business relations. Allstate allegedly requested that all of its matters should be handled by "younger attorneys." Allstate made a motion to dismiss, but the court held that: (1) California's Supreme Court would not recognize a client's right to select among associates of a law firm if selection criteria involved discrimination against members of a protected class; (2) the client's conduct was not privileged; and, (3) the associate had adequately pled the intent element of his intentional interference with business relations claim.

Similarly, in Commonwealth of Pennsylvania and Pennsylvania Human Relations Comm'n v. Thorp, Reed & Armstrong, 361 A.2d 497 (1976) a law firm was ordered by the court to restore a female associate attorney to her former position which had been taken away in retaliation for her filing claims of discrimination by a client. The court held, inter alia, that the firm could not be required to assign or reassign clients to the associate in any case in which a potential conflict affecting the interests of a client was reasonably believed to exist, but the firm could not discriminate in the assignment of the cases of firm clients for other than such sound professional reasons.

Beyond such common law causes of action, an offending client, like the acquiescing law firm, may find himself liable under relevant civil rights legislation. Under the Civil Rights Act of 1866, 42 U.S.C. § 1985(3), federal suit may be brought against conspirators to discrimination. A client who demands that a law firm replace a lawyer on a case due to his race may be said to "conspire" with the firm in unlawful activity. Moreover, some states make it unlawful to "aid or abet" in an employer's discrimination. See, e.g., N.Y. Exec. Law Sec. 296.

Thus, if a client makes a request similar to that in this hypothetical situation, it is incumbent upon the senior partner to inform the client that his decision could subject him to liability personally. Even if the scope of the

attorney-client relationship is limited to the sexual harassment matter, the attorney may be required to volunteer advice in matters beyond the scope of the relationship, if the failure to consider such advice may result in adverse consequences for the client. Nichols v. Keller, 15 Cal. App.4th 1672 (1993); California Rule of Professional Conduct, Rule 3-700.

D. Senior Partner's Ethical Responsibilities

In addition to state and federal statutes, an attorney's conduct is governed by the Rules of Professional Conduct ("RPC"). A violation of these rules can lead to disciplinary actions, up to and including disbarment. As is often the case, there are no rules of professional conduct that give unambiguous direction concerning the issues raised in the hypothetical. However, California's Rules of Professional Conduct may provide some guidance.

RPC, Rule 2-400 - Prohibited Discriminatory Conduct in a Law Practice, states, in pertinent part, that "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. . . in hiring, promoting, discharging or otherwise determining the conditions of employment of any person." Arguably, a senior partner in a law firm that "discriminates" against a white male trial attorney has violated this rule. Nevertheless, according to the rule, no disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred.

RPC, Rule 3-110 - Failing to Act Competently, states, in pertinent part, that "a member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." This rule may come into play when a client's request for a change in staffing comes on the eve of trial. If the client's interests may be prejudiced by bringing in an attorney who is unfamiliar with the facts of the case at the eleventh hour, a law firm may not be providing the client with competent representations.

On the other hand, Rule 3-110 does allow that "if a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." If the white male trial attorney is allowed to be in the courtroom and to assist with the trial, the requirement of competency may be satisfied.

Finally, RPC, Rule 3-700 - Termination of Employment, states, in pertinent part, that "a member representing a client . . . shall withdraw from employment . . . if . . . the member knows or should know that continued employment will result in violation of these rules or of the State Bar Act." Under these circumstances, a law firm believes that agreeing with a client's request constitutes prohibited "discrimination," pursuant to Rule 2-400, then it is mandatory that the firm withdraw from representation of the client.

This is complicated, however, by section (A)(2) of Rule 3-700 which states, "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel" If a client's matter is set for trial in the very near future, withdrawal by the law firm may be construed as "abandoning the client" and as seriously prejudicing the ability of the client to defend the case at trial.

V. INFLUENCE OF RACE/GENDER ISSUES IN THE PRACTICE OF LAW

Everything else aside, is there any legitimacy to the hypothetical client's request to change attorneys? Long before the massive media attention given to the O.J. Simpson trials of the century, people had held stereotypes concerning the functioning of the legal system. Given the complexity and unique circumstances of any given trial, it is virtually impossible to separate the effects, if any, of the race or gender of the jurors, the race or gender of the attorneys, or the race or gender of the parties from the effect of the force of the evidence and the skill with which it is presented.

Not surprisingly, when interviewed after verdicts, "real jurors" will almost uniformly state that it was the weight of the evidence that influenced their decisions, not the race or gender of the parties or attorneys. However, using "mock jury trials" and other "laboratory exercises," psychologists have identified some circumstances in which race and or gender are significant factors in decisions by "jurors."

A. Effects of Race

Studies of both real jury verdicts and "mock jury" deliberations that have attempted to investigate the role of race have tended to focus on the interactions of the race of the jurors and the race of the defendant in criminal settings. Generally speaking, minority defendants are treated more harshly than are white defendants.

In a study attempting to evaluate the effect of the race or sex of the *attorney*, subjects (high school students from a suburb of Los Angeles; race not specified) evaluated the guilt or innocence of a defendant (a white male in all conditions) while the race (black/white) and sex of the attorney was systematically varied (Cohen and Peterson, 1981). The study found that the defendant was significantly more likely to be convicted when represented by a black attorney. There was no significant effect of the attorney's sex. This study, however, illustrates some of the limitations of "mock jury" research. First, the race of the subjects is not specified and, as high school students, they are not representative of the range of individuals that would appear on a real jury. Also, these results are based on individual evaluations of the facts and were not affected by group deliberations.

In other social psychology studies, not in the mock jury area, it has been reported that race can be a factor in the persuasiveness of a speaker depending upon the subject matter. That is, when the subject is "race neutral," there is no difference in perception of persuasiveness of black or white speakers by black or white listeners. When the subject is racial in nature, however, subjects rate speakers of their same race as being more persuasive.

B. Effects of Gender

Studies attempting to evaluate the effect of attorney gender on juror perceptions are evolving as the number of practicing female attorneys increases. Older studies tended to report fairly negative attitudes toward female attorneys. For example, a mock jury study conducted in 1984 found that women jurors rated the female attorney as less intelligent, less friendly, less pleasant, less capable, less expert, and less experienced than the male attorney and the mock jurors stated a preference for retaining a male attorney (Hodgson and Pryor, 1984). Interestingly, gender had no effect on the perceptions of the male jurors. The "control group" individuals read the attorney's statements, rather than listening to them on audiotape. In this group, greater than 90 percent of the subjects assumed that the attorney was a male.

In another, older study, of the effect of attorney gender (McGuire and Bermant), an interesting result was obtained after mock jury deliberations. In this study, immediately following the presentation of the evidence at trial, the sex of the attorney had no effect on the jurors' tendency to vote not guilty. After deliberations, however, jurors who listened to the male attorney were significantly more likely to find the defendant not guilty than those listening to the female attorney. Interestingly, there was no effect in this study of the race of the defendant.

More recent studies, while not as harsh on female attorneys, still reveal differences in perceptions between male and female jurors. For example, in contrast to the earlier study, female jurors tend to say that a female attorney is "the more complete professional" and surmise that she has to work harder to gain credibility in what was a man's world. Male jurors often view female attorneys as overcompensating for their feelings of inferiority, and perceive them to be more dramatic and less powerful than male attorneys. Jurors of both sexes stated that female attorneys appear more compassionate, sensible in their approach to case presentation, and are more nurturing and attentive to their client's needs, on both professional and personal levels (Rice, 1996).

C. Perceptions of Sexual Harassment

In recent years, there has been an increasing number of studies investigating the issue of sexual harassment. The results of some of these studies may be of relevance not only to the litigation of such complaints, but for their initial investigation, as well.

For example, and perhaps not surprisingly, perceptions of "what is sexual harassment" can be affected by the subject's gender (Gowan and Zimmerman, 1996). Subjects were asked to review 17 different "sexual harassment scenarios," rate their offensiveness, and vote for either the plaintiff or defendant. In this study, there was a significant effect of gender only on those scenarios that were "ambiguous" in nature (e.g., seductive behavior). For the ambiguous scenarios, females were more likely to find them offensive and to find in favor of the female plaintiff. The jurors' ethnicity did not affect the results.

Additionally, a well-known social psychological phenomenon, "attractiveness bias," has been confirmed in a mock jury study of sexual harassment (Popovich, et al., 1996; See also, Egbert, et al., 1992). This study varied the physical attractiveness of the victim and the harasser and presented different scenarios of "harassment." The results included a finding that when the harasser (always a male) was "attractive," male subjects viewed him as less responsible, but female subjects viewed the victim as less responsible. Also, when the victim was "not attractive," male subjects were less likely to view the situation as "harassing."

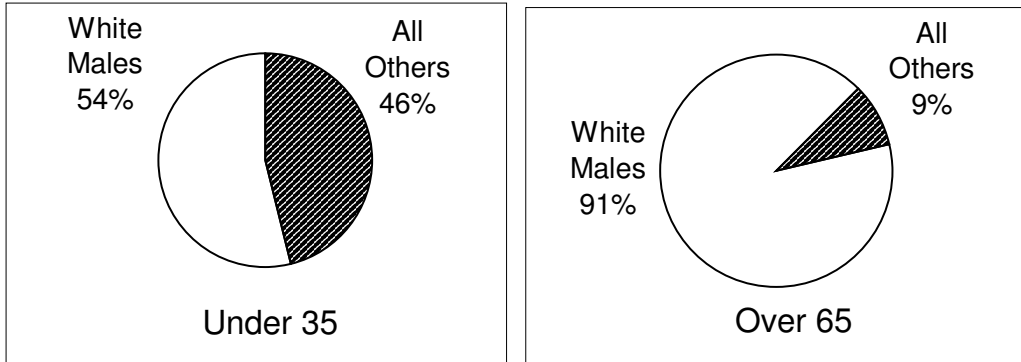
In closing, however, it is important to bear in mind that the psychological findings described herein are merely "general principles" that may or may not have any relevance to the factual setting of any individual case. The difficulty with using psychological research to predict results in actual cases is that each case to be litigated comes with its own unique set of factual circumstances. While there may be slight, but significant, effects of the race/gender of the attorney, the parties, or the jurors, these influences may be of insufficient magnitude to influence the outcome of the case.

VI. CONCLUSION

The current status of minorities and women in the legal profession may be analogous to a glass of water that is either half full, or half empty, depending upon your perspective. Undeniably, opportunities for both minorities and women have increased substantially over the past decades; however, there is still a long way to go. The "face" of the legal profession is changing, as younger attorneys entering the profession are more diverse than ever before (See Figure 4). Progress does not come without effort; however, and it is the professional responsibility of all practicing attorneys to insure that this trend continues, making the legal profession one for others to imitate."

Figure 4. Changing Faces of the Bar
(1991 Statistics for California Bar)

A. Decreasing Dominance of White Males



B. Increasing Presence of Minorities and Women

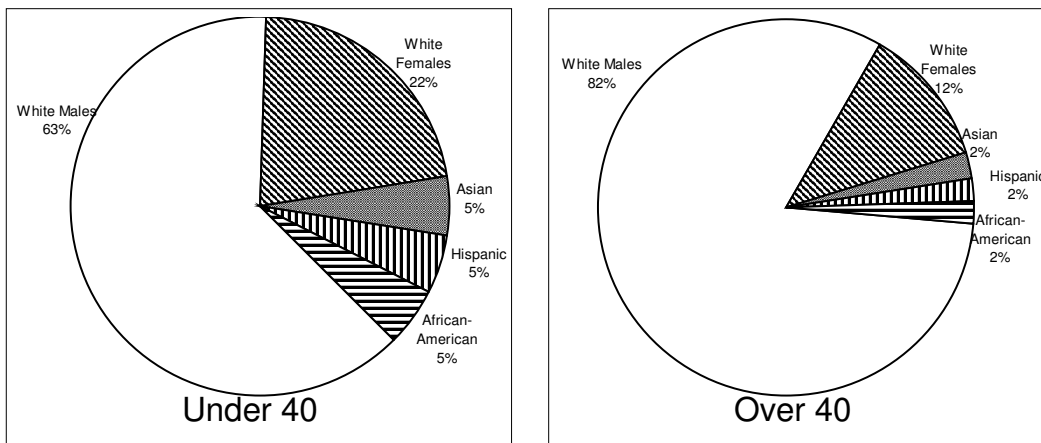


Figure 4. In panel A, this figure depicts the declining dominance of white males among attorneys in California. Whereas white males make up 91% of the attorneys over age 65, the younger members of the bar (under age 35) are comprised of only 54% white males. Panel B illustrates the increasing presence of minority and women attorneys in the California bar when comparing attorneys above the age of 40 with those below that age.

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