

Best Practices for Diversity, Inclusion & Elimination of Bias

Kristen Klein Wheaton, Esq.

Best Practices for Diversity and Inclusion – CAASNY 2020

Kristin Klein Wheaton, Esq.

Partner

kwheaton@goldbergsegalla.com

716-913-4332

Social Unrest

- This year's social unrest is having an impact in the workplace.
- Now more than ever, how employers, including governmental employers, address this issue is very important.
- What is your game plan?



Data

- The number of women in the legal profession continues to increase.
- Female representation among lawyers stood at 37.4% in 2018, up from 34.4% in 2008 and 28.5% in 1998.
- In 2018, female representation among resident active attorneys was 36% according to American Bar Association data.
- Women now comprise a majority of law students, according to the ILP report.

Source: Institute for Inclusion in the Legal Profession – Review dated 2019-2020

Data

- Compared to most other professions, women remain under-represented in the legal profession.
- Women's representation among lawyers (37.4%) is higher than their representation in some other professions, including software developers (19.3%), architects (29.7%), civil engineers (14.8%), and clergy (22.4%).

Source: Institute for Inclusion in the Legal Profession –
Review dated 2019-2020

Data

- Women's representation among lawyers is lower than their representation among financial managers (55.2%), accountants and auditors (60.6%), biological scientists (47.5%), and post-secondary teachers (49.0%); and significantly lower than their representation within the management and professional workforce as a whole (51.5%).

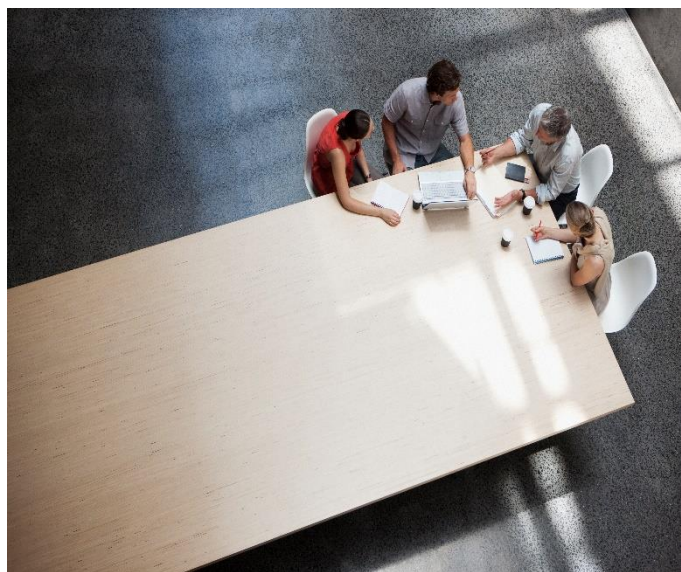
Source: Institute for Inclusion in the Legal Profession – Review dated 2019-2020

Data

- The pace of racial/ethnic minority representation in the legal profession has been steadily increasing during the past decade.
- Aggregate racial minority representation among U.S. lawyers stood at 16.5% in 2018, according to the Bureau of Labor Statistics.
- Based on three year (unweighted) averages, aggregate minority representation among lawyers has increased from 11.3% in 2006-08 to 15.3% in 2016-18.

Source: Institute for Inclusion in the Legal Profession – Review dated 2019-2020

Data



- In 2018, African Americans made up only 4.5% of associates in U.S. law firms, down from 4.7% in 2009, but up from a low point of 4.0% in 2014 and 2015.

Source: Institute for Inclusion in the Legal Profession – Review dated 2019-2020

Data

- Asian Americans are the most likely minority group to enter private practice.
- In 2018, Asian Americans made up 11.7% of associates in law firms, up from 9.3% in 2009.
- Notably, a majority of Asian American associates have been women.
- Hispanics comprise 4.7% of law firm associates in 2018, up from 3.9% in 2009.

Source: Institute for Inclusion in the Legal Profession –
Review dated 2019-2020

Data

- Despite this progress at the associate level, minority representation among law firm partners remains stubbornly low.
- In 2017, minorities made up only 8.4% of all partners and only 6.1% of equity partners that same year.
- In 2018, only 1.8% of all law firm partners are African American, only 2.5% are Hispanic, and only 3.6% are Asian American.

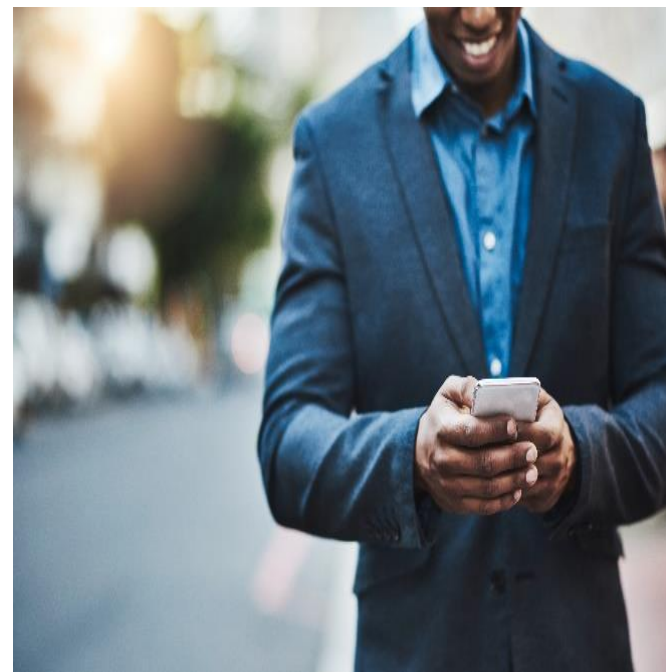
Source: Institute for Inclusion in the Legal Profession –
Review dated 2019-2020

Table 1 - U.S. Lawyers by Gender and Race/Ethnicity¹

	Lawyers	Female	Af Am.	Hisp.	As Am.	Minority
1995	894,000	26.4%	3.6	3.2		6.8
1996	880,000	29.5	3.5	2.8		6.3
1997	885,000	26.6	2.7	3.8		6.5
1998	912,000	28.5	4.0	3.0		7.0
1999	923,000	28.8	5.1	4.0		9.1
2002	929,000	29.2	4.6	3.1		7.7
2003	952,000	27.6	3.6	4.0	2.8	10.4
2004	954,000	29.4	4.7	3.4	2.9	11.0
2005	961,000	30.2	4.7	3.5	2.0	10.2
2006	965,000	32.6	5.0	3.0	2.9	10.9
2007	1,001,000	32.6	4.9	4.3	2.6	11.8
2008	1,014,000	34.4	4.6	3.8	2.9	11.3
2009	1,043,000	32.4	4.7	2.8	4.1	11.6
2010	1,040,000	31.5	4.3	3.4	4.3	12.0
2011	1,085,000	31.9	5.3	3.2	4.2	12.7
2012	1,061,000	31.1	4.4	4.0	4.3	12.7
2013	1,092,000	33.1	4.2	5.1	5.1	14.4
2014	1,132,000	32.9	5.7	5.6	4.4	15.7
2015	1,160,000	34.5	4.6	5.1	4.8	14.5
2016	1,133,000	35.7	4.4	5.6	4.7	14.7
2017	1,137,000	37.4	5.6	4.8	4.4	14.8
2018	1,199,000	37.4	5.5	6.1	4.9	16.5

Data

- Initial employment patterns seem to differ with racial groups.
- African Americans are significantly less likely to start out in private practice than other groups and more likely to start off in business or government.



Source: Institute for Inclusion in the Legal Profession – Review dated 2019-2020

Data

- In 2016, only 38.9% of African American law graduates were initially employed in private practice, compared to 54.9% of Hispanic graduates, 57.6% of Asian American graduates, 41.2% of Native American graduates and 53.7% of white graduates.

Source: Institute for Inclusion in the Legal Profession –
Review dated 2019-2020

Data

- In 2018, 21.2% of all judges were minorities.
- Article III judges have greater representation with 20.4% minority judges in 2018.
- Based upon limited data available, African American representation is greatest among federal government attorneys (8.7% in 2010) and law schools.

Source: Institute for Inclusion in the Legal Profession –
Review dated 2019-2020

Data

- Hispanic representation is highest among in house counsel as of 2015 (5% in 2015) and tenure track faculty members (6.4% in 2013).
- Asian American representation is highest among law firm associates (11.7% in 2018) and tenure-track faculty (8.5% in 2013).

Source: Institute for Inclusion in the Legal Profession –
Review dated 2019-2020

Data



- Law graduates identifying as LGBT are less likely than any other group to start out in private practice and more likely to start in public interest jobs.
- In 2016, 14.6% of law graduates identifying as LGBT took public interest jobs.

Source: Institute for Inclusion in the Legal Profession – Review dated 2019-2020

Data

- In 2018, 3.8 % of associates and 2.1% of partners identified as LGBT, up from 2.3% and 1.4% respectively in 2009.

Source: Institute for Inclusion in the Legal Profession –
Review dated 2019-2020

Data

- Tracking the profession's progress toward diversity and inclusion is made difficult by the continuing lack of data. Outside of law firms and Article III judgeships, the profession lacks basic data and racial/ethnic breakdowns by title, seniority and region or more inclusive efforts covering sexual orientation or disability status.
- More robust statistics are sorely needed.

Source: Institute for Inclusion in the Legal Profession – Review dated 2019-2020

Strategies

- Now that we have the data, what can a government law office do?

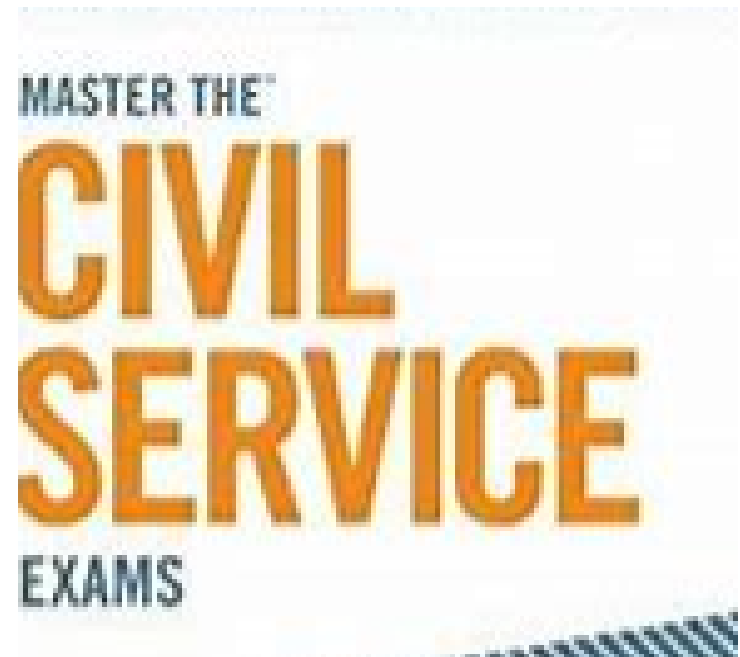


Recruitment Efforts

- Internships – Partner with law schools and minority bar associations, other law school organizations and clubs to recruit potentially diverse law clerk interns to work in the office
- Advertising – Advertise in some non traditional venues that are more likely to attract diverse candidates (Minority Bar Association for example)

Recruitment

- Wait, what about Civil Service Lists?



Recruitment

- Try to broadly advertise for Civil Service Examinations.
- Utilize extra efforts to advertise opportunities to take examinations through non-traditional routes.
- Certainly the rule of 3 limits choices, but the overall goal should be to diversify the pool of candidates on the list.
- Discuss with NYS Civil Service any suggestions they may have for increasing diversity in examinations.

Retention

- Many governmental agencies have trouble retaining minority candidates and lose them to other opportunities.
- Create a mentorship program or provide mentors for newer or inexperienced lawyers with more senior lawyers or leaders within the administration.
- Fully advertise the benefits of public service and the rewarding career opportunities it presents.

Retention

- Check for any potential pay disparities among gender and ethnic groups and make any necessary adjustments to pay scales.
- Retain an expert to assist in diversity and inclusion issues in the workplace – hire a smart, academically prepared, and experienced expert to train employees.
- Create a culture of candid conversation.

Retention

- Create a committee or advisory board to help craft and create your message about diversity in the workplace. (Try to keep political agendas and politics out of it.)
- Keep statistical data on promotions, resignations, hiring, and disciplines to ensure fairness and level treatment of all employees.
- Evaluate opportunities to promote diverse candidates into leadership roles.

Diversity & Inclusion Programs

- Best practices recommend that any Diversity and Inclusion Program must have support, goals, metrics, and accountability.
- Programs in name or policy only, without action, can lead to claims of discrimination for failure to follow policies and decrease employer credibility.

Candid Conversation

- Experts are starting to encourage conversations in the workplace.
- For many people, their entire exposure to people who are different from them—in terms of race, cultural background and even political thought—is in the workplace.



Issues of Social Justice in the Workplace

- Historically, certain topics were deemed off limits in the workplace.
- Social justice issues are now more pervasive than ever before in the workplace. Even if your employees aren't openly talking about them, you can bet that many of them are likely thinking about them or are distracted or impacted by them.

Issues of Social Justice in the Workplace

- Significantly, almost half of Black HR professionals (47 percent) said they do not feel safe voicing their opinions about racial justice issues in the workplace, while only a little more than one-quarter of white HR professionals (28 percent) say the same.
- Black and white workers generally agreed, however, that discussions about race can be uncomfortable.

Source – SHRM “Creating a Safe Space at Work for Discussing Social Justice Topics”, August 21, 2020

Issues of Social Justice in the Workplace

- Employers can provide healthy opportunities for respectful workplace dialogue by hosting town halls, listening sessions, and facilitated conversations.
- Clearly articulate your organization's values and take stances and support causes that are consistent with your core values.

Source – SHRM “Creating a Safe Space at Work for Discussing Social Justice Topics”, August 21, 2020

Issues of Social Justice in the Workplace

- Make sure employees feel healthy and safe. This includes helping employees deal with the emotional impact of what's going on in the country, offering a robust employee assistance program and providing outlets to discuss emotional societal issues in a positive way.
- Take time to review policies and practices and scrub them of any bias or disparate impact on people of color and other minorities or vulnerable populations.

Source: SHRM – “Creating a Safe Space at Work for Discussing Social Justice Topics”, August 21, 2020

Issues of Social Justice in the Workplace

- Consider what your County can do to support social justice initiatives in its industries and communities.
- County government is impacted by unrest just like other community members.
- Ensure all employees, especially supervisors, are well-trained on respect in the workplace; diversity, equity, and inclusion; and in de-escalation techniques.

Source: SHRM – “Creating a Safe Space at Work for Discussing Social Justice Topics”, August 21, 2020

Issues of Social Justice in the Workplace

**BLACK
LIVES
MATTER**



Free Speech?

- Are government employees free to discuss political views and views on social justice in the workplace?
- Are they free to possess or wear shirts, hats buttons, stickers, etc. in the workplace?
- With the increasing movement for social justice reform, there are strong opinions on both sides.

First Amendment Rights

- Support for the Black Lives Matter movement and racial justice is stronger than ever before, but certainly not universally accepted.
- So, what should an employer do when an employee voicing support for the BLM movement clashes with an employee who denounces the movement because they support the “all lives matter” movement?

First Amendment Rights

- Even if conflict is civil and not directed to an employee of another race, an employee's words or actions can still create a hostile work environment or offensive work environment obligating the employer to take corrective action.

Rights of Government Employees

- If an employee's political activity or speech has a nexus to the terms and conditions of their employment and does not create a hostile work environment based on a protected class, the activity or speech may be protected under federal law.

Garcetti v. Ceballos, 547 U.S. 410 (2006)

- Supreme Court held:

When public employees make statements pursuant to their official duties, such employees are not speaking as private citizens for First Amendment purposes, and thus the First Amendment does not prohibit managerial discipline of such employees for such speech.

Venable v. Metropolitan Government of Nashville, 430 F.Supp.3d 350 (M.D. Tenn.2019)

- Police officer commented on social media about a police shooting that was garnering public attention and allegedly racially motivated.
- He did not identify himself as a police officer but his comments were reported to his professional standards bureau.
- The court held that the officer’s “personal views about police officers and the dangers they face [in light of an] officer-involved shooting are a **matter** of public concern and the subject of nationwide debate.”

Venable v. Metropolitan Government of Nashville, 430 F.Supp.3d 350 (M.D. Tenn.2019)

- The Court found no constitutional violation in terminating the officer because “[t]he comments were made directly in response to a police shooting at a time when police shootings were a hot topic of debate among members of the public and the subject of nationwide protests.”
- The Court further noted that the employer could reasonably predict that the officer’s comments would be disruptive to its mission and affect officer morale.

Morris v. City of Columbia, 2019

WL 6093312 (D.S.C. 2019)

- White firefighter terminated for making negative comments about BLM movement on Facebook on duty
- On City's motion for summary judgment, he introduced Facebook comments made by African American coworker firefighters in support of BLM and derogatory to other views
- Court allowed Title VII claim to survive summary judgment

Parting Advice

- Training, training, training
- Evaluate recruitment and retention issues
- Consider outlets for constructive discussion about inequities or social justice issues in the workplace



Questions?

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