

Attorneys Should Have An Ethical Duty To Advance DEI

By **Elena Mitchell** (May 8, 2023)

Following the murder of George Floyd in 2020, companies increasingly began performing racial equity and civil rights assessments to measure company performance in terms of achieving goals related to social justice and diversity, equity and inclusion.[1]

Those in favor of companies conducting racial equity or civil rights assessments consider these assessments to be important risk management tools generating increased shareholder value in the long run.[2]



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But some companies have resisted proposals to conduct racial equity or civil rights assessments by negotiating with shareholders to withdraw proposals, mounting votes against such proposals, or requesting no-action relief from the U.S. Securities and Exchange Commission.[3]

Some companies even have received anti-DEI shareholder demands seeking to examine the effects of corporate DEI efforts on majority stakeholders who allegedly may be negatively affected by such efforts.[4]

Overall, however, there has been rising demand to conduct racial equity and civil rights assessments, and these assessments likely will continue to be seen as valuable risk management tools so long as discrimination pervades the modern workplace.[5]

As a result, many firms have launched practices dedicated to helping clients conduct such assessments since 2020, and many in-house and private lawyers now have experience conducting, or resisting shareholder proposals to conduct, these sorts of assessments for clients.

The murder of George Floyd and others also prompted remarkable, but overall less publicized, discussions about social justice and DEI issues among lawyers in private law firms and internal law departments.[6]

Attorneys continue to grapple with whether and how to advance DEI-related goals in their own workplaces even as they increasingly assist clients in this space.

National and state bar associations can help lawyers navigate these issues, and given that it is the role of the legal profession to champion equal justice for all under the law, these associations should formally recognize an ethical duty for attorneys to promote DEI in the industry and beyond. Then lawyers can leverage lessons learned from client engagements and other corporate racial equity and civil rights assessments to better the legal profession and society.

ABA Recognition of the Value of DEI

The preamble to the American Bar Association's Model Rules of Professional Conduct states that given the role of lawyers in society, lawyers should "strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."[7]

The ABA also recognizes that promoting diversity will help lawyers meet these goals because a diverse profession: (1) encourages engagement and improvement within the legal industry; (2) better reflects and engages clients and citizens; and (3) ultimately strengthens public trust in the rule of law and the legal profession.[8]

Thus, at least since 2008, the ABA has maintained a broad, organizational goal, or Goal III, of eliminating bias and increasing participation not only in the ABA, but also in the legal profession and justice system more broadly.[9]

In 2016, the ABA amended Model Rule 8.4 of the Model Rules of Professional Conduct to include a new subsection (g), prohibiting lawyers from engaging in various kinds of harassment and discrimination.[10]

And in 2021, via passage of Resolution 102, the ABA laudably began encouraging lawyers to dedicate 20 hours per year to promoting DEI in the legal profession.[11]

State Bar DEI Efforts

State bar associations have taken different approaches when it comes to issuing statements on DEI.

The North Carolina State Bar, for example, has published a Diversity, Equity & Inclusion Statement explaining that it "considers diversity and inclusion essential elements of promoting equity and preventing discrimination" — two ideals enshrined in the U.S. and North Carolina Constitutions, which North Carolina attorneys have sworn an oath to protect.[12]

But rather than directing or even urging North Carolina attorneys to promote DEI, the association merely notes its own commitment to incorporate DEI into its own "operations and mission." [13]

The State Bar of California, by contrast, goes further and, like ABA Resolution 102, encourages attorneys to promote DEI in their workplaces and the profession.[14] Attorneys in California also must participate in at least two hours of continuing legal education programming annually covering bias identification and elimination, and one of those hours specifically must cover implicit bias and ways to combat bias.[15]

Many state bar associations also have established anti-harassment and anti-discrimination rules like ABA Model Rule 8.4(g). Pennsylvania's Rule 8.4(g), for example, has recently come under attack after being amended in 2021 to make it professional misconduct for a lawyer to, "in the practice of law, knowingly engage in conduct constituting harassment or discrimination." [16]

After a Pennsylvania attorney sued the members of the Disciplinary Board of the Supreme Court of Pennsylvania and two of the board's disciplinary counsel seeking a declaratory judgment that Pennsylvania Rule 8.4(g) is facially unconstitutional, the U.S. District Court for the Eastern District of Pennsylvania ruled in March 2022's *Greenberg v. Goodrich* that the rule prohibits attorney speech too broadly and constitutes "an unconstitutional infringement of free speech" under the First Amendment.[17]

The defendants appealed and assert that the rule "comfortably fall[s] within Pennsylvania's power to regulate its legal profession" and is not unconstitutional because it is appropriately

tailored to advance the "compelling interest in protecting confidence in the legal system and the legal profession's integrity, as well as ensuring that all lawyers can practice law free from harassment and discrimination." [18]

The ABA also responded in an amici brief that because the rule prohibits "knowing" discrimination or harassment, it does not run afoul of the First Amendment and "[t]here is no constitutional right to engage in discrimination or harassment in the practice of law." [19]

Oral argument for Greenberg v. Lehocky was held in the U.S. Court of Appeals for the Third Circuit on April 13, and it remains to be seen how the court will rule. [20]

Moving Forward

Despite passing Resolution 102, the ABA has stopped short of adopting an affirmative, ethical duty to advance DEI in the profession. State bar associations also have not imposed such an ethical duty.

A major step forward for the legal profession would be formal recognition of an ethical duty for attorneys to promote DEI in their practices, much like the ethical duty for attorneys to provide pro bono service.

The ABA first adopted its Canons of Ethics in 1908, which initially included no reference to pro bono service. [21]

By 1969, the Canons evolved into the Model Code of Professional Responsibility, and the code only encouraged pro bono service generally. [22]

The code was further revised and eventually, in 1983, became the Model Rules of Professional Conduct. [23] In 1993, Model Rule 6.1 was amended to recognize an ethical duty to provide pro bono services and to include an aspirational call of 50 hours of service to be rendered annually. [24]

A new rule codifying an ethical duty for attorneys to promote DEI in their practices could look much like Model Rule 6.1 and borrow language from Resolution 102, similarly including an aspirational call of 20 hours of service to be rendered annually. The rule could simply state:

As a public citizen with a special responsibility to champion equal justice for all, every lawyer has a professional responsibility to promote diversity, equity, and inclusion in the legal profession and in society. A lawyer should aspire to devote at least 20 hours per year to activities that advance DEI.

Examples of activities that could count toward an attorney's annual hours could include, for instance:

- Drafting and adopting policies promoting the recruiting, hiring and advancement of lawyers and other staff from groups that have been historically underrepresented in the legal profession;

- Preparing, presenting or attending CLE and non-CLE programs covering topics related to DEI, discrimination and harassment, and explicit and implicit bias;
- Participating in and financially supporting organizations and affinity groups that advance DEI in the profession or in society more broadly; and
- Conducting DEI, racial equity or civil rights assessments for private law firms, internal law departments or clients.

In conducting some of these activities, lawyers can leverage lessons learned from client engagements and other corporate racial equity and civil rights assessments.

For instance, and as published reports make clear, conducting a DEI assessment is time- and labor-intensive. As such, lawyers assisting their own firms or legal departments with conducting an internal DEI assessment should carefully consider the purpose and scope of such an assessment at the outset.

Or a lawyer could present a CLE program to other attorneys on the basics of conducting a privileged DEI review for a client and what attorneys need to know about maintaining privilege during the process.

Finally, the comment to the new DEI rule could explain that, like Model Rule 6.1, the new DEI rule "is not intended to be enforced through disciplinary process."^[25]

Even without an enforcement mechanism, an aspirational rule would establish an important benchmark against which attorney performance could be both measured and encouraged.

Concluding Thoughts

In a world of increasing diversity, national and state bar associations have taken important steps toward eliminating discrimination and bias and encouraging DEI in the profession more generally.

Establishing DEI-related committees, collecting and analyzing DEI-related data, and rolling out strategic plans certainly are helpful.

But these leadership groups could generate greater momentum to drive real change — and better serve the legal profession and society — if they issued a codified, professional obligation for attorneys to promote DEI in the profession and beyond.

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[1] See Saijel Kishan, What Are Civil Rights Audits, and Why Are Companies Doing Them?, The Washington Post (May 3, 2022, 2:19 p.m. EDT), https://www.washingtonpost.com/business/what-are-civil-rights-audits-and-why-are-companies-doing-them/2022/05/03/2de0d12e-caa2-11ec-b7ee-74f09d827ca6_story.html.

[2] Valecia McDowell et al., Diversity culture clashes: the desire for and backlash to DEI audits and interventions, Westlaw Today (Feb. 9, 2023), https://www.mvalaw.com/media/news/15112_WLT_McDowell.pdf.

[3] See Ron S. Berenblat et al., Racial Equity Audits: A New ESG Initiative, Harvard Law School Forum on Corporate Governance (Oct. 30, 2021), <https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative/>.

[4] See Diversity culture clashes: the desire for and backlash to DEI audits and interventions, *supra* n.3.

[5] See *Id.*

[6] See Lisa Davis et al., A Look At The Legal Profession Since Murder of George Floyd, Law360 (May 24, 2022), <https://www.law360.com/articles/1495567/a-look-at-the-legal-profession-since-murder-of-george-floyd>.

[7] Model Rules of Professional Conduct: Preamble & Scope, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/?target=_blank&rel=noopener https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/.

[8] Diversity, Equity, and Inclusion Frequently Asked Questions and Resources, ABA, <https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/2022-aba-diversity-faqs.pdf>.

[9] ABA Mission and Goals, ABA, https://www.americanbar.org/about_the_aba/aba-mission-goals/.

[10] Rule 8.4: Misconduct, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/?target=_blank&rel=noopener https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/.

[11] Resolution 102, ABA (Aug. 9-10, 2021), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2021/102-annual-2021.pdf>.

[12] Diversity, Equity & Inclusion Statement, North Carolina State Bar, <https://www.ncbar.gov/about-us/diversity-equity-inclusion-statement/>.

[13] Id. (emphasis added).

[14] Diversity, Equity & Inclusion Calls to Action, State Bar of California, <https://www.calbar.ca.gov/Portals/0/documents/CallstoAction/Attorneys.pdf>.

[15] MCLE Requirements, State Bar of California, <https://www.calbar.ca.gov/Attorneys/MCLE-CLE/Requirements>.

[16] Jenna Greene, As fight escalates over lawyer harassment and bias rules, bar groups hit back hard, Reuters (Sep. 15, 2022), <https://www.reuters.com/legal/legalindustry/fight-escalates-over-lawyer-harassment-bias-rules-bar-groups-hit-back-hard-2022-09-14/>.

[17] Greenberg v. Goodrich, 593 F. Supp. 3d 174, 210, 225 (E.D. Pa. 2022).

[18] Br. of Defs.-Appellants at 16, Greenberg v. Lehocky et al., No. 22-1733 (Sept. 6, 2022), available at <https://fingfx.thomsonreuters.com/gfx/legaldocs/lbpgnkoklvq/Greenberg%20Opening%20Brief%20-%20Final.pdf>.

[19] Br. for Amicus Curiae ABA in Supp. Of Defs.-Appellants at 10, Greenberg v. Lehocky et al., No.22-1733 (Sept. 13, 2022), available at <https://fingfx.thomsonreuters.com/gfx/legaldocs/lbpgnkmelvq/PA%20ABA%20brief.pdf>.

[20] See Docket, Greenberg v. Lehocky et al., No. 22-1733 (3d Cir. Apr. 13, 2023).

[21] Canons of Ethics, ABA, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1908_code.pdf.

[22] ABA Model Code of Professional Responsibility, ABA, <https://njdc.info/wp-content/uploads/2014/05/ABA-Model-Code-of-Professional-Responsibility.pdf>.

[23] Model Rules of Professional Conduct, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/.

[24] ABA Model Rule 6.1, ABA, https://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1/.

[25] See Rule 6.1 Voluntary Pro Bono Publico Service – Comment, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service/comment_on_rule_6_1.