Recognizing & Addressing Implicit or Unconscious Bias

Part 2

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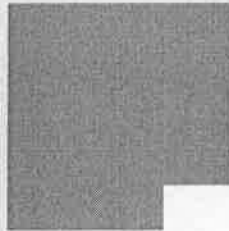
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Diversity Best Practices

Proven Strategies for Addressing Unconscious Bias in the Workplace

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Unconscious Bias in the Workplace
(August 2008)

Submitted by:
Howard Ross

Cook Ross Inc.

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to www.pli.edu to view the on demand program or segment for which it
was written.

Testing Your Own Unconscious Bias

The most effective tool available for testing one's own unconscious bias is the Implicit Association Test (IAT), created and maintained by Project Implicit, a consortium made up of researchers from Harvard University, the University of Virginia, and the University of Washington. The IAT was created more than 10 years ago and has now been used by millions of people in over 20 countries. Researchers at these three schools, as well as others, have used the test to study many aspects of organizational and social performance, ranging from healthcare decisions to the operations of the criminal justice system. To take the IAT, without charge, go to https://implicit.harvard.edu/implicit/

Exploring Unconscious Bias

by Howard Ross, Founder & Chief Learning Officer, Cook Ross, Inc.

Consider this: Less than 15% of American men are over six foot tall, yet almost 60% of corporate CEOs are over six foot tall. Less than 4% of American men are over six foot, two inches tall, yet more than 36% of corporate CEOs are over six foot, two inches tall.[1] Why does this happen? Clearly corporate boards of directors do not, when conducting a CEO search, send out a message to "get us a tall guy," and yet the numbers speak for themselves. In fact, when corrected for age and gender, an inch of height is worth approximately $789 per year in salary![2] Similar patterns are true for Generals and Admirals in the Military, and even for Presidents of the United States. The last elected President whose height was below average was William McKinley in 1896, and he was "ridiculed in the press as 'a little boy.'"[3]

It seems not only unfair, but patently absurd to choose a CEO because of height, just like it is unfair and absurd to give employees lower performance evaluations solely because they are overweight. Or to prescribe medical procedures to people more often because of their race. Or to treat the same people different ways because of their clothing. Or even to call on boys more often than girls when they raise their hands in school. And yet, all of these things continuously happen, and they are but a small sampling of the hundreds of ways we make decisions every day in favor of one group, and to the detriment of others, without even realizing we're doing it.

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1 Malcolm Gladwell discusses this phenomenon in his book, Blink, based on research conducted by Timothy Judge and Daniel Cable.
2 Judge, Timothy A., and Cable, Daniel M., "The Effect of Physical Height on Workplace Success and Income," Journal of Applied Psychology, June 2004, p. 435
3 Judge, Timothy A., and Cable, Daniel M., "The Effect of Physical Height on Workplace Success and Income," Journal of Applied Psychology, June 2004, p. 428

Lately, the concept of unconscious bias or "hidden bias" has come into the forefront of our work as diversity advocates because the dynamics of diversity are changing as we enter the 21st Century. Our tradition paradigm has generally assumed that patterns of discriminatory behavior in organizations are conscious; that people who know better do the right thing, and those who don't cause bias. As a result, we have developed a "good person/bad person" paradigm of diversity: a belief that good people are not biased, but inclusive, and that bad people are the biased ones.

One of the core drivers behind the work of diversity and inclusion professionals, almost since the inception of the first corporate diversity efforts, has been to find the "bad people" and fix them; to eradicate bias. There is good reason for this. If we are going to create a just and equitable society, and if we are going to create organizations in which everybody can have access to their fair measure of success, it clearly is not consistent for some people to be discriminated against based on their identification with a particular group. Also, clear examples of conscious bias and discrimination still exist, whether in broader societal examples like the recent incidents in Jena, Louisiana, or in more specific organizational examples.

Driven by this desire to combat inequities, we have worked hard through societal measures, like civil and human rights initiatives, to reduce or eliminate bias. We have put a lot of attention on who "gets" diversity, without realizing that to a degree our approach has been self-serving and even arrogant. "If they were as (wise, noble, righteous, good, etc.) as us, then they would 'get it' like we do!" Usually this is based on the notion that people make choices to discriminate due to underlying negative feelings toward some groups or feelings of superiority about their own. There is no doubt that this is often true. But what if, more times than not, people make choices that discriminate against one group and in favor of another, without even realizing that they are doing it, and, perhaps even more strikingly, against their own conscious belief that they are being unbiased in their decision-making? What if we can make these kinds of unconscious decisions even about people like ourselves?

The problem with the good person/bad person paradigm is two-fold: it virtually assures that both on a collective and individual basis we will never "do diversity right" because every human being has bias of one kind or another. Secondly, it demonstrates a lack of understanding of a reality: *human beings, at some level, need bias to survive*. So, are we biased? Of course. Virtually every one of us is biased toward something, somebody, or some group.

The concept of the unconscious was, of course, Freud's primary gift to the science of the mind, and, while it is not the purpose of this paper to delve too deeply into the esoteric, this concept drove the development of modern psychology. Yet, as behavioral psychology moved into the forefront during the 50's, 60's, and 70's, the study of the unconscious became de-emphasized. Recent research, driven largely by our ability to now manage huge quantities of data, and new exploratory techniques have given us an ability to not only observe the unconscious, but also to track and quantify its impact.

We now have a vast body of research, conducted at some of our finest institutions of learning – Harvard, Yale, the University of Washington, the University of Virginia, MIT, Tufts, and the University of Illinois, among others – that is showing us the same thing: unconscious or hidden beliefs – attitudes and biases beyond our regular perceptions of ourselves and others – underlie a great deal of our patterns of behavior about diversity.

The Necessary Purpose of Bias

Let's begin our exploration here by trying to understand the purpose of bias. We go out in the world every day and make decisions about what is safe or not, what is appropriate or not, and so on. This automatic decision making is what psychologist Joseph LeDoux has suggested is an unconscious "danger detector" that determines whether or not something or someone is safe before we can even begin to consciously make a determination.[4] When the object, animal, or person is assessed to be dangerous, a "fight or flight" fear response occurs.

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4   LeDoux, J. The Emotional Brain: The Mysterious Underpinnings of Emotional Life, New York: Simon and Schuster

On a conscious level, we may correct a mistake in this "danger detector" when we notice it. But often, we simply begin to generate reasons to explain why it was accurate to begin with. We are generally convinced that our decisions are "rational," but in reality most human decisions are made emotionally, and we then collect or generate the facts to justify them. When we see something or someone that "feels" dangerous, we have already launched into action subconsciously before we have even started "thinking." Our sense of comfort or discomfort has already been engaged.

From a survival standpoint this is not a negative trait. It is a necessary one. We have all heard the axiom, "it is better to be safe than sorry," and to a large degree this is true. If you sense something coming at your head, you duck. And if later you find out it was only a shadow of a bird flying by the window, better to have ducked and not needed to than to ignore the shadow and later find out it was a heavy object!

Where people are concerned, these decisions are hard-wired into us. At earlier times in our history, determining who, or what, was coming up the path may have been a life or death decision. If it was a hostile animal, or a hostile tribe member, you might die. Our minds evolved to make these decisions very quickly, often before we even "thought about it."

Our fundamental way of looking at and encountering the world is driven by this "hard-wired" pattern of making unconscious decisions about others based on what feels safe, likeable, valuable, and competent. Freud knew that the unconscious was far vaster and more powerful than the conscious. He described it as an iceberg: far more under the surface than above. Yet, recent research indicates that even Freud may have underestimated the unconscious. As Timothy Wilson, a University of Virginia psychologist who has studied the subject extensively has written: "According to the modern perspective, Freud's view of the unconscious was far too limited. When he said that consciousness is the tip of the mental iceberg, he was short of the mark by quite a bit – it may be more the size of a snowball on top of that iceberg."[5]

Scientists estimate that we are exposed to as many as 11 million pieces of information at any one time, but our brains can only functionally deal with about 40. So how do we filter out the rest? How is it that we can walk down a busy street in New York City with a virtual ocean of stimulus in front of us and still look for a specific person or thing? How can we have a conversation with a friend in the middle of thousands of people at a rock concert? We do it by developing a perceptual lens that filters out certain things and lets others in, depending upon certain perceptions, interpretations, preferences and, yes, biases that we have adapted throughout our life.

We can see this in some very mundane ways: if you or your partner was pregnant, did you notice how many more pregnant women you saw all of a sudden? If you were looking for a new car, how often did you suddenly start to see that car in commercials and on the street? Our perceptive lens enables us to see certain things and miss others, depending on the focus of our unconscious. It filters the evidence that we collect, generally supporting our already held points-of-view and disproving points of view with which we disagree.

As a result of these pre-established filters, we see things, hear things, and interpret them differently than other people might. Or we might not even see them at all! In fact, our interpretations may be so far off that we have to question, how do we know what is real anyway?

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5   Wilson, Timothy, Strangers to Ourselves

IN FOCUS

The Diversity of Language: An Introduction

The language of diversity makes people uncomfortable. Words like discrimination, oppression, dominance, subordination, heterosexism, racism or male privilege often cause negative reactions. When people speak these words, others begin to focus on what it means for them. It is easier to become defensive, argue the meaning or ignore these interactions than it is to learn how the language of diversity affects others and impacts all aspects of our lives. And, if we can't talk productively about something, then we can't do anything about it.

American English is saturated with "the language of oppression," which is perpetuated by a lack of awareness and understanding of language as an instrument of oppression. For any change to occur we must find a way to deal with the pain and discomfort caused by certain terms and concepts. This is no easy task since the discomfort is rooted in our long history of discriminatory attitudes and practices. We need to recognize that the words that carry a charge present an opportunity for learning and change. Heterosexism isn't a word that accuses "heterosexual" people of being bad, just as "disadvantaged" doesn't refer to someone who is helpless. Used responsibly, these and other words can help us to understand issues and respond in a way that causes positive change for everyone.

Since we have all learned the terminology of oppression simultaneously with learning the English language, we cannot unlearn it without making a conscious effort. *The Diversity Factor Language Guide*, from which this introduction is excerpted, is an aid in the unlearning process. While not definitive, it represents what we have learned about communicating the dynamics of oppression. It focuses on the meaning and impact of group identities, including race, gender, ethnicity, sexual orientation and ableness. To support those interested in relearning, here are some general principles:

•Notice your defensiveness and accept the discomfort of unlearning and relearning. To be competent in this arena is the same as learning to be competent in anything else. It requires a desire to know, motivation to become informed, opportunities to practice and the willingness to correct your mistakes.

•The best way to check the appropriateness of a term is to ask a member of the group being referred to while remembering that no one individual represents the entire group.

•People often collude in oppressing others by failing to challenge negative terminology about their own group and by using such terminology when speaking about others.

•Not everyone in a particular identity group, or everyone at a particular time, will agree on the use of specific terms or expressions. For example, many people of color prefer to be called Hispanic. Others identify with Latino/a. Still others prefer to be called by their national origin, e.g., Cuban, Mexican, Colombian, etc.

•All speakers of a language are influenced by the dynamics of dominant and subordinated group membership. If you are a white, heterosexual man, your experience of language will be different from a black woman or a gay Asian man.

•Humor is a familiar and treacherous trap. It is next to impossible to gauge what might offend someone or for others to know your intent.

•Speaking and writing appropriately is, in the main, easy. Consider: "Would I want someone to use a similar expression about me?"

•Negative language used within a given identity group about itself and its own members is very different from the same language used by people outside the group—though such usage is also often objectionable to group members.

While the language of oppression is still with us, new words continue to emerge that are more accurate and descriptive, and allow us to be more successful in ameliorating oppression and more productive in our interactions with each other. People who apply their learning place themselves in a position to affect change in the world. If humankind can relearn the language of diversity, then we can relearn how to respect and treat each other with honor, dignity and love.
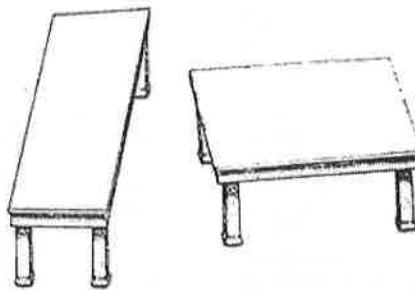
Exercise of the Unconscious

Look at the picture below of the two tables and see if you can determine which of the tops is bigger. Or are they the same size, the same shape?

You probably would say: "Obviously they are not the same shape. The one on the left is clearly narrower and longer than the one on the right." Or is it?

Now take a piece of paper and either cut out or trace the table top on the left. Then lay your cutout or tracing over the top of the table top on the right. Which is bigger? That's right, they are both identical.

This picture was created by Roger Shepard, an Oxford and Stanford University professor.[6] We all have seen some of these kinds of illusions over the years, in Readers Digest or e-mail exchanges, and we often refer to them as optical illusions. We would be more accurate describing them as cognitive illusions, because the illusory experience is not created by our eyes, but by our brain. As Shepard says,

"Because we are generally unaware that we are imposing a perceptual interpretation on the stimulus, we are generally unaware that our experience has an illusory aspect. The illusory aspect may only strike us after we are informed, for example, that the sizes or shapes of lines or areas that appear very unequal are, in fact identical in the picture."[7]

When we look at the picture, having no reason to assume that there is an illusion at play, we don't even consider that we might be seeing something different than what is obviously right in front of us. The problem is that it is not what is right in front of us at all.

6 Shepard, Roger, Mind Sights: Original Visual Illusions, Ambiguities, and Other Anomalies, New York: W. H. Freeman and Company, 1990, p. 48
7 Ibid, p. 46

The bottom line? We make assumptions and determinations about what is real every moment of every day. We sort out those 11 million pieces of information, we see what we see, and we believe that what we see is real. Only occasionally do we realize how subjective those determinations are, and how much they are impacted not by what is in front of us, but by what we interpret is in front of us, seen through our own lens on the world.

The challenge is that even knowing that we are inherently biased, we may not be able to help ourselves. According to Shepard,

> "Because the inferences about orientation, depth, and length are provided automatically by (our) underlying machinery, any knowledge or understanding of the illusion we may gain at the intellectual level remains virtually powerless to diminish the magnitude of the illusion."[8]

Our perception, in other words, is so deeply buried in our "underlying machinery," our unconscious, that even knowing that it is there makes it difficult, or impossible, to see its impact on our thinking and on what we see as real.

The Deep Impact of Unconscious Bias in the Workplace

Now, if all of this is about a silly illusion about a table, then who really cares? But what if it determines whether or not you will hire the most qualified candidate for a job? Or give an employee a fair performance review? Or hire the right CEO?

Where diversity is concerned, unconscious bias creates hundreds of seemingly irrational circumstances every day in which people make choices that seem to make no sense and be driven only by overt prejudice, even when they are not. Of course, there are still some cases where people are consciously hateful, hurtful, and biased. These people still need to be watched for and addressed. But it is important to recognize that the concept of unconscious bias does not only apply to "them." It applies to all of us.

Each one of us has some groups with which we consciously feel uncomfortable, even as we castigate others for feeling uncomfortable with our own groups. These conscious patterns of discrimination are problematic, but, again, they pale in comparison to the unconscious patterns that impact us every day. Unconscious perceptions govern many of the most important decisions we make and have a profound effect on the lives of many people in many ways.

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8   Ibid

SPECIAL CASE STUDY

CHUBB

Chubb

Chubb has built its solid reputation on one simple principle, "Never compromise integrity." This principle captures the spirit of Chubb, and the property, casualty and specialty insurance provider applies this same standard in its approach to diversity and inclusion within its organization.

According to Chubb, companies that perceive diversity as exclusively a moral imperative or societal goal are missing the larger point. Workforce diversity should be viewed as a competitive advantage and a business imperative, and only when companies approach diversity and inclusion in this way can they achieve a fully diverse and inclusive workforce.

The company believes that diversity is all about finding and developing the best talent, creating an inclusive work environment and achieving outstanding business results. Talent comes in many packages. The packages vary by race, age, gender, ethnicity, color, sexual orientation and disability. Diversity, for Chubb, is about recognizing, respecting and valuing these differences. But the company also appreciates that diversity is also about things that are not so tangible. Diversity is about differences in thinking styles, religious beliefs, education, socioeconomic status, and geographic location, among many variables.

In a true effort to create an environment where all employees can realize their fullest potential and in which the company can benefit from the competitive advantage diversity provides, Chubb offers trainings on various aspects of diversity, including how to recognize and address unconscious bias.

The first step in tackling workplace bias is to provide an open channel of communication for employees. Kathy Marvel, who serves as the company's Chief Diversity Officer, shares that Chubb provides easy access to employee relations personnel via a dedicated phone line called "Voice of the Employee." Callers can confidentially discuss issues that may require further investigation.

"In our leadership training program called the 'Leadership Development Seminar,' we have included a section on biases," Marvel explains. "This training allows participants to identify biases that they may hold and their impact on effective leadership."

During the past 18 months, Chubb has also piloted several versions of bias awareness training for its management teams. Additionally, "we have paired the bias awareness training with performance management training to help provide guidance on objectively linking performance with business goals, while managing the challenges we may face due to unconscious biases we may have," Marvel states. "The combined performance management / bias awareness session seems to be most effective, and we are determining how best to move forward with that format."

According to Marvel, any organization seeking to address unconscious bias discussions or training from within must do so carefully. "It may be misconstrued that an organization that is conducting bias training has uncovered biases in their practices, and this may make organizations reluctant to proceed with valuable training that may change behaviors. Each organization must assess that risk with their general counsel."

While the company has been participating in training, Marvel cautions that understanding and accepting one's biases is not an overnight process, nor a comfortable one. "Providing both team dialogue and personal reflection time is crucial for successful implementation," Marvel says.

The Résumé Study

A number of studies point directly to how unconscious decisions impact business decisions. Researchers at MIT and the University of Chicago have discovered that even names can unconsciously impact people's decision-making.[9] These researchers distributed 5,000 resumes to 1,250 employers who were advertising employment opportunities. The résumés had a key distinction in them: some were mailed out with names that were determined to be "typically white," others with names that were "typically black." Every company was sent four resumes: one of each race that was considered an "average" résumé and one of each race that was considered "highly skilled."

Pre-interviews with company human resources employees had established that most of the companies were aggressively seeking diversity, a fact that seems more likely to have them lean toward somebody with a name that suggests a black candidate. And yet, the results indicated something else was occuring. Résumés with "typically white" names received 50 percent more callbacks than those with "typically black" names. There was another striking difference. While the highly skilled "typically white" named candidates received more callbacks than the average ones, there was virtually no difference between the numbers of callbacks received by highly skilled versus average "typically black" named candidates. Even more strikingly, average "typically white" named candidates received more callbacks than highly skilled "typically black" named candidates![10]

The Affinity Bias Example

Unconscious patterns can play out in ways that are so subtle they are hard to spot. Imagine, for example, that you are conducting an interview with two people, we'll call them Sally and John. John reminds you of yourself when you were younger, or of someone you know and like. You have that sense of familiarity or "chemistry." You instantly like him, and though you are not aware of why, your mind generates justifications. ("He seems like a straightforward kind of guy. I like the way he 'holds' himself.") You ask him the first interview question and he hems and haws a bit. After all, it's an interview. He's nervous. Because you feel an affinity toward him, you pick up on his nervousness. You want to put him at ease. You say, "John, I know it's an interview, but there's nothing to be nervous about. Take a breath and let me ask the question again." John nails it this time and he's off and running to a great interview. The whole interaction took four seconds, yet it made a world of difference.

Then you sit down with Sally. There is nothing negative about her, just no real connection. It is a very "business-like" interaction. You ask her the first question and she's a little nervous too, but this time you don't pick up on it. This interview moves forward, but not quite as well as John's. The next day a co-worker asks you how the interviews went, and you respond: "John was great...open, easy to talk to. I think he'll be great with staff and clients." And your reply about Sally? "She's okay, I guess." Your perceptions about the interviews constitute your reality. You probably don't even remember the four-second interaction that changed John's entire interview. In fact, if somebody asks you, you would swear you conducted the interviews exactly the same way with the same questions. Your own role in influencing the outcomes was completely invisible to you, driven by your background of comfort with John.

9 Bertrand, Marianne and Mullainathan, Sendhil, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, University of Chicago Graduate School of Business, NBER and CEPR; MIT and NBER, 2004
10 Bertrand, Marianne and Mullainathan, Sendhil, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, University of Chicago Graduate School of Business, NBER and CEPR; MIT and NBER, 2004

IN FOCUS

Micro-Affirmations and Unconscious Bias

Mary P. Rowe, Ph.D., Adjunct Professor of Negotiation and Conflict Management at the Massachusetts Institute of Technology (MIT) Sloan School of Management.

Micro-affirmations – apparently small acts, which are often ephemeral and hard-to-see, events that are public and private, often unconscious but very effective, which occur wherever people wish to help others to succeed.

What Are Micro-Affirmations?

Micro-affirmations are tiny acts of opening doors to opportunity, gestures of inclusion and caring, and graceful acts of listening. Micro-affirmations lie in the practice of generosity, in consistently giving credit to others – in providing comfort and support when others are in distress, when there has been a failure at the bench, or an idea that did not work out, or a public attack. Micro-affirmations include the myriad details of fair, specific, timely, consistent and clear feedback that help a person build on strength and correct weakness.

I have come to believe that teaching and training about micro-affirmations may help an organization in several different ways:

The first effect is obvious – appropriately affirming the work of another person is likely both to help that person do well, and to help him or her to enjoy doing well.

The second effect is that consistent, appropriate affirmation of others can spread from one person to another – potentially raising morale and productivity. It helps everyone, men and women, people of color and Caucasians. It appears to be particularly helpful for department heads, and anyone who is senior to another person, to "model" affirming behavior.

The third effect is subtle, and deals with the point that it may be hard for a person to "catch" himself or herself unconsciously behaving inequitably. I may not always be able to "catch myself" behaving in a way that I do not wish to behave. But if I try always to affirm others in an appropriate and consistent way, I have a good chance of blocking behavior of mine that I want to prevent. Many micro-inequities are not conscious – but affirming others can become a conscious as well as unconscious practice that prevents unconscious slights.

Implications for Action

•Managers can and should pay attention to "small things."

•The principles of appreciative inquiry are relevant to micro-affirmations: "leading" rather than "pushing;" building on strength and success, rather than first identifying faults and weakness.

•Small things are especially important with respect to feelings. (Managers must be impartial about facts but it is often appropriate and helpful to affirm peoples' feelings.) As it happens, it is relatively easy for most people to practice and teach how to affirm feelings. This is important because the "mechanics" of affirmation are not trivial in human affairs – attitudes may follow behavior just as behavior may follow attitudes.

•Whenever a question is brought to us about how to change offensive behavior – our own behavior or that of another – we can teach the principles of changing behavior, and explore options about how to do it.

Excerpted with permission from an article by Mary Rowe: Micro-affirmations & Micro-inequities, Rowe, M. Journal of the International Ombudsman Association, Volume 1, Number 1, March 2008.

Now, imagine that same dynamic occurring in the way you:

- recruit people
- make hiring decisions
- conduct your initial orientation interview
- mentor employees (or not!)
- make job assignments
- give people training opportunities
- listen to people's ideas and suggestions
- make promotional choices
- give performance reviews
- decide organizational policy
- conduct marketing campaigns
- choose board members
- treat customers

…and literally hundreds of other choices, and you can see that we have an issue that dramatically impacts our organizations. And almost all of it can be invisible to us.

Unconscious Self-Perception and Performance

While it's clear that unconscious beliefs impact the way we perceive others, unconscious beliefs also impact how we view of ourselves and, as a result, our work performance. In a 1995 study by three psychology professors, a group of Asian-American female undergraduates were asked to fill out a brief questionnaire, then complete a math test. The women were split into three groups. The first group was given a "female identity salient" questionnaire designed to activate the gender identity of the tester. The second group's questionnaire was designed to activate the Asian cultural identity of the tester. And the third group was a control group whose questionnaire had no conscious focus.

Based on these different questionnaires, participants in the group that answered the "Asian salient" questionnaire performed at the highest level, 54%, while the control group averaged 49% and the "female identity salient" group had only 42%. The positive stereotypes about Asians in math seem to have had an "encouraging" impact on the first group, while the negative stereotypes about women and math may have had a suppressing impact on the group that was focused on their gender identity.

"Confirmational" behavior

We make decisions largely in a way that is designed to confirm beliefs that we already have. This phenomenon of "confirmational behavior" occurs unconsciously in both positive and negative ways.

Our thoughts and decisions are constantly influenced by widely held stereotypes. Imagine, for example, that you have an ingrained unconscious belief that "young Hispanic men are lazy" (as untrue as that stereotype might be). How do you manage a young Hispanic man who reports to you? What actions are you likely to take? Isn't it likely that you will have a tendency to micro-manage him? Are you more or less likely to invest in developing him? Are you more or less likely to put him on high level assignments? Are you more or less likely to introduce him to significant players in the organization? When he makes a mistake, are you more or less likely to accept his explanation?

The answers are apparent. As a result of your stereotype and consequent actions, the employee would become frustrated, perhaps even angry. He would become resigned and lose motivation. He might leave, but, then again, having experienced the same kind of treatment in other places, he might believe that this is "just the way it is" and stay while "going through the motions" on his job. In other words, he would behave in a way that appears "lazy" to you, further confirming your erroneous stereotype.

On the other hand, take "John" from the interview mentioned earlier. For some reason, you believe in him. He reminds you of yourself when you were younger. How do you treat him? You show a deep interest in his career. You introduce him to all of the "right" people. You make sure he gets key job assignments for upward mobility. If people express concerns about him, you say: "Don't worry. He's a good kid. I'll talk to him." Not because you are helping him, but because you really see him as more competent. The impact? John flourishes. In fact, two years later the announcement comes out: John has been appointed a director, the youngest person ever to get such an appointment. And your response? "Boy, am I a good judge of talent, or what?"

Our patterns of belief and their impact are so deeply ingrained, and so concealed in our unconscious, it becomes difficult for us to fully understand their impact on our decision-making. Our minds automatically justify our decisions, blinding us to the true source, or beliefs, behind our decisions. Ultimately, we believe our decisions are consistent with our conscious beliefs, when in fact, our unconscious is running the show.

The Organizational Unconscious

Unconscious behavior is not just individual; it influences organizational culture as well. This explains why so often our best attempts at creating corporate culture change with diversity efforts seem to fall frustratingly short; to not deliver on the promise they intended.

Organizational culture is more or less an enduring collection of basic assumptions and ways of interpreting things that a given organization has invented, discovered, or developed in learning to cope with its internal and external influences. Unconscious organizational patterns, or "norms" of behavior, exert an enormous influence over organizational decisions, choices, and behaviors. These deep-seated company characteristics often are the reason that our efforts to change organizational behavior fail. Despite our best conscious efforts, the "organizational unconscious" perpetuates the status quo and keeps old patterns, values, and behavioral norms firmly rooted.

"Flexible work" arrangements are one area in which the conflict between our conscious choices and the "organizational unconscious" is coming to a head. Flexible work arrangements – alternative arrangements or schedules that deviate from the traditional working day and/or week – are often established to allow employees, especially parents, to meet personal or family needs. In principle the policy makes business sense and may even draw a lot of corporate and employee support. Turnover among young, talented parents can cause an organization to lose some of its best employees and cost hundreds of thousands, or even millions, of dollars in replacement costs. Thus, many organizations have a flexible work policy clearly articulated in the employee manual.

SPECIAL CASE STUDY

Weyerhaeuser
Growing Ideas™

Weyerhaeuser

For Weyerhaeuser, one of the world's largest forest products companies, ensuring an environment that is truly diverse and inclusive is a top priority. So when the company made the important decision to look into combating unconscious bias within its corporate walls, the move made perfect sense.

"What we are trying to do here is build a more diverse and inclusive culture at Weyerhaeuser," states Effenus Henderson, the company's Chief Diversity Officer.

In Henderson's view, unconscious bias can and will show up in many areas of the workplace. Unconscious bias can show up in hiring, promotions or even in daily interactions around the office.

A critical part of addressing unconscious bias is in first recognizing and acknowledging that it exists. "You have to be able to recognize the kinds of issues or situations where people feel disrespected and devalued and look for those subtleties that other people might not always look for," explains Henderson.

Weyerhaeuser's managers are expected to encourage women, minorities, veterans, and individuals with disabilities to apply for positions for which they are qualified. Further, the company's leaders are expected to maintain a work environment that supports the success of all employees. Each member of the company's senior management team, for example, develops an action plan based on his or her individual diversity leadership assessment and is held accountable for follow through.

Weyerhaeuser understands that creating a company that is truly diverse and inclusive takes time and requires discipline, high expectations and accountability. The company takes great pains to ensure that it continues to improve upon its reputation for being an employer of choice. It is for this very reason that Weyerhaeuser diligently works to ensure bias is proactively addressed within the organization.

"I think it is important to recognize that bias exists, and you must coach leaders in a way that will allow them to recognize it," asserts Henderson. "This will help them build inclusive behaviors that help recognize things that exist in all of us that can at times get in the way of being inclusive and respectful of others."

In addition to some of the blatant ways that bias manifests itself, there are many subtle ways in which unconscious bias appears. Unconscious bias, Henderson points out, can show up in generational differences within the workplace. Younger workers may make assumptions about older workers, and vice versa, leading to unconscious, yet impactful, attitudes and actions. The same goes for assumptions across – and within – racial and ethnic groups, as well as management levels.

"We did a survey amongst our company employees to see what they thought about [unconscious bias] and how they thought it showed up, and the feedback we got back from them was that employees felt that managers who didn't mention diversity did not have an interest in the topic or a stake in the topic," Henderson shares. "At Weyerhaeuser, we know that there is no easy framework for this, but what we have tried to do is create a culture within our organization where people feel included and where our management team is held accountable when we fall short of this."

> Each one of us has some groups with which we consciously feel uncomfortable, even as we castigate others for feeling uncomfortable with our own groups. These conscious patterns of discrimination are problematic, but, again, they pale in comparison to the unconscious patterns that impact us every day. Unconscious perceptions govern many of the most important decisions we make and have a profound effect on the lives of many people in many ways. ...Unconscious patterns can play out in ways that are so subtle they are hard to spot. **"**

Howard Ross
Founder & Chief Learning Officer
of Cook Ross Inc., a diversity
training and change-management
firm based in Silver Spring, Md.

However, when employees actually take advantage of flexible work policies, they can often be viewed by others – including coworkers, bosses, and company leadership – as a "less committed," "less valuable," or "less desirable" member of the team. The "official rules" say that flexible work arrangements are acceptable, but in actuality a conflict exists. While the organization consciously acknowledges that offering flexible work arrangements is the "right" thing to do and may even help increase retention and employee satisfaction, the organizational unconscious believes differently. Unconsciously, the organization's culture of fear and mistrust pervades: fear that the company will ultimately lose productivity and revenue through flexible work arrangements, and mistrust that employees are misusing the policy and "cutting corners" in terms of time requirements.

Conflicts such as this can leave employees frustrated by the feeling that their leaders and the company as a whole are disingenuous in their statements, when in actuality the leaders may not see the conflict themselves.

How to Deal With Unconscious Bias in the Workplace ... For Better or For Worse

Given the enormous impact of unconscious patterns on both our individual behavior and on organizational behavior, the question becomes, "How do we begin to see the organizational unconscious, and what can we do about it?" How do we engage in a seemingly contradictory path...consciously becoming aware of and addressing something that is, by nature, concealed?

There are a number of strategies that will help us create workplace cultures in which employees can actively "unconceal" perceptions and patterns that have been hidden. According to the Level Playing Field Institute, a San Francisco based nonprofit which studies, identifies and removes hidden biases from the classroom to the board room, there are steps each of us can take to mitigate our hidden bias.

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INSTITUTE

Corporate Leavers Survey Findings

The Corporate Leavers Survey, a national study conducted by the Level Playing Field Institute in 2007, shows that each year more than 2 million professionals and managers voluntarily leave their jobs solely due to unfairness, costing U.S. employers $64 billion In turnover annually. Among the findings were:

• Persons of color are more than three times more likely to leave solely due to unfairness in the workplace than heterosexual, Caucasian men.

• Respondents who said unfairness was the only reason for leaving their job were most likely to cite the following specific forms of unfair conduct: (1) being asked to attend more recruiting or community related events than others because of one's race, gender, religion or sexual orientation, (2) being passed over for a promotion due to one's personal characteristics, (3) being publicly humiliated and (4) being compared to a terrorist In a joking or serious manner.

• 24% percent who experienced unfairness said their experience "strongly" discouraged them from recommending their employer to other potential employees. Similarly, 13% said their experience "strongly" discouraged them from recommending their employer's products or services to others.

• Respondents to the survey also expressed differing opinions on which actions their employers could have taken to convince them to stay. Fair compensation was the most important factor for heterosexual Caucasian men and women, while almost half (43 percent) of gays and lesbians would have been "much more likely" to stay if they were offered better benefits. More than one-third of people of color (34 percent) indicated they would have likely stayed if their employer had better management who recognized their abilities.

For more information about the Corporate Leaver Survey and the Level Playing Field Institute, please visit www.corporateleavers.org, www.lpfi.org or email info@lpfi.org.

Level Playing Field Institute Presents:

How to Make it Safer to Talk About Race, Age & Gender in the Workplace

Intercontinental Hotel
888 Howard Street, San Francisco
Thursday, September 4, 2008
12:00p – 1:30p

For more information, contact Martha Kim at martha@lpfi.org or by phone at (415) 946-3027.

Top 10 Ways to Combat Hidden Bias

1. Recognize that as human beings, our brains make mistakes without us even knowing it. The new science of "unconscious bias" applies to how we perceive other people. We're all biased and becoming aware of our own biases will help us mitigate them in the workplace.
2. Reframe the conversation to focus on fair treatment and respect, and away from discrimination and "protected classes". Review every aspect of the employment life cycle for hidden bias – screening resumes, interviews, onboarding, assignment process, mentoring programs, performance evaluation, identifying high performers, promotion and termination.
3. Ensure that anonymous employee surveys are conducted company-wide to first understand what specific issues of hidden bias and unfairness might exist at your workplace. Each department or location may have different issues.
4. Conduct anonymous surveys with former employees to understand what were the issues they faced, what steps could be taken for them to consider coming back, whether they encourage or discourage prospective employees from applying for positions at your company and whether they encourage or discourage prospective customers/clients from using your company's products or services.
5. Offer customized training based upon survey results of current and former employees that includes examples of hidden bias, forms of unfairness that are hurtful and demotivating, and positive methods to discuss these issues..
6. Offer an anonymous, third-party complaint channel such as an ombudsperson; since most of the behaviors that employees perceive as unfair are not covered by current laws – e.g. bullying, very subtle bias – existing formal complaint channels simply don't work.
7. Initiate a resume study within your industry, company and/or department to see whether resumes with roughly equivalent education and experience are weighted equally, when the names are obviously gender or race or culturally distinct.
8. Launch a resume study within your company and/or department to reassign points based on earned accomplishments vs. accidents of birth – e.g. take points off for someone who had an unpaid internship, add points for someone who put him/herself through college.
9. Support projects that encourage positive images of persons of color, GLBT and women. Distribute stories and pictures widely that portray stereotype-busting images – posters, newsletters, annual reports, speaker series, podcasts. Many studies show that the mere positive image of specific groups of people can combat our hidden bias.
10. Identify, support and collaborate with effective programs that increase diversity in the pipeline. Reward employees who volunteer with these groups, create internships and other bridges, and celebrate the stories of those who successfully overcome obstacles.

Many companies also choose to undergo an organizational diversity audit. Most organizational audits assess the conscious layers of organizational behavior. What do people think, believe, and see about what's going on in the organization?

What Does All of This Mean?

An awareness of unconscious bias requires us to fundamentally rethink the way we approach diversity work on a number of different levels. We have focused a great deal of attention on trying to find ways for people, especially those in the dominant groups, to "get" diversity. The challenge is that "getting it," on a conscious level, may have little or no impact on our unconscious beliefs and, more importantly, behavior. Our knowledge of unconscious bias makes several things abundantly clear:

- The limiting patterns of unconscious behavior are not restricted to any one group. All of us have them, and those of us who are diversity professionals particularly have to focus on our own assumptions and biases if we expect to have the moral authority to guide others in acknowledging and confronting theirs.

- A person who behaves in a non-exclusive or even discriminatory way does not have to have negative intent. When we approach people who view themselves as good individuals trying to do the right thing as if they "should have known better," we are likely to be met with resistance. If we approach them with an assumption of innocence in intent, but with an emphasis on the impact of their behavior, we are more likely to reach them effectively and garner their willing attention.

- Finally, we should not rely on any sense of subjective determinations of attitude, either individually or collectively, to determine whether our organizations are functioning in inclusive ways. Our conscious attitudes may have little to do with our success in producing results. We have to create objective measurements that give us individual and collective feedback on our performance if we are to create organizations that are truly inclusive.

Formal audits and evaluations also assess people's sense of how the culture is operating outside of their personal experience and look at indicators (metrics) that might identify how intentions and values are really expressed, thereby revealing the patterns of the organizational unconscious.

An understanding of unconscious bias is an invitation to a new level of engagement about diversity issues. It requires awareness, introspection, authenticity, humility, and compassion. And most of all, it requires communication and a willingness to act.

About Cook Ross, Inc.

Cook Ross, Inc. is a nationally recognized, woman-owned consulting firm founded in 1989. For nearly 20 years, Cook Ross, Inc. has provided diversity and cultural competency solutions through its training, consulting products and services to hundreds of organizations across 47 of the 50 United States, and 10 countries outside of the U.S.

We view diversity as a powerful resource that can be globally acknowledged and managed to create unprecedented learning and growth as well as an issue of legal compliance and awareness. We believe that attention to diversity, if done well, can improve productivity, morale, work satisfaction, creativity, internal and external communication, leadership, satisfaction in the communities that are being served, and profitability.

Our methodology is built around a transformative approach to Diversity and Inclusion Consulting – Re-Inventing Diversity for the 21st Century©. This approach creates sustainable change in organizations by replacing race-based, US-centric, 'us vs. them' diversity training with a systems model that explores globalism, cultural intelligence and cultural flexibility, inherent human tendency toward bias, and unconscious organizational patterns that exist which impact the way employees, vendors, and customers from different cultures, ages, and backgrounds all relate to each other.

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NOTES

4

Five Habits for Cross-Cultural Lawyering[1]

Sue Bryant
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Jean Koh Peters
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Practicing law is often a cross-cultural experience. The law, as well as the legal system in which it operates, is a culture with strong professional norms that give meaning to and reinforce behaviors. The communication style of argument predominates, and competition is highly valued. Even when a lawyer and a non-law-trained client share a common culture, the client and the lawyer will likely experience the lawyer–client interaction as a cross-cultural experience because of the cultural differences that arise from the legal culture.

In addition to these cultural differences, we know that the global movement of people, as well as the multicultural nature of the United States, creates many situations where lawyers and clients will work in cross-cultural situations. To meet the challenges of cross-cultural representation, lawyers need to develop awareness, knowledge, and skills that enhance the lawyers' and clients'

capacities to form meaningful relationships and to communicate accurately.

This chapter, and the habits it introduces, prepares lawyers to engage in effective, accurate cross-cultural communication and to build trust and understanding between themselves and their clients. Section 1 identifies some ways that culture influences lawyering and the potential issues that may arise in cross-cultural lawyer–client interactions. Section 2 identifies the principles and habits that are skills and perspectives that can be used to identify our own cultural norms and those of our clients and to communicate effectively, knowing these differences. As one anthropologist has recognized, there is "a great distance between knowing that my gaze transforms and becoming aware of the ways that my gaze transforms."[2] To help lawyers identify the ways their gaze transforms and the cultural bridges that are needed for joint work between lawyers and clients, we have developed five habits for cross-cultural lawyering.

CULTURE AND THE ROLE
IT PLAYS IN LAWYERS' WORK

To become good cross-cultural lawyers, we must first become aware of the significance of culture in the ways in which we make sense out of the world. Culture is like the air we breathe; it is largely invisible, and yet we are dependent on it for our very being. Culture is the logic through which we give meaning to the world.[3] Our culture is learned from our experiences, sights, books, songs, language, gestures, rewards, punishments, and relationships that come to us in our homes, schools, religious organizations, and communities.[4] We learn our culture from what we are fed and how we are touched and judged by our families and significant others in our communities. Our culture gives us our values, attitudes, and norms of behavior.

Through our cultural lens, we make judgments about people based on what they are doing and saying. We may judge people to be truthful, rude, intelligent, or superstitious based on the attributions we make about the meaning of their behavior. Because culture gives us the tools to interpret meaning from behavior and words, we are constantly attaching culturally based meaning to what we see and hear, often without being aware that we are doing so.[5]

In this chapter, when we talk about cross-cultural lawyering, we are referring to lawyering where the lawyer's and the client's ethnic or cultural heritage comes from different countries, as well as where their cultural heritage comes from socialization and identity in different groups within the same country. By this definition, everyone is multicultural to some degree.[6] Cultural groups and cultural norms can be based on ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, religion, accent, skin color, or a variety of other characteristics.

This broad definition of culture is essential for effective cross-cultural lawyering because it teaches us that no one characteristic will completely define the lawyer's or the client's culture.[7] For example, if we think about birth order alone as a cultural characteristic, we may not see

any significance to this factor. Yet if the client (or lawyer) comes from a society where "oldest son" has special meaning in terms of responsibility and privilege, identification of the ethnicity, gender, or birth order alone will not be enough to alert the lawyer to the set of norms and expectations for how the oldest son ought to behave. Instead, the lawyer needs to appreciate the significance of all three characteristics to fully understand this aspect of the client's culture.

A broad definition of culture recognizes that no two people have had the exact same experiences and thus no two people will interpret or predict in precisely the same ways. People can be part of the same culture and make different decisions while rejecting norms and values from their culture. Understanding that culture develops shared meaning and, at the same time, allows for significant differences helps us to avoid stereotyping or assuming that we know that which we have not explored with the client. At the same time that we recognize these individual differences, we also know that if we share a common cultural heritage with a client, we are often better able to predict or interpret, and our mistakes are likely to be smaller misunderstandings.

When lawyers and clients come from different cultures, several aspects of the attorney–client interaction may be implicated. The capacities to form trusting relationships, to evaluate credibility, to develop client-centered case strategies and solutions, to gather information, and to attribute the intended meaning from behavior and expressions are all affected by cultural experiences. By using the framework of cross-cultural interaction, lawyers can learn to anticipate and name some of the difficulties they or their clients may be experiencing. By asking ourselves as part of the cross-cultural analysis to identify ways in which we are similar to clients, we identify the strengths of connection. Focusing on similarities also alerts us to pay special attention when we see ourselves as "the same" as the client so that we do not substitute our own judgment for the client's through overidentification and transference.

Establishing Trust

Lawyers and clients who do not share the same culture face special challenges in developing a

trusting relationship where genuine, accurate communication occurs. Especially where the culture of the client is one with a significant distrust of outsiders[8] or of the particular culture of the lawyer, the lawyer must work hard to earn trust in a culturally sensitive way. Similarly, cultural difference may cause the lawyer to mistrust the client. For example, when we find the client's story changing or new information coming to light as we investigate, we may experience the client as "lying" or "being unhelpful." Often this causes us to feel betrayed by our client's sanctions.

Sometimes when a client is reacting negatively to a lawyer or a lawyer's suggestions, lawyers label clients as "difficult." Professor Michelle Jacobs has warned that white lawyers interpreting clients' behavior may fail to understand the significance of racial differences, thereby erroneously labeling African American clients as "difficult." Instead, the lawyer may be sending signals to the client that reinforce racial stereotypes, may be interpreting behavior incorrectly, and therefore may be unconsciously failing to provide full advocacy.[9]

In these situations, lawyers should assess whether the concept of insider-outsider status helps explain client reactions. Where insider-outsider status is implicated, lawyers must be patient and try to understand the complexities of the relationship and their communication while building trust slowly.

Accurate Understanding

Even in situations where trust is established, lawyers may still experience cultural differences that significantly interfere with lawyers' and clients' capacities to understand one another's goals, behaviors, and communications. Cultural differences often cause us to attribute different meanings to the same set of facts. Thus one important goal of cross-cultural competence is for lawyers to attribute to behavior and communication that which the actor or speaker intends.

Inaccurate attributions can cause lawyers to make significant errors in their representation of clients. Imagine a lawyer saying to a client, "If there is anything that you do not understand, please just ask me to explain" or "If I am not

being clear, please just ask me any questions." Many cultural differences may explain a client's reluctance to either blame the lawyer for poor communication (the second question) or blame himself or herself for lack of understanding (the first question). Indeed clients from some cultures might find one or the other of these results to be rude and therefore be reluctant to ask for clarification for fear of offending the lawyer or embarrassing themselves.

Cultural differences may also cause lawyers and clients to misperceive body language and judge each other incorrectly. For an everyday example, take nodding while someone is speaking. In some cultures, the nodding indicates agreement with the speaker, whereas in others it simply indicates that the listener is hearing the speaker. Another common example involves eye contact. In some cultures, looking someone straight in the eye is a statement of open and honest communication, whereas a diversion of eyes signals dishonesty. In other cultures, however, a diversion of eyes is a sign of respect. Lawyers need to recognize these differences and plan for a representation strategy that takes them into account.

Organizing and Assessing Facts

More generally, our concepts of credibility are very culturally determined. In examining the credibility of a story, lawyers and judges often ask whether the story makes "sense" as if "sense" were neutral. Consider, for example, a client who explains that the reason she left her native country was that God appeared to her in a dream and told her it was time to leave. If the time of leaving is a critical element to the credibility of her story, how will the fact finder evaluate the credibility of that client's story? Does the fact finder come from a culture where dreams are valued, where an interventionist God is expected, or where major life decisions would be based on these expectations or values? Will the fact finder, as a result of differences, find the story incredible or evidence of a disturbed thought process or, alternatively, as a result of similarities, find the client credible?

The way different cultures conceptualize facts may cause lawyers and clients to see

different information as relevant. Lawyers who experience clients as "wandering all over the place" may be working with clients who categorize information differently than the lawyer or the legal system. If a lawyer whose culture is oriented to hour, day, month, and year tries to get a time line from a client whose culture is not oriented that way, she may incorrectly interpret the client's failure to provide the information as uncooperative, lacking intelligence, or, worse, lying.[10] A client who is unable to tell a linear time-related story may also experience the same reaction from courts and juries if the client's culture is unknown to the fact finders.

Individual and Collective

In other settings, the distinction between individual and collective cultures has been called the most important concept to grasp in cross-cultural encounters.[11] Understanding the differences between individual and collective cultures will help lawyers see how they and clients define problems, identify solutions, and determine who important players are in a decision.[12]

Lawyers who explore differences in individual and collective cultures may see different communication styles, values, and views of the roles of the lawyer and client. In an individualistic culture, people are socialized to have individual goals and are praised for achieving these goals. They are encouraged to make their own plans and "do their own thing."[13] Individualists need to assert themselves and do not find competition threatening. By contrast, in a collective culture, people are socialized to think in terms of the group, to work for the betterment of the group, and to integrate individual and group goals. Collectivists use group membership to predict behavior. Because collectivists are accepted for who they are and feel less need to talk, silence plays a more important role in their communication style.

Majority culture in the United States has been identified as the most individualistic culture in the world.[14] Our legal culture reflects this commitment to individualism. For example, ethical rules of confidentiality often require a lawyer to communicate with an individual client in private if confidentiality is to be maintained and may prohibit the lawyer from representing the group or taking group concerns into account to avoid potential conflicts.[15] Many client-empowerment models and client-centered models of practice are based on individualistic cultural values.

Here is an example of how a result that appeared successful to the lawyers can nevertheless be unacceptable when taken in the context of the client's collective culture. In this case, lawyers negotiated a plea to a misdemeanor assault with probation for a battered Chinese woman who had killed her husband and who faced a 25-year sentence if convicted of murder. The client, who had a strong self-defense claim, refused to plead to the misdemeanor charge because she did not want to humiliate herself, her ancestors, her children, and their children by acknowledging responsibility for the killing. Her attorneys did not fully comprehend the concept of shame that the client would experience until the client was able to explain that the possibility of 25 years in jail was far less offensive than the certain shame that would be experienced by her family (past, present, and future) if she pled guilty. These negative reactions to what the lawyers thought was an excellent result allowed the lawyers to examine the meaning of pleas, family, responsibility, and consequences within a collective cultural context that was far different than their own.[16]

Legal Strategy and Decision Making

In another case, attorneys—whose client was a Somalian refugee seeking political asylum—had to change their strategy for presenting evidence in order to respect the client's cultural and religious norms. Soldiers had bayoneted her when she resisted rape, and she was scarred on a breast and an ankle. To show evidence of persecution, the plaintiff would have had to reveal parts of her body that she was committed, by religion and culture, to keeping private. Ultimately the client developed a strategy of showing the injury to the INS lawyer who was also female.[17] This strategy, challenging conventional legal advocacy and violating cultural norms of the adversarial system, allowed the client to present a case that honored her values and norms.[18]

Immigrant clients often bring with them prior experiences with courts or interactions with governments from their countries of origin that influence the choices they make in their cases. Strategies that worked in their country of origin may not be successful here. For example, clients from cultures that punish those challenging governmental action may be resistant to a lawyer's suggestion that a Supplemental Security Income (SSI) benefits appeal be taken, challenging the government's decision to deny a claim. Conversely, those who come from societies where refusal to follow government requirements is a successful strategy may be labeled as belligerent by the court when they consistently resist or challenge the court.

Finally, cultural differences may cause us to misjudge a client or to provide differential representation based on stereotype or bias. Few lawyers engage in explicit open racial or cultural hostility toward a client. However, if recent studies in the medical field have relevance for lawyers, we need to recognize that even lawyers of goodwill may engage in unconscious stereotyping that results in inferior representation. Studies in the medical field show that doctors are less likely to explain diagnoses to patients of color and less likely to gather significant information from them or to refer them for needed treatment.[19] Although no studies of lawyers to our knowledge have focused on studying whether lawyers engage in discriminatory treatment, two recent studies have identified differential treatment by the legal system based on race. One study done by Child Welfare Watch shows that African American children are far more likely to be removed from their home, put in foster care, and left there longer than similarly situated white children.[20] Another study showed that African American juveniles received disproportionate sentences when compared with similarly situated white youths. In each of these legal studies, lawyers—as prosecutors, representatives, and judges—were deeply implicated in the work that led to the differential treatment.

Once a cultural difference surfaces, we can see stark cultural contrasts with clear connections to lawyering choices. In hindsight, it is easy to see the cultural contrasts and their effect on the clients' and lawyers' challenges to find acceptable accommodations to the legal system. In the moment, however, cases are more difficult, and the differences and similarities are more subtle and, at times, invisible. The following sections give you some insights into how to make this more visible.

Culture-General and Culture-Specific Knowledge

In addition to developing awareness of the role that culture plays in attributing meaning to behaviors and communication, a competent cross-cultural lawyer also studies the specific culture and language of the client group the lawyer represents. Culture-specific knowledge, politics, geography, and history, especially information that might shed light on the client's legal issues, relationship with the lawyer, and process of decision making will assist the lawyer in representing the client better. As the lawyer develops culture-specific knowledge, he or she should apply this knowledge carefully and examine it on a case-by-case basis. Finally, a lawyer will have a greater capacity to build trust and connection if he or she speaks the client's language even if they do not share a common culture.

If the lawyer represents clients from a multitude of cultures, the lawyer can improve cross-cultural interactions by acquiring culture-general knowledge and skills. This culture-general information is also helpful to lawyers who are beginning to learn about a specific culture. Because learning any new culture is a complex endeavor (remember the number of years that we spent learning our own), the lawyer can use culture-general knowledge and skills while learning specifics about a new culture.

HABIT 1: DEGREES OF SEPARATION AND CONNECTION

The first part of Habit 1 encourages lawyers to consciously identify the similarities and differences between their clients and themselves and to assess their impact on the attorney–client relationship. The framework of similarities and differences helps assess lawyer–client interaction, professional distance, and information gathering.

The second part of the habit asks the lawyer to assess the significance of these similarities and differences. By identifying differences, we focus consciously on the possibility that cultural misunderstanding, bias, and stereotyping may occur. By focusing on similarities, we become conscious of the connections that we have with clients as well as the possibility that we may substitute our own judgment for the client's.

Pinpointing and Recording Similarities and Differences

To perform Habit 1, the lawyer brainstorms, as quickly as possible, as many similarities and differences between the client and himself as he can generate. This habit is rewarded for numerosity—the more differences and similarities the better. A typical list of similarities and differences might include the following:

Ethnicity	Economic Status	Marital Status
Race	Social Status	Role in Family
Gender	Language	Immigration Nationality
Sexual Orientation	Religion	Education
Age	Physical Characteristic	Time
Individualistic/ Collective	Direct or Indirect Communication	

With each client and case, you may identify different categories that will influence the case and your relationship. These lists will change as the relationship with the client and the client's case changes. Exhaustive lists help the lawyer make conscious the less obvious similarities and differences that may enhance or interfere with understanding.

Consciously identifying a long list of similarities and differences allows lawyers to see clients as individuals with personal, cultural, and social experiences that shape the clients' behavior and communications. In asking you to create long lists, we do not mean to suggest that all similarities and differences have the same order of importance for you or your client. For example, in interactions involving people of color and whites, race will likely play a significant role in

the interaction given the discriminatory role that race plays in our society.[21] In some cases, such as rape or domestic violence, gender differences may also play a greater role than in others. The connections that cause a lawyer to feel connected to a client may be insignificant to a client.

The most important thing is to make this list honestly and nonjudgmentally, thinking about what similarities and differences you perceive and suspect might affect your ability to hear and understand your client's story and your client's ability to tell it.

Another way to illustrate the degrees of connection and separation between client and lawyer is through the use of a simple Venn diagram. Draw two circles, overlapping broadly if the worlds of the client and of the lawyer largely coincide, or narrowly if they largely diverge. By creating a graphical representation of Habit 1, the lawyer can gain insight into the significance of the similarities and differences. For example, the list of similarities may be small, and yet the lawyer may feel "the same" as the client because of one shared similarity, or the lawyer may have many similarities and yet find herself feeling very distant from the client.

Analyzing the Effect of Similarities and Differences on Professional Distance and Judgment

After creating the lists and diagrams, the lawyer can identify where the cross-cultural challenges might occur. By naming the things that unite and distance us from our clients, we are able to identify relationships that need more or less professional distance because they are "too close" or "too far." No perfect degree of separation or connection exists between lawyer and client. However, where the list of similarities is long, the lawyer may usefully ask, "Are there differences that I am overlooking? Am I developing solutions to problems that may work for me but not for my client?" By pondering these questions, we recognize that even though similarities promote understanding, misunderstanding may flow from an assumption of precise congruence. Thus, in situations where lawyers and clients have circles that overlap, the lawyer should ask herself, "How do I develop proper professional distance with a client who is so similar to me?"

In other cases, where the list of differences is long, the question for the lawyer is "Are there any similarities that I am missing?" We know that negative judgments are more likely to occur when the client and lawyer see the other as an "outsider." Thus the lawyer who identifies significant cultural differences between the client and herself will be less likely to judge the client if she also sees herself as similar to the client. Where large differences exist, the lawyer needs to consciously address the question "How do I bridge the huge gap between the client's experiences and mine?"

What does the analysis of connection and difference indicate about what we ought to share with clients about ourselves? Lawyers usually know far more about their clients than the clients know about the lawyers. Some information of similarity and difference will be obvious to a client, and other significant information will be known only if the lawyer chooses to tell the client. In thinking about establishing rapport with clients, lawyers often think about revealing information that will reveal similarities and establish connections to clients. Of course, exactly what information will cause the client to bond with the lawyer is difficult to know, as the significance of specific similarities and differences may be very different for the lawyer and the client.

Analyzing the Effect of Similarities and Differences on Gathering and Presenting Information

Differences and similarities or assumptions of similarity will significantly influence questioning and case theory. One example of how differences and similarities in the lawyer–client dyad may influence information gathering can be seen in the way lawyers probe for clarification in interviews. Lawyers usually ask questions based on differences that they perceive between their clients and themselves. Thus a lawyer, especially one with a direct communication style, tends to ask questions when a client makes choices that the lawyer would not have made or when he perceives an inconsistency between what the client is saying and the client's actions. A lawyer tends not to ask questions about choices that a client has made when the lawyer would have made the same choices;

in such a situation, the lawyer usually assumes that the client's thought processes and reasoning are the same as his own.

For example, in working with a client who has fled her home because of spousal abuse and is living with extended family members, a lawyer might not explore the issue of family support. In contrast, had the client explained that she could not go to her family for support, the same lawyer might have explored that and developed housing alternatives. The probing occurs when the lawyer perceives the client's choices as different from the ones the lawyer might make, and therefore she tries to understand in this case why the client has failed to involve her family. The same lawyer might ask few questions about family support when she assumes that a client living with family had family support, because the lawyer would expect her own family to support her in a decision to leave an abusive spouse.

In her failure to ask questions of the first client, the lawyer is probably making a host of assumptions about cultural values that relate to the client's and the lawyer's family values. Assumptions of similarities that mask differences can lead the lawyer to solutions and legal theories that may not ultimately work for the client. For example, in assuming that the first client has family support, the lawyer in the previous example may neglect to explore other housing arrangements or supportive environments that the client needs. Family relationships are incredibly rich areas for cultural misunderstanding, and thus assumptions of similarity are perhaps even more problematic when issues of family are involved.

To identify the unexplored cultural assumptions that the lawyer may be making, the lawyer should ask what she has explored and what she has left unexplored. Reflection on the attorney–client interview allows the lawyer to identify areas where the lawyer may have missed relevant explanations of behavior.

HABIT 2: RINGS IN MOTION

If the key to Habit 1 is "identifying and analyzing the distance between me and my client," the key to Habit 2 is identifying and analyzing how cultural differences and similarities influence

the interactions between the client, the legal decision makers, the opponents, and the lawyer.

Lawyers interview clients to gain an understanding of the client's problem from the client's perspective and to gather information that will help the lawyer identify potential solutions, particularly those that are available within the legal system or those that opponents will assent to. What information is considered relevant and important is a mixture of the client's, opponent's, lawyer's, and legal system's perspectives.

If these perspectives are different in material ways, information will likely be presented, gathered, and weighed differently. Habit 2 examines these perspectives explicitly by asking the lawyer to identify and analyze the similarities and differences in different dyads and triads to assess the various cultural lenses that may affect the outcome of a client's case.

Like Habit 1, the lawyer is encouraged to name and/or diagram the differences and similarities first and then to analyze their effect on the case.

Pinpoint and Record
Similarities and Differences
in the Legal System–Client Dyad

The lawyer should identify the similarities and differences that may exist between client–law and legal decision maker–law. As in Habit 1, the similarities and differences can be listed or can be put on a Venn diagram. In many cases, multiple players will influence the outcome and should be included when identifying the similarities and differences. For example, a prosecutor, a prospective jury, a presentence probation officer, and a judge may all make decisions that influence how the client charged with a crime will be judged and sentenced. Or a forensic evaluator in a custody case may play a significant role in deciding the outcome of a case. Therefore, at various points in the representation, different, important players should be included in the diagram of similarities and differences.

For example, a forensic evaluator in examining a capacity to parent may look for signs of the parent's encouragement of separation of parent and child. In cultures that do not see this kind of separation as healthy for the child, the

evaluator may find little that is positive to report. For example, the parent may be criticized for overinvolvement, for practices such as sharing beds with children, or for failing to tolerate "normal" disagreements between child and parent. Lawyers should identify the potential differences that exist between the client and decision makers and focus on how to explain the client's choices where they differ from the evaluator's norms.

In thinking about how differences and similarities might influence the decision makers, lawyers often try to help clients make connections to decision makers to lessen the negative judgments or stereotyping that may result from difference. To the extent that lawyers have choices, they may hire or suggest that the court use expert evaluators that share a common culture or language with the client. Cross-cultural misunderstandings and ethnocentric judgments are less likely to occur in these situations. By checking with others that have used this expert, lawyers can confirm that, despite their professional education, the expert has retained an understanding and acceptance of the cultural values of the client. When the client and decision makers come from different cultures, the lawyer should think creatively about similarities that the client shares with the decision makers. By encouraging clients and decision makers to see similarities in each other, connections can be made cross-culturally.

In addition to focusing on the decision makers, the lawyer should identify the cultural values and norms implicit in the law that will be applied to the client. Does the client share these values and norms, or do differences exist?

Pinpoint and Record
Similarities and Differences
in the Legal System–Lawyer Dyad

The lawyer should also focus on the legal system–lawyer dyad and assess the similarities and differences between herself and the legal system. To what extent does the lawyer adopt the values and norms of the law and legal decision makers? How acculturated to the law and legal culture has the lawyer become? In what ways does the lawyer see the "successful" client the same as the law and legal decision makers,

and to what extent does the lawyer have different values and evaluations? Understanding the differences and similarities between the lawyer and the legal system players will help the lawyer assess whether her evaluation of the case is likely to match the legal decision maker.

Again the lawyer can list or create a diagram that indicates the similarities and differences. By studying these, the lawyer can develop strategies for translation between the client and the legal system that keeps the client and her concerns central to the case.

Pinpoint and Record Similarities and Differences of Opponents to Legal Decision Makers/Clients/Lawyers

The cultural background of an opposing party may also influence the outcome of a case. By listing or diagramming similarities and differences of the opponent with the various other players involved in a case, the lawyer can assess a case and design creative solutions. Often in settling cases, lawyers look for win-win solutions that meet the needs of clients and their adversaries. For example, in assessing the possibility of resolving a custody case, a lawyer may want to know what the norms of custody are in the opposing party's culture and the extent to which the opposing party still embraces these values. How might gender norms about who should have custody influence the opponent's capacity or willingness to settle the case? Will the opponent be the only decision maker in resolving the case, or might the extended family, especially the grandparents, be the people who need to be consulted for the settlement to take place. All these factors and more should be included in a lawyer's plan for negotiation.

Reading the Rings: Analyze the Effect of Similarities and Differences

After filling in the diagrams and/or making the lists of the different dyads, the lawyer can interpret the information to look for insights about the impact of culture on the case and potential successful strategies. The lawyer's goal in reading the rings is to consciously examine influences on the case that may be invisible but will nonetheless affect the case.

The following questions may help identify some of those insights:

Assessing the legal claim: How large is the area of overlap between the client and the law?

Assessing cultural differences that result in negative judgments: What are the cultural differences that may lead to different values or biases, causing decision makers to negatively judge the client or the opponent?

Identifying similarities that may establish connections and understanding: What does a successful client look like to this decision maker? How similar or different is the client from this successful client?

Assessing credibility: How credible is my client's story? Does it make "sense"? To what extent is knowledge of the client, her values, and her culture necessary for the sense of the story? How credible is my client? Are there cultural factors influencing the way the client tells the story that will affect her credibility?

Identifying legal strategies: Can I shift the law's perspective to encompass more of the client's claim and desired relief? Do my current strategies in the client's case require the law, the legal decision maker, or the client to adjust perspectives?

Identifying bones to pick with the law: How large is the area of overlap between the law and myself?

Identifying how my biases shape the inquiry: How large is the area of overlap between the lawyer–client, lawyer–law, and client–legal system circles? Notice that the overlap is now divided into two parts: the characteristics relevant to the legal case that the lawyer shares with the client and those relevant characteristics that the lawyer does not share with the client. Does my client have a plausible claim that is difficult for me to see because of these differences or similarities? Am I probing for clarity using multiple frames of reference—the client's, the legal system's, the opponent's, and mine? Or am I focused mostly on my own frame of reference?

Identifying hot-button issues: Of all the characteristics and perspectives listed on the rings, which loom largest for me? Are they the same ones that loom largest for the client? For the law?

Habit 2 is more cumbersome than Habit 1 and requires looking at multiple frames of reference at once.[22] However, lawyers who have used Habit 2 find that it helps them to focus when a case or client is troubling them. The lawyer can identify why she has been focusing on a particular aspect of a case even when that aspect is not critical to the success of the case. She may gain insight into why a judge is bothered by a particular issue that is presented in the case. In addition, lawyers might gain insight into why clients are resisting the lawyer's advice or the court's directive and are "uncooperative." Lawyers might also begin to understand why clients often see the lawyer as part of a hostile legal system when a high degree of overlap between the lawyer and the legal system is identified.

What can the lawyer do with the insights gained from reading the rings or lists? Lawyers can ask whether the law and legal culture can be changed to legitimate the client, her perspective, and her claim. Can the lawyer push the law or should she persuade the client to adapt? Hopefully, by discovering some of these insights, the lawyer may be better able to explain the client to the legal system and the legal system to the client.

HABIT 3: PARALLEL UNIVERSES

Habit 3 helps a lawyer identify alternative explanations for her client's behavior. The habit of parallel universes invites the lawyer to explore multiple alternative interpretations of any client behavior. Although the lawyer can never exhaust the parallel universes that explain a client's behavior, in a matter of minutes the lawyer can explore multiple parallel universes to explain a client's behavior at a given moment.

For example, if a lawyer has a client in a custody dispute who has consistently failed to follow a court order to take her child for a psychiatric evaluation, the lawyer might assume that her client has something to hide. Although the client tells the lawyer she will do it, it remains undone. A lawyer using parallel universe thinking can imagine many different explanations for the client's behavior: the client has never gone to a psychiatrist and is frightened; in the client's experience, only people

who are crazy see psychiatrists; going to a psychiatrist carries a lot of shame; the client has no insurance and is unable to pay for the evaluation; the client cannot accept that the court will ever give the child to her husband, who was not the primary child caretaker; the client may fear that she will be misinterpreted by the psychiatrist; or the client simply did not think that she needed to get it done so quickly.

Using parallel universe thinking, the lawyer for a client who fails to keep appointments can explore parallel universe explanations for her initial judgment that "she does not care about the case." The behavior may have occurred because the client lacked carfare, failed to receive the letter setting up the appointment, lost her way to the office, had not done what she promised the lawyer she would do before their next appointment, or simply forgot about her appointment because of a busy life.

The point of parallel universe thinking is to get used to challenging oneself to identify the many alternatives to the interpretations to which we may be tempted to leap on insufficient information. By doing so, we remind ourselves that we lack the facts to make the interpretation, and we identify the assumptions we are using. The process need not take a lot of time; it takes only a minute to generate a number of parallel universe explanations to the interpretation to which the lawyer is immediately drawn.

Parallel universe thinking would cause the lawyer in the introductory example to try to explore with the client why she is resistant or to talk to people who share the client's culture to explore possible cultural barriers to her following the court's order.

Parallel universe thinking is especially important when the lawyer is feeling judgmental about her client. If we are attributing negative inferences to a client's behavior, we should identify other reasons for the behavior. Knowledge about specific cultures may enlarge the number of explanations that we can develop for behavior. Parallel universe thinking lets us know that we may be relying on assumptions rather than facts to explain the client's behavior and allows the lawyer to explore further with the client or others the reasons for the behavior. This exploration may also be helpful in explaining the client's behavior to others.

By engaging in parallel universe thinking, lawyers are less likely to assume that they know why clients are doing what they are doing when they lack critical facts. Parallel universe thinking also allows the lawyer to follow the advice of a cross-cultural trainer who suggests that one way to reduce the stress in cross-cultural interactions is to ask, "I wonder if there is another piece of information that, if I had it, would help me interpret what is going on."[23]

HABIT 4: RED FLAGS AND REMEDIES

The first three habits focus on ways to think like a lawyer, incorporating cross-cultural knowledge into analyzing how we think about cases, our clients, and the usefulness of the legal system. Habit 4 focuses on cross-cultural communication, identifying some tasks in normal attorney–client interaction that may be particularly problematic in cross-cultural encounters as well as alerting lawyers to signs of communication problems.

Good cross-cultural interaction requires mindful communication where the lawyer remains cognitively aware of the communication process and avoids using routine responses to clients. In cross-cultural communication, the lawyer must listen deeply, carefully attuned to the client and continuously monitoring whether the interaction is working and whether adjustments need to be made.

Habit 4 is accomplished in the moment and requires little planning for the experienced lawyer. The lawyer can identify ahead of time what she will look for to spot good communication and "red flags" that will tell her that accurate, genuine communication is probably not occurring.

In addition to paying attention to red flags and corrective measures, culturally sensitive exchanges with clients should pay special attention to four areas: (1) scripts, especially those describing the legal process; (2) introductory rituals; (3) client's understanding; and (4) culturally specific information about the client's problem.

Use Scripts Carefully

The more we do a particular activity, the more likely we are to have a "script." Lawyers often have scripts for the opening of interviews, explaining confidentiality, building rapport, explaining the legal system, and other topics common to the lawyer's practice. However, a mindful lawyer uses scripts carefully, especially in cross-cultural encounters, and instead develops a variety of communication strategies to replace scripts and explore understanding.

Pay Special Attention to Beginnings

A lawyer working with a client from another culture must pay special attention to the beginnings of communications with the client. Each culture has introduction rituals or scripts as well as trust-building exchanges that promote rapport and conversation. A lawyer who is unaware of the client's rituals must pay careful attention to the verbal and nonverbal signals the client is giving to the lawyer. How will the lawyer greet the client? What information will be exchanged before they "get down to business"? How do the client and lawyer define "getting down to business"? For one, the exchange of information about self, family, status, or background is an integral part of the business; for another, it may be introductory chitchat before the real conversation takes place. If an interpreter who is familiar with the client's culture will be involved with the interview, the lawyer can consult with the interpreter on appropriate introductory behavior.

Use Techniques That Confirm Understanding

Both clients and lawyers in cross-cultural exchanges will likely have high degrees of uncertainty and anxiety when they interact with someone they perceive to be different. The lack of predictability about how they will be received and their capacity to understand each other often leads to this uncertainty and anxiety. To lessen uncertainty and anxiety, both the lawyer and the client will be assisted by using techniques that consciously demonstrate that genuine understanding is occurring. Active listening techniques, including feedback to the client rephrasing his or her information, may be used to communicate to the client that the lawyer understands what the client is saying.[24]

In addition to giving the client feedback, the lawyer should look for feedback from the client that she understands the lawyer or is willing to ask questions if she does not understand. Until the lawyer knows that the client is very comfortable with a direct style of communication, the lawyer should refrain from asking the client if she understands and instead probe for exactly what the client does understand.

Gather Culture-Sensitive Information

How do we gather information that helps us interpret the client within her cultural context? In the first instance, the lawyer should engage in "deep listening" to the client's story and voice. For reasons identified in Habit 1, the lawyer, in question mode, will often be too focused on his or her own context and perspective. When exploration of the client's values, perspective, and cultural context is the goal, the lawyer needs to reorient the conversation to the client's world, the client's understandings, the client's priorities, and the client's narrative. Questions that get the client in narrative mode are usually the most helpful.

Questions that ask the client how or what she thinks about the problem she is encountering may also expose differences that will be helpful for the lawyer to understand the client's worldview. What are the client's ideas about the problem? Who else has the client talked to and what advice did they give? What would a good solution look like? What are the most important results? Who else besides the client will be affected? Consulted? Are there other problems caused by the current problem? Does the client know anybody else who had this problem? How did they solve it? Does the client consider that effective?

If the client has come from another country, the lawyer should ask the client how this problem would be handled in the client's country of origin. For example, in many legal cultures, the lawyer is the "fixer" or the person in charge. In contrast, most law students in the United States are taught client-centered lawyering, which sees the lawyer as partner, and our professional code puts the client in charge of major decisions about resolving the case.

Look for Red Flags That the Interaction Is Not Working

What are the red flags that mindful lawyers pay attention to in assessing whether the conversation is working for the client and lawyer? Red flags that the lawyer can look for include the following:

The client appears bored, disengaged, or even actively uncomfortable;

the client has not spoken for many minutes, and the lawyer is dominating the conversation;

the lawyer has not taken any notes for many minutes;

the client is using the lawyer's terminology instead of the lawyer using the client's words;

the lawyer is judging the client negatively;

the client appears angry; or

the lawyer is distracted and bored.

Each lawyer and client and each lawyer–client pair will have their own red flags.

The first step is to see the red flag and be shaken out of complacency. "Uh-oh, something must be done." The next step is the corrective one. This must be done on the spot, as soon as the red flag is seen. The general corrective is to do anything possible to return to the search for the client's voice and story.

Explore Corrective Measures

In creating a corrective, the lawyer should be careful to use a different approach than the one that has led to the red flag. For example, if the client is not responding to a direct approach, try an indirect approach. If the call for narrative is not working, ask the client some specific questions or ask for narrative on a different topic.

Other suggested correctives include

turning the conversation back to the client's stated priority;

seeking greater detail about the client's priority;

giving the client a chance to explain in greater depth her concerns;

asking for examples of critical encounters in the client's life that illustrate the problem area;

exploring one example in some depth;

asking the client to describe in some detail what a solution would look like; and

using the client's words.

Again, these are only a few examples of many correctives that can be fashioned. Encounter by encounter, the lawyer can build a sense of the red flags in this relationship and the correctives that "work" for this client. Client by client, the lawyer can gain self-understanding about her own emblematic red flags and correctives that specifically target those flags. Red flags can remind the lawyer to be aware of the client and to be focused on the client in the moment. With reflection, the red flags can help the lawyer avoid further problems in the future.

HABIT 5: THE CAMEL'S BACK

Like the proverbial straw that breaks the camel's back, Habit 5 recognizes that, in addition to bias and stereotype, there are innumerable factors that may negatively influence an attorney–client interaction. A lawyer who proactively addresses some of these other factors may limit the effect of the bias and stereotyping and prevent the interaction from reaching the breaking point. Once the breaking point has been reached, the lawyer should try to identify why the lawyer–client interaction derailed and take corrective actions or plan for future corrective action.

Consider the case of a woman client with a horrible story of torture, whom the lawyer had very limited time to prepare for in an asylum trial (she lived out of town). During their conversation, the woman spoke in a rambling fashion. The lawyer, just back from vacation, was thinking angry thoughts toward the client. In the extreme stress caused by time pressure and by listening to the client tell about some horrible rapes that she had suffered, the lawyer fell back on some awful, old conditioning: against people who are of a different race, people who are overweight, and people who "talk too much."

In the midst of these feelings, which were causing the lawyer shame, what can the lawyer do to put the interview back on track and prevent a collision? This lawyer, like all lawyers,

had biases and stereotypes that he brought to this attorney–client interaction. Research on stereotypes indicates that we are more likely to stereotype when we are feeling stress and unable to monitor ourselves for bias. By identifying the factors contributing to the negative reactions and changing some of them, the lawyer could prevent himself, at least sometimes, from acting on the basis of his assumptions and biases.

For example, the lawyer in the previous situation can take a break, have some food and drink, and identify what is interfering with his capacity to be present with the client before he resumes the interview. This, however, requires that the lawyer accept his every thought, including the ugly ones, and find a way to investigate and control those factors that are simply unacceptable in the context of lawyering. Knowing oneself as a cultural being and identifying biases and preventing them from controlling the interview or case are keys to Habit 5 thinking.

Over time, lawyers can learn to incorporate the analysis that they are doing to explore bias and stereotype into the analysis done as part of Habit 1. In addition to biases and stereotypes, straws that break the lawyer's back frequently include stress, lack of control, poor self-care, and a nonresponsive legal system. Final factor analysis identifies the straws that break the lawyer's back in the particular case and corrective steps that may work to prevent this from happening.

For example, assume that a lawyer, after working with a few Russian clients, begins to stereotype Russians as people who intentionally communicate with a lack of candor with lawyers. Habit 5 encourages this lawyer to be extra mindful when interviewing a Russian client. Given her biases, there is a higher likelihood that the lawyer will not find herself fully present with this client. In addition to using the other habits, the lawyer can improve the communication by controlling other factors (hunger, thirst, time constraints, and resource constraints), knowing that she is at greater risk of misunderstanding this client.

The prudent lawyer identifies proactively factors that may impede full communication with the client. Some she cannot control: pressure from the court, lack of resources, bad

timing, excessive caseload. But some she can: the language barrier (through a competent interpreter), her own stress (through self-care and adequate sleep, food, and water), and the amount of time spent with the client (increase as needed).

Habit 5 thinking asks the lawyer to engage in self-analysis rather than self-judgment. A lawyer who has noticed a red flag that recurs in interactions with clients can brainstorm ways to address it. Likewise, a lawyer who has noticed factors that tend to be present at particularly smooth encounters with clients can brainstorm ways to make more use of these advantages. By engaging in this reflective process, the lawyer is more likely to respond to and respect the individual clients.

NOTES

1. This work grows out of a joint collaborative process that was conceived in conversations in the early 1990s and began as a project in fall 1998 with a concrete goal of developing a teaching module about cross-cultural lawyering. Ultimately that project resulted in these materials for use in clinical courses, which we first presented at the 1999 CUNY Conference, "Enriching Legal Education for the 21st Century, Integrating Immigrant Perspectives Throughout the Curriculum and Connecting With Immigrant Communities." This work has also contributed to a chapter written by Jean Koh Peters in the supplement to her book, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions.*

Many wonderful colleagues, students, and staff from CUNY and Yale aided us in the development of this work. The Open Society Institute, Emma Lazarus Fund, provided support for the conference, our work, and the publication of these materials.

2. R. Carroll, *Cultural Misunderstandings* 3 (University of Chicago Press 1988). Others have referred to this as "conscious incompetence," where the individual recognizes that cross-cultural competence is needed, but the person has not yet acquired the skills for this work. See W. S. Howell, *The Empathetic Communicator* 30–35 (1982).

3. Carroll, *Cultural Misunderstandings* 2. Objective culture includes that which we observe including artifacts, food, clothing, and names. It is

relatively easy to analyze and identify its use. Subjective culture refers to the invisible, less tangible aspects of behavior. People's values, attitudes, and beliefs are kept in people's minds. Most cross-cultural misunderstandings occur at the subjective culture level. See K. Cushner & R. Brislin, *Intercultural Interactions* 6 (Sage Publications 1996), p. 6.

4. Those who grew up in cultures in the United States that prized individualism and self-reliance can identify specific experiences from their childhood that helped them develop these traits, such as paper routes and baby-sitting jobs and proverbs such as "God helps them who help themselves" and "The early bird catches the worm." Cushner & Brislin, *Intercultural Interactions*, p. 7. Not all who grew up in the United States share this commitment to individualism; significant cultural groups in the United States prize commitment to community. They might have heard "Blood is thicker than water."

5. Ethnocentrism occurs when a person uses his own value system and experiences as the only reference point from which to interpret and judge behavior.

6. Cushner & Brislin, *Intercultural Interactions*, p. 10.

7. Critical feminist race theorists have established the importance of intersectionality in recognizing, for example, that women of color have different issues than white women or men of color. The intersectionality of race and gender gives women of color different vantage points and life experiences. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1249 n. 29 (1991); see also Melissa Harrison and Margaret E. Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, Columbia Journal Of Gender and Law (1996), 387, 403. Professors Montoya and Harrison discuss the importance of seeing multiple and changing identities.

8. The insider/outsider group distinction is one of the core themes in cross-cultural interactions. K. Cushner & D. Landis, The Intercultural Sensitizer, in *Handbook of Intercultural Training* 189 (2d ed.; D. Landis and R. Bhagat eds., 1996). Historical struggles between native countries of the lawyer and client or situations where lawyer's or client's native country has dominated the other's country can create difficult power dynamics between lawyer and client.

For example, racial discrimination both historical and current by Anglo-Americans against African Americans can have significant influences on the lawyer–client relationship. *Infra*, note 32.

9. Michelle Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U.L. Rev. 345, 372 (1997).

10. Harrison and Montoya, *supra* note 4, at 160. For example, after discussing the scholarship on lawyer as translator or ethnographer, Professor Zuni Cruz invited Esther Yazzie, a federally certified Navajo translator, to describe and enact the skills necessary to work successfully with language interpreters. "Ms. Yazzie's presentation debunked for all of us the idea that languages are transparent or that representations of reality somehow exist apart from language. One of several examples cited by Ms. Yazzie involved different conceptualizations of time: 'February' translated into Navajo as 'the time when the baby eagles are born.' Certainly, this is a temporal concept more connected to nature and to place than a word such as 'February' and, as such, is a different construct."

11. Cushner & Brislin, Intercultural Interactions, *supra* note 14, at 302.

12. Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 Clin. L. Rev. 557, 580–584 (1999), *supra* note 5, at 580–584, tells a number of stories illustrating difference in individualistic and community-focused lawyering and how culture influences the choices that lawyers make.

13. Cushner & Brislin, *Intercultural Interactions*, *supra* note 4 at 302.

14. Hofstede 1980 and 1991 as cited in Cushner & Brislin, Intercultural Interactions, *supra* note 4, at 302. Other nations that rank high on this dimension are Australia, Canada, Great Britain, the Netherlands, and New Zealand. Nations that score high on collectivism are primarily those in Asia and South America.

15. See also Kimberly O'Leary, Using "Difference Analysis" to Teach Problem-Solving, Clin. L. Rev. 65, 72 (1997), at 72. Professor O'Leary points to both the ethical rules and concepts of standing as limiting lawyers' conceptions about who is involved in a dispute. Following our presentation at the 2000 AALS Clinical Teacher's conference, Peter Joy alerted us to a contemplated change in California professional responsibility rules on confidentiality, allowing the

privilege to be maintained when family members or others were part of the interview process.

16. This scenario was told to me by Professor Holly Maguigan, who for years has represented a number of battered women in criminal cases. In this case, her students worked with a lawyer from the Legal Aid Society. These lawyers were significantly aided by the advocates of the New York Asian Women's Center who perform both language and cultural translations. The New York Asian Women's Center is a community-based organization that works with a diverse group of Asian women in assisting them to deal with issues of intimate violence. For a more detailed analysis of the difference between individualism and collectivism, see Cushner & Landis, *Handbook of Intercultural Training*, note 11 *supra*, at 19.

17. Peter Margulies, *Re-framing Empathy in Clinical Legal Education*, 5 Clin. L. Rev. 605 (Spring 1999). Margulies also presented this case at the 1999 CUNY Conference, "Enriching Legal Education for the 21st Century, Integrating Immigrant Perspectives Throughout the Curriculum and Connecting With Immigrant Communities."

18. The classic fact finder, the judge, never saw the evidence. The adversary learned about the evidence not from the lawyer, but from the client, and the adversary, not the advocate, presented the evidence to the court.

19. See Jacobs, *People From the Footnotes*.

20. *Race, Bias & Power in Child Welfare*, Child Welfare Watch, Spring/Summer 1998, Number 3. Child Welfare Watch is funded by the Child Welfare Fund and produced by City Limits Community Information Services, Inc.

21. The legal system's focus on the protection of individual rights and personal liberties reflects the essential and pervasive cultural value of individualism. The American values of free-market competition, decentralized and minimized government intervention, and laissez-faire economics are mirrored in the adversarial process. The American legal model, including the "rules of the game," fosters competition between largely autonomous and self-interested, zealous advocates in a winner-take-all scheme.

22. Because Habit 2 requires the exploration of multiple frames of reference, Jean came up with the rings as a way to assess the perspectives and analyze where there was overlap of all three perspectives and where there were differences. Not everyone comfortably uses the diagrams or thinks in the visual

ways that diagramming encourages. Habit 2 can be done with lists, filled-in Venn diagrams, or other imaginative ways that help the lawyer concretely examine the cultural differences and similarities that are involved in a case.

23. R. Brislin and T. Yoshida, *Intercultural Communication Training: An Introduction* (Sage Publications, 1994).

24. I do not know how the recommendation that we engage in active listening by identifying the emotional content of the client's communication works for clients from more indirect cultures. One might hypothesize that a client who would be reluctant to directly name the way she is feeling may feel uncomfortable with the lawyer giving feedback of the emotional content of the message.

Effective Policies and Programs for Retention and Advancement of Women in the Law

WorkLife Law
UC Hastings College of the Law

Best Practices

Diversity Beyond the Body Count

For too long, diversity efforts have counted women and lawyers of color, and exhorted employers to improve the body count. The drawback of this approach is that it doesn't tell employers what is going wrong, or they should be doing differently.

The PAR Research Institute's **Beyond the Body Count Approach** highlights that effective measures to improve the retention of women need to do two things: address the hours problem and design basic business processes to control for implicit bias.

Address the Hours Problem

Only 9 percent of employed American mothers work more than 50 hours a week during the key years of career advancement – age 25 to 44.[1] So even if an employer does everything else absolutely perfectly, it is unlikely to advance a proportionate number of women without addressing the fact that most mothers do not work the schedule currently enshrined as "full time." Offering only a single one-size-fits-all schedule not only will cause an employer to eliminate a large percentage of the pool of talented women—it also will drive away many younger men.

Control for Implicit Bias in Basic Business Systems

Research shows that subtle bias has profound effects, and continues to shape office politics in ways that systematically disadvantages women and people of color. Offering an implicit bias training can help, but it does not really address the problem. Changing minds and hearts at an individual level is fine, but the real problem is the way implicit bias is built into the basic business systems; in the law, the key ones are the assignment, evaluation and compensation systems.

The PAR Research Institute (formerly The Project for Attorney Retention) has worked for fifteen years to gather best practices to give legal employers concrete guidance. Note, however, that organizations may have changed their practice since we interviewed them. **We would love to hear about it if something has changed – or if you have a best practice to report.** You can contact us at:

http://worklifelaw.org/about-the-center/contact/.

"Research shows that subtle bias has profound effects, and continues to shape office politics in ways that systematically disadvantages women and people of color. Offering an implicit bias training can help, but it does not really address the problem."

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[1] Calculations performed by Alison Gerrimill, using the 2011 American Community Survey, which is a nationally representative survey conducted by the United States Census Bureau, http://www.census.gov/acs/www/.

Addressing the Hours Problem

APPOINT A BALANCED HOUR COORDINATOR

What Is A Balanced Hours Coordinator? Why Do Firms Need One?

A Balanced Hours Coordinator is a partner or administrator with a direct report to the head of the firm who is appointed by the firm to oversee the successful implementation and administration of its balanced hours program. Firms need a Balanced Hours Coordinator because even the most expertly drafted, well-intentioned balanced hours policy cannot implement itself. A mere paper policy is essentially worthless or, worse yet, it can be damaging—damaging to the careers of the attorneys who opt to take advantage of it without appropriate guidance and institutional support, and damaging to management's credibility as it creates false expectations and erodes associates' morale. By adopting a balanced hours program and appointing a Balanced Hours Coordinator to keep a balanced hours program on track, to troubleshoot problems as they arise, and to guide balanced hours and supervising attorneys, firms can ensure that their policy will succeed in practice.

Functions of a Balanced Hours Coordinator:
- Collect and provide information about balanced hours at the firm
- Help attorneys and the firm create balanced hour proposals
- Monitor schedule creep and assignments
- Address excessive hours with supervising attorneys
- Advocate for and support balanced hours attorneys
- Provide training about the program initially for the firm as a whole and thereafter for new attorneys

Check out the real-world examples of balanced hour coordinators below. Does your firm have a balanced hour coordinator? Is it planning to appoint one? Let us know your experiences, thoughts, and questions.

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"Firms need a Balanced Hours Coordinator because even the most expertly drafted, well-intentioned balanced hours policy cannot implement itself."

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Q&A with Roslyn Pitts, Balanced Hour Coordinator, Kirkpatrick Lockhart

Q: Do you know why the firm created your position?
A: Experts in the field have identified infrastructure as an essential element of programs like ours. K&LNG created the balanced hours coordinator position to serve as a crucial part of that infrastructure here—to implement, support, and manage the balanced hours program. Administratively, the program has many moving parts, so it's very important to have one person dedicated exclusively to the role.

Q: What do you think are the advantages and/or disadvantages of creating your position as an administrative one, as opposed to putting a partner in that role?
A: I am not certain that the firm set out to create an administrative position. However, because this role is administratively intense, a practicing lawyer simply would not have the time to invest. I do not see any disadvantages to my being a law firm administrator. I have a direct line of communication to Peter Kalis, chairman and managing partner of our firm. I practiced law and can relate to the pressures and life demands experienced by our lawyers. We designed our administrative process to include local partner input and decision-making. We expect that our proposing BH lawyers may feel more comfortable speaking candidly with an administrator who has no influence over their work assignments, compensation, bonus, evaluations, etc.

Q: Could you state your job description in a nutshell?
A: To implement, manage and assist in any way with the balanced hours program; to listen to, coach, counsel and advise lawyers participating in or interested in participating in the program; and to do whatever necessary to contribute to the success of the program from our lawyers,' the firm's and clients' perspectives.

Q: What do you see as your most important function?
A: To support, counsel and coach our BH lawyers.

Q: Why?
A: It is crucial to the success of the program for us to understand the needs of our BH lawyers and to make sure those needs are guiding the process of helping them through difficult times, addressing their issues and adjusting their hours arrangements when necessary. The legal industry is very demanding, and lawyers who participate in the BH Program will continue to be pulled in

> "It is crucial to the success of the program for us to understand the needs of our BH lawyers and to make sure those needs are guiding the process of helping them through difficult times, addressing their issues and adjusting their hours arrangements when necessary."

many directions. It will take a great deal of support to help them manage the competing responsibilities while maintaining their approved arrangements.

Q: How do you define "coaching"? What do you see going into that?
A: It depends on the stage of the process the BH lawyer is in. For example, before submitting a BH proposal, the coaching would be discussing the lawyer's existing needs, identifying how best to address such needs and creating options that may assist the lawyer in reaching his/her personal and professional goals. After the BH proposal is approved, the coaching would change to assisting the BH lawyers with issues, stresses and concerns that arise during their day-to-day lives.

Q: Would you act as a go-between if there was a supervising attorney who was experiencing difficulty with a balanced hours attorney or on behalf of the balanced hours attorney appeal to the supervising attorney if things weren't working?
A: Yes.

Q: Who ultimately makes the decision to approve a balanced hours proposal?
A: The administrative partner of the [local] office, where the proposing BH Lawyer resides, approves the BH proposal. For example, if the balanced hours lawyer works in our New York office, the New York administrative partner approves the BH proposal.

Q: What do you think is the most difficult aspect of your position? A: Perhaps the most difficult aspect of the position is managing the expectations of the supervising partners and the BH lawyers. The reality is that the legal industry is based on client demands and billable hours, both of which are expectations that need to be met and neither of which are particularly conducive to flexibility. We are committed to working with this reality so that all approved BH arrangements and indeed, this program, are successful.

Q: What do you think will be the easiest or the best aspect about your job?
A: The best aspect of this role is the potential to make a positive impact on the lives of some of our lawyers. Integrating our personal and professional lives is very important and equally as challenging. I struggled with the balance when I practiced law, and ultimately chose to "opt out" of the practice. I hope to help our lawyers through the challenging times. My goal is to ultimately lead our firm (and perhaps the legal industry) to view flexibility as not only acceptable but also as the norm.

Q: How do you plan to go about solving the typical problems that affect many part-time programs-"the creep," or not enough work, or not the quality or level of work that one would like?

> "The reality is that the legal industry is based on client demands and billable hours, both of which are expectations that need to be met and neither of which are particularly conducive to flexibility."

A: We plan to carefully monitor utilization, workloads, work assignments and skill levels/development and, when necessary, to modify BH arrangements to address the needs of the BH lawyer, the firm and our clients. We will encourage communication among BH lawyers and supervising partners; strategic planning and creative problem solving when issues arise; and adaptation to changing circumstances when necessary. I will make every effort to develop personal relationships with each BH lawyer, to contact them regularly and to encourage them to keep me informed of their progress and to come to me with any issues, concerns or problems as soon as one arises.

Q: What would be the best advice that you could give to law firms that are struggling with this issue?
A: Recognize that you need to be aware of the personal and professional roles and responsibilities of your lawyers and develop programs designed to have the best chance of success in your culture. Flexibility, management support, program infrastructure and daily partner involvement with lawyers participating in the program are the keys to successful programs.

MAKE BALANCED HOURS AVAILABLE TO ALL ATTRONEYS

Making balanced hours available to all attorneys is a best practice that prevents several common problems traditionally faced by part-time programs.

In the past, it was common for law firms to limit part-time schedules to mothers of young children. This created resentment among other attorneys who might want to work fewer hours for reasons other than childcare, and did nothing to retain these attorneys. It also put firm administrators in the awkward position of having to pass judgment on the legitimacy of the reasons for which part-time was requested, and helped to maintain a "mommy track." To the extent that the practice resulted in the denial of flexible leaves for men who wanted to take care of their children, it also left the firms vulnerable to claims of sex discrimination.

Forward-thinking corporations, such as Fannie Mae, Ernst and Young, and Deloitte and Touche, stopped asking their employees why they wanted a flexible or reduced schedule more than a decade ago. They realized that if retaining good employees is the name of the game, it doesn't matter why they want to work a different schedule — all that matters is whether the schedule the employees propose will allow the company to retain them while at the same time getting the necessary work done.

Since The PAR Research Institute's Balanced Hours report came out in 2000 recommending "universal availability" of balanced hours schedules, an increasing number of law firms have made flexible schedules available to all

attorneys. A majority of the largest firms now permit attorneys to reduce their hours without regard to the reason, and The PAR Research Institute has heard numerous stories of attorneys working fewer hours so they can pursue interests outside of the office such as athletic training, political campaigns, writing, religious activities, and volunteer service.

One concern with universal availability that law firms sometimes voice is the fear that universal availability will "open the floodgates" and everyone will want to work part-time. It is entirely possible that more attorneys will use balanced hours programs if they are available, but if the alternative is having those attorneys leave the firm, the trade-off works in the firm's favor. It is unlikely, however, that all attorneys will want to reduce their hours. A number of law firms have good reduced hours programs — firms such as Dickstein Shapiro and Hogan and Hartson -- and while their programs have healthy usage rates, they have not experienced a flood of requests for reduced hours. Why not? Several reasons: attorneys tend to be type A personalities who thrive on hard work and success, attorneys have different personal needs at different times in their careers and not everyone will want reduced hours at the same time, and not all attorneys want to trade money for time.

So, the right question next time an attorney asks for a reduced hours schedule is not "why do you need it?" but rather "how can we make it work?" **Cathy**

> "One concern with universal availability that law firms sometimes voice is the fear that universal availability will "open the floodgates" and everyone will want to work part-time."

Cathy Hoffman, Part-Time Advisor, Arnold & Porter

In 2001, Arnold & Porter ("A&P") appointed Cathy Hoffman, a partner who works an 80% schedule in the firm's D.C. office, as the firm's Part-Time Advisor. According to Ms. Hoffman, firm management determined "that it would be great to have someone attorneys could speak with confidentially about the ins and outs of the arrangement." Ms. Hoffman, who is a litigator with an expertise in antitrust law, began working part-time after her first child was born, three years after she became a partner.

Ms. Hoffman dispelled the belief that going part-time will ruin one's career in Balancing Act, a cover story in the September/October 2003 issue of Diversity & the Bar Magazine. As she explained to that interviewer as well as to The PAR Research Institute, A&P has accommodated part-timers since the 1960s and 1970s when Brooklyn Born-then an associate with two children-pioneered working part-time as an attorney. Born later became a partner and served not only on the firm's policy committee, but also as the head of A&P's derivatives practices. According to Hoffman, Born "set a precedent that it is possible for attorneys to work part-time and still be productive" and "[a]s a result, there's now a general acceptance by management and the firm's attorneys of part-time arrangements."

ADHERE TO THE PRINCIPLE OF PROPORTIONALITY

Proportionality is fundamental to a balanced hours program's success, particularly in these key areas: salary, bonuses, benefits, and advancement. If the principle of proportionality is not followed - for example, if all benefits are denied to an attorney who reduces his or her hours - the balanced hours program creates disincentives for its use. In addition to the financial penalties, it produces a sense of unfairness and second-class citizenship. If the program isn't attractive to attorneys who do not want to work long hours, their choice will be, of course, to leave the firm. In response to these issues, some law firms are now providing more-than-proportional compensation and advancement, and "proportional" should therefore be viewed as a minimum position.

Salary
Proportional pay for proportional work is an essential component of a successful balanced hours program. In other words, working an 80% schedule should result in an 80% paycheck. Giving balanced hours employees a "haircut" by paying them, for example, 60% of a full-time salary for 80% of the full-time hours, will undermine a balanced hours program, and may even create claims under the Equal Pay Act (EPA) and Title VII. For example, in Lovell v. BBNT Solutions, 295 F. Supp. 2d 611 (E.D. Va. 2003), a federal district court in Virginia held that paying a woman chemist who worked a 75% schedule a lower effective pay rate than a full-time male chemist, for substantially the same work, violated the EPA; part-time status alone could not justify a lower rate of pay.

Bonuses
Bonuses should also be at least proportional. It is a best practice to reward desirable behavior, whether in a balanced hours program or any other program, and bonuses can be used to encourage business development, firm service, professional development, and the like. In recognition of this, many firms pay bonuses that are based on factors other than or in addition to the number of hours billed. Under such bonus plans, balanced hours attorneys should receive full bonuses for meeting established non-hours-based criteria, and proportional bonuses for hours-based criteria. Note: when balanced hours attorneys have worked more hours than their agreements with their firms call for, some firms recognize the additional work through a bonus. While it is good to compensate the attorneys for their additional time, a better practice is to prevent the schedule creep in the first place or to give the attorneys time off to compensate them for the extra time worked.

Benefits
This same principle of proportionality applies to benefits programs, including health care and leave. An increasing number of firms provide full benefits to balanced hours attorneys, as reflected in The Scoop. Firms should review their

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insurance policies to see whether their providers have established a minimum number of hours an employee must work to be eligible for coverage (often 20-25 hours). This minimum may be met by counting all work done by the attorney, including non-billable.

Advancement

Advancement opportunities, too, should be at least proportional. For example, at a firm with an eight-year track to partnership, an associate who works full-time for four years and then moves to an 80% schedule should be considered for partnership after nine years. An increasing number of firms keep attorneys "on track" to be eligible for partnership with their classes if they work an 80% - 90% schedule. Firms may look not just to hours worked to determine partnership eligibility, but also to factors such as skills, knowledge, professional maturity, judgment, and business development potential. All of these may be as important as the number of hours put in over the years.

BUILD AN EFFECTIVE IMPLEMENTATION PLAN

Many firms will say, "we have a reduced hours policy, but it doesn't work,"- that is, it hasn't stemmed attrition or improved recruiting, morale, and client service. The most likely problem is that the policy has not been effectively implemented. A policy is destined to gather dust on a shelf unless a carefully considered implementation plan and infrastructure have been created to support it. Here are some key steps to take to implement a balanced hours program.

Articulate the Business Benefits

Support for the program comes from the recognition of the business benefits firms can expect to realize from it. Every attorney should be able to articulate why the firm needs a balanced hours program. To build a strong base for the business case, gather data and statistics about the firm's current position, including recent attrition statistics, recruiting efforts and results, attrition and hiring expenses, the diversity of the firm's attorneys (particularly partners), expressions from associates about the important of balance, and expressions from clients about attrition.

Key Players are Crucial

Identify the key players at your firm, and get them on board early. No new program can work effectively without the support of those who have the most power and influence. Setting the tone from the top down is critical to reducing resistance to change, and your key players will be the primary communicators of the changes to come. Key players are likely to include managing partners, executive committee members, significant rainmakers, and partners with a proven ability to influence the actions of the firm. Don't ignore counsel or associates who might also be key players in this area, especially if they have been advocating for changes at the firm. Getting key players on board means getting them to understand the business case for a balanced hours program, and enlisting them as advocates.

Create an Implementation Team

Create an implementation team with a clear mission and establish a clear plan of action early. The team may include key players, but is also likely to include practice group heads, human resources, and senior associates. While commitment from the top is critical, buy-in to implementation is best achieved with a team representing a cross-section of the firm. Work with the team to establish a strategy and an action plan for implementation.

Create an Action Plan

A course of action should include:

- Communicating the business reasons for the balanced hours program to the entire firm (such as in firm meetings or memoranda from the management committee, as well as in every day conversations);

- Appointing a balanced hours coordinator;

- Developing a schedule for roll-out of the program, including revision and distribution of the policy, revision of policies that will be affected by the new program (such as advancement, compensation), training, and an effective date

- Training for all attorneys about the program;

- Anticipating and addressing resistance;

- Measuring progress and revising strategies as necessary;

- Communicating successes to help the program become part of the firm's culture.

ADOPT A WRITTEN POLICY

A key component of a balanced hours program is a written policy. To create a policy that will be uniquely effective at your particular firm, reflect on your firm's business objectives and its culture. Make sure the policy is specific enough to be useful, but also allows for flexibility in order to meet the needs of individual attorneys and staff.

Two fundamental principles to keep in mind while drafting the policy are proportionality and flexibility. Proportionality means not only pay, benefits, and bonuses need to be kept in proportion based on hours worked, but also that billable hour requirements, assignments, and advancement must be proportionate. Flexibility is necessary to accommodate individual needs. For example, only allowing for four-day weeks in your policy would not address the needs of those desiring a five-day week with fewer hours per day.

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"A key component of a balanced hours program is a written policy. To create a policy that will be uniquely effective at your particular firm, reflect on your firm's business objectives and its culture."

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A written policy should include the following key elements:

- Definition of balanced hours, including eligibility and duration.

- The process for requesting a balanced hours schedule.

- Guidelines for employees and their supervisors on creating a balanced hours schedule, including non-billable work and how emergency situations requiring extra hours will be addressed

- Provisions for compensation, benefits, and advancement.

- A requirement for an individualized written agreement between the employee and the firm.

- A mechanism for periodic review of schedules.

- Training for supervisors and employees.

DEVELOP INDIVIDUALIZED SCHEDULES

A universally available policy cannot be one-size-fits-all, but rather must provide enough flexibility to fit specific individual situations. Flexibility applies not only to the total number of hours worked, but also to when and where work can be done.

Law firms that have implemented balanced hours programs have allowed for a variety of successful arrangements, including, but not limited to:

- Fewer hours each day, with regular beginning and end times.
- Fewer hours each week, with flexible hours in the office.
- Fewer hours each year (e.g., litigators may take time off after working long hours for weeks while on trial; corporate attorneys may take time off between deals).

The duration that an attorney may work a balanced hours arrangement should not be artificially limited by time frames such as one year or five years, but rather should allow schedules to evolve as an attorney's personal needs and professional goals change. Some attorneys may wish to work a balanced hours schedule indefinitely, while others would prefer to work fewer hours for a few months. Still others may want to work a reduced schedule for a few years, and a different flexible schedule in later years according to their family needs. Allowing employees to move between balanced hours arrangements and to and from standard hours schedules without fear of repercussion allows the firm and the employee to maximize the retention benefits that balanced hours programs offer and to provide more workable and realistic individual arrangements.

"The duration that an attorney may work a balanced hours arrangement should not be artificially limited by time frames such as one year or five years, but rather should allow schedules to evolve as an attorney's personal needs and professional goals change."

Work expectations should be kept in line with both hours worked and when they are worked. If an attorney is working fewer hours, they should be doing proportionally less work. The goal is to have a policy that encourages discussion between attorneys and supervisors about feasible workloads, expectations, and effective scheduling, and supports the mutually agreed upon arrangement.

CHECK FOR ASSIGNMENT DISPARITY

If you're familiar with The PAR Research Institute's research, you know that a major penalty for attorneys who reduce their hours is the loss of good assignments. The PAR Research Institute has heard reports of attorneys being passed over for challenging and interesting assignments, being relegated to document reviews, and even being told to change their practice areas to do more rote work. The PAR Research Institute has also heard that getting the dog work of the firm causes frustration and a sense of second-class citizenship for the reduced-hours attorneys, and is a factor in their decisions whether to stay with the firm.

Sometimes the loss of good assignments happens because partners assume, with good intentions, that attorneys who reduce their hours don't want to work on matters that might involve short deadlines or travel. Sometimes the loss happens because partners tend to grab whichever attorneys are closest when an assignment becomes available - and attorneys who aren't in the office as often don't have as much of an opportunity to be grabbed. Additional reasons are that some partners won't work with attorneys who work less than full-time on the often untested and mistaken assumption that the attorneys will be unreliable, and some partners refuse to work with such attorneys in a conscious attempt to make reduced hours schedules unpalatable by demonstrating that negative consequences attach to the schedule.

Whatever the reason, it hurts law firms in the long run when reduced-hours attorneys don't get a proportionate share of desirable assignments. The attorneys won't get the experience they need for their professional development, and the firms' human capital assets won't be enhanced. The attorneys are more likely to leave their firms, thereby driving up attrition costs and weakening client relationships. The reduced-hours program gets undermined so it is no longer an effective recruiting and retention tool.

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"Sometimes the loss of good assignments happens because partners assume, with good intentions, that attorneys who reduce their hours don't want to work on matters that might involve short deadlines or travel."

Some firms have changed their assignment systems in response to The PAR Research Institute's research and in response to research that shows that "free market" or "hey you" assignment systems disadvantage women attorneys. They have implemented a more centralized assignment system that evens out workloads, increases opportunities for different attorneys to work with each other, and strives for fairness in access to desirable work.

How can you know if your assignment system is fair? Check for Assignment Disparity. Look at who is working for the firm's biggest clients, who is working on the highest profile matters, and who is working with the firm's most influential partners. Take a bit of a historical look as well, checking billing records for the past couple of years. If the same type of attorneys are always getting the best assignments - such as attorneys who work full-time, whites or males - that is a red flag telling you that a better assignment system is necessary. Your firm and your clients will be best served if every team of attorneys includes women, minorities, and attorneys on reduced schedules.

Deloitte & Touche and Ernst & Young have both used this type of assignment checking system for years. Does your firm have a similar system? How is it working? Send us an email.

> "How can you know if your assignment system is fair? Check for Assignment Disparity. Look at who is working for the firm's biggest clients, who is working on the highest profile matters, and who is working with the firm's most influential partners."

One Balanced Hours Attorney's Story

The challenge did not seem too daunting: take instructions from the client at 5:25 p.m. and e-mail the revised document to him by 9:00 the following morning, along with a comparison showing the changes from the previous version. If I hadn't had to leave the office by 5:30 p.m., I would probably have marked up the document by hand and given it to word processing to incorporate the changes. My preference would have been to deal with it by the same method from home. However, at that time I could not afford a fax machine and the firm would not provide one. So I put the document on my laptop and made the changes in the document myself later that evening.

My problems started when I tried to connect to the firm's network. It took me several attempts to make the connection. Every time I instructed the computer to run a comparison of the revised and original documents, it froze and I had to reboot and start the connection process all over again. Eventually, I managed to [get the document] to the client.

If I had undertaken the same task in the office, I estimate it would have taken me about 25 minutes to revise the document, run the comparison and send the e-mail to the client. Working from home, it took over two hours and a huge amount of frustration to achieve the same result.

— Associate at a Washington, D.C. law firm.

PROVIDE TECH SUPPORT WITH THAT TECHNOLOGY

Making balanced hours programs effective often involves encouraging attorneys to use technology to work more efficiently. All too often, however, technology can create frustration and major inefficiencies, as demonstrated by the situation recounted below.

Useful tools for balanced hours attorneys may include:

- Cell phones and cell service

- BlackBerries or similar hand-held email devices.

- Laptops, tablets or hand-held general-purpose computers

- Fax machines.

- Second phone lines.

- Internet service.

- Virtual Private Networks for secure remote access

Each attorney's situation is likely to be unique, and some firms therefore provide attorneys with a yearly stipend for purchasing technology rather than a "standard issue" set of devices. While laudable, this practice needs to be balanced against the IT costs of providing technical support for many different devices and brands. A middle-of-the-road approach is to offer attorneys a stipend and a standard set of options for spending their stipends.

Spending money on technical support services provides cost-effective benefits: why have balanced-hours attorneys wasting valuable time on non-billable activities when a trained IT person can solve problems more quickly and free the attorneys up to do client work? An investment in making technical support available can reduce stress and increase productivity when attorneys and staff are working in non-traditional ways.

Depending on the firm's size, an in-house information technology support department may be able to provide on-call services and technical support. Alternatively, and especially if the firm does not provide standardized equipment, it may be best to contract with an outside vendor who may be more available to an off-site employee. In addition to IT support, proper training in technology, either by in-house staff, contracted trainers, or in local classrooms will increase the efficient use of technology and decrease technical support costs.

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"An investment in making technical support available can reduce stress and increase productivity when attorneys and staff are working in non-traditional ways."

HOLD PARTNERS ACCOUNTABLE FOR RETENTION & ATTRITION

If an inflexible workplace hurts the bottom line, it follows that managers who fail to implement effective work/life initiatives hurt profitability. And managers who hurt profitability typically feel it in their compensation.

This is the thinking behind the best practice of holding practice group leaders accountable if they fail to stem uncontrolled attrition due to their failure to implement work/life programs in an effective way. Many companies — including Deloitte & Touche, Ernst & Young, BP p.l.c., Chubb Corporation, and Safeway—hold managers accountable for failure to implement diversity measures effectively.

One increasingly common mechanism is linking managers' compensation to their ability to meet the organization's diversity goals.

- At BP, executives are rated on their success in achieving goals related to diversity and inclusion as well as on other dimensions of performance; diversity ratings directly impact their bonus pay. At Chubb, an employee's ability to meet specific diversity goals affects merit increases as well as bonuses. Chubb's senior managers must set goals for developing and promoting diverse candidates, and are required to report their results to the CEO and Board of Directors. At Safeway, a supervisor's success in meeting the company's diversity goals is a criterion for advancement and compensation.

- At Ernst & Young, partners are rated on four different parameters of success: People, Quality, Markets, and Operational Excellence. Most of the parameters are self-explanatory; the role that the "People" parameter plays at E&Y is not. The rating a partner receives for the year in the People component reflects his or her effectiveness at leading and managing people. Among other criteria, this includes the ability to retain the firm's talent by creating a flexible work environment, as well as the ability to retain women and minorities. So that rewards match rhetoric, the business-critical nature of effectively leading people is reinforced by ensuring that a partner's total score (which determines compensation) cannot be more than one point higher than the score received for People - regardless of the amount of business an individual partner has brought in. Ultimate message: Bringing in work without being able to keep talented people on board does neither the client nor the firm any good.

"Retention of women and minority attorneys positively impacts the bottom line at law firms too."

- Retention of women and minority attorneys positively impacts the bottom line at law firms too. The PAR Research Institute has documented the steep costs of "churn and burn" attrition of talented lawyers: losing a single associate can cost a law firm between $200,000 and $500,000. Additionally, increased retention solidifies client relationships and improves the quality of the legal representation the firm is able to provide, both of which are essential to the firm's long-term health.

The PAR Research Institute understands that as part of some law firms' diversity initiatives, some firms have implemented formal mechanisms to hold individual and managerial partners financially accountable for their roles in retaining and advancing women (and minority) attorneys. Whether it's by dangling a carrot or wielding a stick, these firms often provide financial incentives to partners to go the extra mile to attract, retain and advance women (and minority) attorneys.

Does your law firm hold partners financially accountable for the retention and advancement of women attorneys, or for the success of the firm's balanced hours program? Send us an email and let us know.

Sidley Austin LLP

At Sidley Austin LLP, a partner's compensation is linked in part to his or her efforts to advance and retain women and minority attorneys at the firm. The PAR Research Institute discussed the firm's partnership evaluation and compensation processes with María Meléndez, New York Chair of the firm's Diversity Committee, and Kathleen Roach, Chair of the firm's Committee on the Retention and Promotion of Women.

Every year the firm's Management Committee meets to determine individual partnership compensation adjustments for the following year based on information provided in partner self-evaluations and personal interviews. As part of the annual process, each partner completes a self-evaluation. Of the dozen or so questions contained in the self-evaluation, two in particular highlight a partner's efforts to retain and advance women (and minority) attorneys at the firm. One question specifically requests the partner to provide detailed information about the partner's efforts throughout the year to advance women and diverse lawyers. Another question-asking what the partner has done to "push down" work-provides another opportunity to focus attention on efforts to create opportunities for women and diverse attorneys at the firm, and to reward partners who mentor more junior women and minority attorneys.

According to Ms. Meléndez, "Every single partner must account for what they've done in these areas," first in the written self-evaluation, and then

(cont.) Sidley Austin LLP

in the face-to-face interviews with the Management Committee. During the interview, answers to the self-evaluation questions are reviewed and discussed to afford the Management Committee the opportunity to question partners further and to hear directly from them about their efforts. At the end of the process, the Management Committee meets and determines individual partner's compensation based upon the information provided in the evaluations and interviews.

When asked how much weight these particular factors are given in compensation decisions, Ms. Roach replied that Sidley's approach is "not a formula-based compensation system." Instead, the process "takes into account all factors." "What's important," she says, is that Sidley's process "specifically identifies each partner's individual efforts to recruit, retain, and mentor women and diverse attorneys an important factor" in compensation. The fact that the evaluation form requires the partners to detail efforts to advance women highlights and "formally identifies this as one of the criteria [the Management Committee] will use to decide" compensation. Is it working? Yes, as part of a larger initiative. Ms. Roach and Ms. Meléndez note that the Firm's evaluation process was implemented five years ago when Sidley also made other changes to increase the retention of women and diverse attorneys. Ms. Meléndez and Ms. Roach believe that all of these programs together are responsible for Sidley's excellent track record of attorney retention and advancement including that Sidley has closed the gender-gap in the Firm's attrition rate-that is, it's attrition rate for men and women across all of their U.S. offices is essentially the same, a fact of which they are "very proud." In addition, in 2007, 29% of lawyers promoted to partner at Sidley were women, and one third of all Firm committee chairs are women.

> "Corporate counsel and government attorneys are already successfully job sharing, and law firms have begun to try it out."

JOB SHARE

What is Job Sharing? Can Law Firms Do it?

Job sharing is a work arrangement that allows two attorneys to share a single position. Corporate counsel and government attorneys are already successfully job sharing, and law firms have begun to try it out. According to the findings from the 2005 NALP Workplace Questionnaire, 1.6% of private law firms surveyed allow job-sharing and another 18.4% allow it on a case-by-case basis. In total, 127 law firms of 637 offices surveyed allow job-sharing on an affirmative or case-by-case basis. In a job sharing arrangement, two attorneys share the responsibilities of one full-time position, each earning pro-rated salary and receiving full or pro-rated benefits. There are two basic job share models: the twins model and the islands model. Attorneys who use the twins model essentially share everything - clients,

and responsibilities - but work on different days of the week. This model requires a high level of communication between the attorneys, but provides the benefits of consistent client coverage, two heads thinking about a legal matter for the price of one, and coverage during vacation and other leave.

In contrast, the islands model requires little reliance on the job sharing partner, as both attorneys handle their own separate caseloads, in essentially two separate jobs. The islands model provides flexibility within a law department to cover different types of practice areas that may not justify a full-time attorney, and also can be structured to assure coverage during vacation.

Which model is used will depend largely on the type of practice and the specific client needs. Some clients may prefer to rely on one attorney only, even if that means not being able to interact with that attorney every day of the week. Other clients may prefer to work with two attorneys, knowing one of them is always available at the office.

Attorneys who job share report a high level of satisfaction. Unlike part-time attorneys, they are not bothered at home when a problem arises on their day off. The collaborative aspects of job sharing are also often appealing.

Job sharing is one reduced schedule solution that may be particularly effective in smaller law firms. Like many law departments, small law firms often have limited financial resources and workload pressures that limit the availability of part-time options. In these smaller, more intimate environments where a high level of communication among attorneys probably exists naturally, job sharing can provide a viable and cost-effective solution to the attorneys' needs for balance without compromising the workload needs and finances of the firm.

According to Linda Marks, Director of Special Projects for the Center for WorkLife Law and co-author with Karyn Feiden of *Negotiating time: New Scheduling Options in the Legal Profession*, successful job sharing requires both a team that can work well together and a supportive employer. She emphasizes the essential three C's of a job sharing partner: compatibility, communication and cooperation. Marks also suggests that potential job sharers develop a written proposal so both attorneys can clarify their ideas about how the job will be shared and can present a clear and strong proposal to firm management.

There are few costs associated with job sharing, mainly benefits if both job share partners have full benefits and malpractice insurance. The benefits and savings attributable to job sharing can far outweigh the costs, however. Job sharing can

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"Attorneys who job share report a high level of satisfaction. Unlike part-time attorneys, they are not bothered at home when a problem arises on their day off."

greatly reduce the high costs of attrition, and that alone recoups any cost. In addition, reduced absenteeism and increased efficiency result when job sharers do not use their work time to attend to their personal affairs. In *Negotiating Time*, Marks provides a chart and full discussion of the cost analysis of job shared positions.

An In-House Attorney:

When I asked to go part time, my boss suggested that I job share. She was concerned that the clients wouldn't be covered on the day I wanted to take off, and also that I would have to do a full workload on a part-time schedule. I was concerned about relying on someone else to do some of my work, so I talked with other job sharers in our company. It was clear it was working for them, so I decided to give it a try. I had input into the final choice when my partner was hired. At first, my partner worked the same hours that I did and 'shadowed' me so she could learn the job and the corporate culture. Now, we each work a designated three days a week. If we need to revise the schedule for personal or work-related reasons, we do.

It is working really, really well. My partner and I have similar styles. We tend to give the same advice, and we have the same manner in working with clients. We both want the same thing: to do a good job, work well together, and go home. There is no competition, and I don't have to worry that she wants to get ahead of me on the promotion track. Although we share most of our work, each of us on occasion is assigned to projects that we handle individually.

We keep each other informed about what is going on in the work we share. We copy each other on emails, and send an email summary at the end of the day. We talk on the phone as well. I don't mind talking to my partner on my day off because I like her and we are a team. If a client starts a matter with me while I am in the office, I let him or her know that if the matter requires follow up on a day I am not scheduled to be in, my job share partner will handle it and I will have briefed her on the matter. We keep each other informed so the client is not in a position of having to repeat information he or she already gave to one of us.

We change our outgoing voicemail and email messages to reflect our schedules, and we tell clients to email both of us and that whoever is in the office will respond. The clients feel we are interchangeable and very responsive — they often forget which of us they talked to because we are so similar.

They also like it because we respond so quickly to them and no one is left hanging.

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"In these smaller, more intimate environments where a high level of communication among attorneys probably exists naturally, job sharing can provide a viable and cost-effective solution to the attorneys' needs for balance without compromising the workload needs and finances of the firm."

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RESPECT PERSONAL TIME: CURB EMAIL USE ON WEEKENDS

It's a 24/7 world, where we have smart phones and instant access to everyone and everything at our fingertips. Not so long ago you had to be in your office to do work — no longer. With this new freedom to work anywhere at anytime, attorneys are under more pressure than ever to be accessible and responsive round the clock. How do you distinguish between an e-mail that can wait until Monday from one that requires your immediate attention in the middle of a dinner out on Friday night?

What would you think if you received the following message when you logged in for weekend work?

IT'S THE WEEKEND

Help reduce weekend mail overload for both you and your colleagues by working off-line in a replica of your mailbox.

Firm research has shown if you send a note, recipients will feel compelled to respond so, if actions/responses can wait until the next business day, change your work location to your Remote/Disconnected setting. This will hold your outbound mail until you change your work location back to In Office.

This is the message professionals at PriceWaterhouseCoopers (now PwC) see the first time they log in on the weekend — a gentle reminder that it is the weekend and that they should be respectful of their colleagues' personal time. It reminds the person logging in that although they may not expect colleagues to respond immediately, the recipients of their e-mails may feel compelled to reply immediately. If an email can wait, PriceWaterhouseCoopers urges employees to work offline so that e-mails will not be sent until the workweek resumes on Monday. According to Kristin Rivera, a partner in the San Francisco office, management undertook this email program because it makes "people feel good" and because it ensures that co-workers are "not bombarded with e-mails on Monday."

Another E-mail Tip for Respecting Colleagues' Time

Cut Down on Email Clutter
Disable the "Reply to All" Option. This practice was also instituted at PWC and cut down on e-mail clutter by at least a third according to one partner. If a sender wants a group of colleagues to receive a reply e-mail, they have to physically type in all intended recipients. More often than not, replying to all is unnecessary. When this option is inconvenient, chances are the e-mails you receive actually require and deserve your personal attention.

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"It's a 24/7 world, where we have smart phones and instant access to everyone and everything at our fingertips. Not so long ago you had to be in your office to do work — no longer."

projects, Of course, some emails can't wait — that's inevitable. But most can. An alternative to the PriceWaterhouseCoopers approach is to require or encourage attorneys who send e-mails over the weekend to include a deadline. If it's an emergency requiring immediate attention, so be it; if not, at least, the recipient can make an educated decision about whether or not to focus on the matter over the weekend.

Is your firm using e-mail or other technology to institute work/life balance? Send us an email.

MOVE TOWARDS MASS CAREER CUSTOMIZATION

Most organizations offer flexible work arrangements as accommodations and exceptions to the "norm" of full-time work. Yet the American workforce has changed significantly in the past generation: only 17% of today's households have a breadwinner husband and stay-at-home wife — down from 63% a few generations ago.

This means that the old-fashioned assumption that committed professionals will be available for work virtually 24/7, because they have someone else taking care of the home front is no longer realistic. Today's corporations are recognizing that this outdated model no longer fits the wants and needs of today's workforce.

Leading the way in this important paradigm shift away from the traditional lockstep ladder is the highly individualized "Mass Career Customization" (MCC) model now being pioneered by Deloitte and Touche USA LLP. Mass Career Customization is built on the assumption that talented individuals will, for a wide variety of reasons, want to change the pace of their careers several times during the course of their working lives. MCC allows professionals to tailor their careers, changing both their role and their pace - without jeopardizing their long-term career prospects.

Mass Career Customization allows all employees-in partnership with their employer-to create a customized career path. The idea, borrowing from the business approach of "mass product customization," is to approach a career path as a "lattice" rather than a "ladder," and to change from a "one-size-fits-all" to a "custom-made" approach. The model changes from a one-dimensional model with flexibility as the exception, and makes individually customized careers the norm throughout the organization.

In some ways, Deloitte's MCC model is similar to The PAR Research Institute's Balanced Hours Model, which also emphasizes creating individually tailored arrangements that meet both the law firm's business objectives and the attorney's personal and professional development needs.

The MCC model, however, is not a substitute for an effective program to control the stigma frequently associated with working alternative schedules. To Deloitte's

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credit, 74% of the participants in their MCC pilot program were men — a good sign that their program is not stigmatized. Learn more about the Mass Career Customization model developed by Deloitte.

ON-RAMPING

Recently, law firms are offering attorneys returning from maternity, adoption, or caregiver leave to ramp back up into their practice. These "on-ramping" policies, which allow for a gradual return to a full-time schedule or an easy introduction to a reduced hour schedule, have become popular and well utilized. The PAR Research Institute has collected best practices in the on-ramping area:

Ramp Up Program Models with Schedules Ranging From 3 Months to One Year:

- After leave, provide automatic (upon request) 3-month graduated return on individualized schedule

- 50% of full time in the first month back

- 60% 2nd month

- 70% 3rd month

- During or after phase-in, attorney can return to full-time or propose more permanent flexible work arrangement

- 70% of previous schedule for 6-10 months after return

- Automatic "pace reduction option" for associates, scheduling reduced pace for up to 6 months without prior approval

- Flexible return where attorneys can propose their own return schedule over which they gradually progress back to work over 12 months. Includes working at home, fewer days, reduced hours, or any combination.

- Option to work reduced schedule for up to 6 months within first year following birth or adoption

- Automatic one-year part-time option for returning attorneys

Other Leave Support for Ramping Down & Ramping Up:

- Provide a "leave buddy" from the same practice area to give attorneys someone to talk with about issues and concerns.

- Offer counseling sessions with therapists trained in helping parents with family and work transitions.

- Provide a maternity leave "toolkit" with tips tailored to the individual to help them both as new mothers and to give them guidance on how to return to work.

(cont.) Other Leave Support for Ramping Down & Ramping Up:

- Have a maternity mentoring program — mother to choose one or two mentors from available pool based on her needs or help her to find appropriate mentor (e.g., new mothers, mothers of multiples, single mothers, practice area, etc.) about 2-3 months before maternity leave begins. Maternity mentors act as sounding boards and provide guidance on preparing to go on maternity leave, handling work requests and communication during leave, selecting a work arrangement upon returning, and gearing back up for work after leave.

- Send small gifts to mother/child/new dads.

- Connect each woman with a network of other women who stay in touch while the new mother is on leave, and help prepare her and the workplace for her return.

- Develop a "parental support program" to deal with the problems and issues of new parents re-entering the workplace while simultaneously caring for a new baby.

- Encourage fathers-to-be to take paternity leave; and allow on ramping for new dads.

TELECOMMUTING

Many law firms and legal departments have long offered workplace flexibility through ad hoc telecommuting. That is, attorneys, through communication with their supervisors, can work remotely from the office on an occasional basis or on a discrete project.

More recently, law firms and legal departments are offering telecommuting options as part of a regular, recurring flexible work schedule. Legal employers are finding that this flexible work option is well utilized by both men and women.

If you offer telecommuting, The PAR Research Institute recommends implementing these best practices:

Telecommuting Program/Policy:

- Available to all employees who can conceivably work remotely (reduces backlash and stigma).

- Defines "core hours" when the telecommuter is to be available.

- Provides training for supervisors.

- Provides technology and support.

- Ensures compliance with employment laws.

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"...law firms and legal departments are offering telecommutin-goptions as part of a regular, recurring flexible work schedule. Legal employers are finding that this flexible work option is well utilized by both men and women."

Supervisors:

- Focus on productivity and results.

- Keep communication open.

- Address problems quickly.

Telecommuters:

- Have set work times and a designated workspace.

- Are accessible by phone and email when away from desk.

- Maximize use of technology.

- Set up childcare and eldercare.

- Maintain office and client relationships.

- Keep supervisors informed of status of work.

Here are some important additional practices:

- Offer the same compensation, benefits, and promotion opportunities to telecommuters as to those not telecommuting.

- Establish a consistent schedule.

- Ensure effective accessibility.

Telecommuting Successes:

By including telecommuting as part of a flexible work program, legal employers can reduce the stigma often associated with utilizing flexible work arrangements by offering an option that is widely utilized by male and female employees, parents and non-parents alike. At Accenture, where telecommuting has been an option available to all attorneys in their US legal group for over ten years, male and female employees cite their flexible work arrangements program as one of their most important benefits. Similarly, Allstate's legal department has found that the company's work-at-home option is the most popular flexible work option with men.

Another large legal department sends out a daily email to all employees with information about who is out of the office and who is working remotely. By including even those who are working from home on an occasional basis in this daily email, this legal department is further de-stigmatizing flexible work by highlighting that most lawyers take advantage of flexible work options.

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Compensation System

In Summer 2010, The PAR Research Institute and the Minority Corporate Counsel Association published the groundbreaking study on the impact of law firm compensation systems on women. Based on a survey of nearly 700 women lawyers, the study concluded that existing compensation systems open the door to gender bias because they contain tremendous subjectivity, lack transparency, and because so much of the negotiation surrounding salaries take place out of sight.

IMPROVE TRANSPARENCY

The path to becoming a billing partner is varied, and often there is no official guidance as to a lawyer can accomplish this goal. Sometimes it is just who gets the file open first; sometimes it is the partner with the most political clout. Said one lawyer, "We have partners who are named as billing partners for clients who never do any billable work for those clients.... There is no consistency and no one to turn to for guidance; there are no rules." Yet this is [important] to the overall determination of partner compensation.

A system that is not clearly and formally explained to everyone means that, to gain the knowledge necessary to understand the system, one needs to rely on informal networks and relationships with people in power. This situation will disadvantage out-groups, which in most law firms means that it will disadvantage disproportionate numbers of women and people of color. Informal, opaque systems also will disadvantage many white men who are too shy or introverted to know the right people, and the ropes.

A best practice is to write a memo that explains clearly how a firm's compensation system works, and provides for each new partner an introductory session with an existing partner-mentor to explain the system and to answer questions. Of course, the partner-mentor needs to be someone who actually understands the compensation system: as our survey indicates, many partners do not.

> "The system is effectively feudal. Compensation is centralized with a very small group of partners. Because voting is weighted, the firm chair knows exactly how many votes he needs to control the firm and he pays the top tier enough to buy their loyalty. The dominant factor is origination credit, but there are virtually no rules or guidelines and so credit is a free for all, with the strongest usually winning. Sadly, the partners compete as much with each other within the firm as with those outside the firm. The women partners approached firm management five years ago and asked the firm to research best practices and do a benchmarking survey on compensation systems... These efforts were entirely rebuffed."

"A system that is not clearly and formally explained to everyone means that, to gain the knowledge necessary to understand the system, one needs to rely on informal networks and relationships with people in power."

When the compensation system is changed, this needs to be clearly explained. This probably will be best handled in small meetings: in large meetings, people will be reluctant to ask questions, whereas one-on-one meetings are likely to yield inconsistency in the information given.

A more basic point is that firms need to understand what factors actually play a major role in a firm's compensation—to talk about realities rather than aspirations. Gaining this information often will require a statistical analysis, to identify what factors are actually influencing compensation, as opposed to what factors are announced to have an influence. This kind of statistical analysis typically will require an outside consultant—but this is a type of analysis familiar to consultants who specialize in compensation systems.

A final point is that firms need to understand whether those factors that play an important role in elevation to partnership are different from those factors that play an important role in the setting of partner compensation. If different factors have a major influence on the setting of partner compensation than on the elevation to partnership, firms need to inform new partners of this fact. Again, making this kind of information process more formal can avoid in-group favoritism—where "those in the know" succeed, while those who are not in the know tend to fail. Allowing in-group favoritism to flourish will disadvantage not only women, but also people of color, lesbian and gay lawyers, and perhaps others.

BENCHMARKING

A first step is to establish baseline information on the percentage of revenues/profits generated by, and credited to, women lawyers, and lawyers of color. The second, and perhaps most important step is to implement regular monitoring and analysis of the impact of a given compensation system on out-groups, including women and people of color.

This type of benchmarking is important in order to control the kind of biases that occur even in organizations where good intentions abound. A recent study of a business with an elaborate performance evaluation process, and a strong commitment to merit-based compensation systems, found that women and people of color nonetheless got lower raises when supervisors took the evaluations and awarded raises, without a process to check for bias at that step of the process.

To quote a well-known phrase, what gets measured gets done. To put this differently, "If you're not keeping score, you're only practicing." If systematic differentials in compensation by race and/or sex emerge, further steps can be initiated. Given the wide range in different types of compensation systems, probably the best advice is to call in a consultant to analyze where the problems arise, and how best to address them.

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"A more basic point is that firms need to understand what factors actually play a major role in a firm's compensation—to talk about realities rather than aspirations."

IMPROVE DIVERSITY ON COMPENSATION COMMITTEES & INTRODUCING OTHER CHECKS ON BIAS & IN-GROUP FAVORITISM

In our respondents' firms, the committees in charge of compensation were remarkably white, and remarkably male. This creates the perfect conditions for in-group favoritism that systematically disadvantages women, and people of color of both sexes. An important point is that if the relevant committee has one woman or person of color, this creates the risk of the unhealthy dynamics that surround tokenism. For example, when only one woman is on an important committee, her sex become so salient that she may feel the need to judge women more harshly to prove that she is not favoring women. Or she may feel that every time she opens her mouth her comments are taken as representing all women. A variety of dynamics can emerge. In short, heterogeneous committees can provide a break on bias.

The fact that many committees in charge of compensation are elected may contribute to those committees' lack of diversity. In this context, it is worth noting that many respondents said that—although the committee in charge of compensation, in theory, is elected—in practice the election typically rubber-stamped candidates that have already been chosen by the powers that be. One useful approach may be for the management committee to propose a diverse slate of candidates for the compensation committee (if that firm has a separate compensation committee).

A final practice that exists in some firms can help mute in-group favoritism in the operation of compensation committees: the rule that no partner's compensation can rise more than 10% while he or she is serving on the comp committee. Said Barbara Caufield, equity partner at Dewey & LeBoeuf, "We used to do this. I don't know why we ever stopped. It was very effective in ensuring that nobody stayed too long on the compensation committee!"

RE-EXAMINE THE BILLABLE HOURS THRESHOLD

Billable hours inevitably play a significant role in the level of partner compensation. Yet two different models exist for taking billable hours into account. One requires all partners to meet a certain billable-hours threshold in order to receive all the credit available for the billable-hours component of attorney compensation, on the theory that billable hours are only one type of contribution partners need to make for firms to flourish. The other system rewards the attorneys who work the most hours, signaling that billing hours is a critical contribution to a firm's long-term financial viability.

The threshold approach to billable hours was used in only a small minority

of our respondents' firms. The predominant system presumably was one in which attorneys who work the longest hours tend to receive increased compensation even if, for example, a partner could be increasing a firm's profitability more by leveraging associates better, decreasing unwanted attrition among valued attorneys, or moving from lower- to higher-margin practice areas. Because many more men than women have two person careers in which they can rely on their partner to take care of all matters outside of work, a most-hours-wins systems disproportionately disadvantages women partners. In addition, in the opinion of many law firm consultants, systems focused heavily on billable hours not only are not economically justified; they introduce perverse incentives, most notably the hoarding the work and inefficiencies that are detrimental to clients' interests.

REDESIGN ORIGINATION CREDIT

Sixty percent of firms in the survey do not formally award origination credit. Yet even in firms without formal origination credit, origination often plays a central role in the setting of law firm compensation. Old-fashioned origination credit could usefully be redesigned in a number of ways:

- **Origination credit should not be inheritable.** If the purpose of origination credit is to incentivize lawyers to bring in new clients, it is hard to discern the rationale for allowing the partner who "owns" the client to pass on origination credit to whomever he or she wants. This practice has very negative effects both on diversity and on the perceived fairness of a firm's compensation system.

- **Reward teams, not individuals.** The point of a law firm is to build teams of lawyers that, together, can serve a client's interests better than a sole practitioner could. As noted above, consultants often advocate systems that recognize a variety of contributions to a given client's work. One step in this direction is the common practice of dividing credit among three or more attorneys: the one who brought in the work, the billing partner, the partner who manages the client relationship, and the partners who actually do the work. Obviously, if the weight given to origination credit swamps the other factors considered, the resulting system will differ little from old-fashioned origination credit. Another alternative is to shift away from origination credit, towards an analysis of whose work currently binds a given client to the firm. Less than one in five majority equity partners and only roughly one in six income- and minority equity partners reported this kind of system when asked what factors were considered "very important" in setting compensation. Yet a majority of firms appear to already be engaged in this calculation: 66% of majority equity partners, 63% of minority-equity partners, 60% of majority income partners and 45% of minority-income partners said this factor was either "important" or "very important."

"Sixty percent of firms in the survey do not formally award origination credit."

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- **Origination credit by matter, not by client.** A complementary practice is to reward origination credit according to who brings in a given matter, rather than who first introduced the client to the firm. Along with that, suggest that expansion of work does not go to first contact, but to the expander and also spread among the other secondary roles — important because women and minorities are more likely to be expanders than first contacts. Finally, suggest the sunset and then acknowledge how difficult change is.

- **Sunsets.** Some firms have a three-year sunset on origination credit. "At that point," said James G. Cotterman of Altman Weil, "either new business credit ceases or is reduced. Other compensation credits, such as billing attorney credit and working attorney credit, would remain in most systems and palliate the abrupt reduction in new business credit." Sunsets recognize the importance of origination, while also ensuring that different lawyers have relationships with a given client, to ensure that the client stays with the firm even if a single attorney on the team serving the client leaves.

- **Pitch credit.** A pervasive complaint by both women and people of color is that they are invited on pitches in order to appeal to in-house departments intent on diversity—but then get no origination credit. This could be eliminated by a clearly stated and widely disseminated policy to the effect that, if a woman or person of color is invited on a client pitch, that attorney needs to be given part of any origination credit that results from the pitch— and part of the work.

ENSURING A DIVERSE COMMITTEE HANDLES DISPUTES OVER REWARD ALLOCATION
ORIGINATION CREDIT

Not only the system of reward allocation, but also the process for settling disputes, can make a tremendous difference for women and people of color. This study shows clearly that the current system, in which origination credit contests are left to be negotiated privately between the contesting partners is having a highly negative effect on many women and attorneys of color. This is precisely the kind of context—out of the public eye, with no oversight whatsoever—in which hidden bias flourishes.

The National Association of Women Lawyers recommends that firms establish "a powerful and diverse oversight committee" charged with resolving disputes over origination credit.

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"A complementary practice is to reward origination credit according to who brings in a given matter, rather than who first introduced the client to the firm."

TAKE A PRO-ACTIVE STEPS TO CHECK THE HIDDEN BIAS THAT WILL OTHERWISE EMERGE IN THE CONTEXT OF COMPENSATION SYSTEMS

The first step is to look very carefully at law firm compensation systems that are totally subjective. While these may work well in some small firms, they present very serious risks of gender and racial bias. This also have serious drawbacks from a business standpoint, which is why, as one consulting firms notes delicately, "Altman Weil's consultants find it difficult to justify totally subjective systems. If a firm has a totally subjective system, benchmarking to assess whether it is creating racial and gender disparities is even more important."

Even where a firm's system is not totally subjective, subjectivity is an inevitable part of most firms' compensation systems. If biases are unmonitored and unchecked, both women and attorneys of color often will find themselves having to "try twice as hard" to make half as much. This occurs, as noted above, because the successes of women (and the literature is much the same with respect to people of color) will tend to be overlooked or attributed to quirks of fate, while evidence of their failures and limitations will tend to be noticed, remembered, and interpreted as evidence of lack of merit. Again, this will happen even when the individuals in a given firm have no hostility or ill will towards women or people of color, and believe in good faith that they are sincerely committed to advancing women and attorneys of color.

Luckily, employers can institute practices that control for cognitive bias. The goal is not to eliminate bias, which is impossible, but to teach people what assumptions they need to double-check. An efficient way to accomplish this in a law firm setting is to require training in the context of performance evaluation, given each year, to introduce the four basic patterns of gender stereotyping:

- **Prove-It-Again!:** When women have to prove their competence over and over again in order to be judged as competent as men.

- **Tightrope:** When women face social pressure to play a limited number of traditionally feminine roles—and encounter pushback if they don't. Research shows that, too often, women who conform to traditional roles are liked but not respected, while women who do not conform are respected but not liked. This is important for all attorneys because they all weigh in on others' advancement and compensation (be it of associates or partners).

- **Maternal Wall:** When motherhood triggers strong assumptions that women are no longer committed or competent.

- **Tug of War:** When gender bias against women turns into conflicts among the women.

"If biases are unmonitored and unchecked, both women and attorneys of color often will find themselves having to *"try twice as hard"* to make half as much."

The committee that decides compensation needs additional training to ensure that they do not penalize women for self-promotion, do not discount women's successes, do not award men more compensation "because they have a family to support" or award women less compensation "because they have someone to support them."

Many programs and consultants are available to provide this training. Another important resource is the American Bar Association's Commission on Women in the Profession's *Fair Measure: Toward Effective Attorney Evaluations.*

In addition, studies show that procedures that require the formal articulation of reasons for a decision provides a check on bias, because then people stop and self-check to examine their assumption. This recommendation poses a challenge for compensation systems that traditionally have operated in the closet. Unfortunately, that kind of decision-making opens the door wide to unexamined bias, particularly in an environment in which there are relatively few women, people of color or other diverse attorneys.

The literature also stresses that putting someone in charge of diversity who has access to leadership is the single most effective way to achieve diversity.

A minimum first step is to introduce a formal metric, formally disseminated, that reports the breakdown of women and people of color in tiers of compensation. This will no doubt be a controversial proposal but, again, "if you're not keeping score, you're only practicing."

"...studies show that procedures that require the formal articulation of reasons for a decision provides a check on bias, because then people stop and self-check to examine their assumption."

CONFORM TO THE STANDARD BUSINESS PRACTICE BY LINKING COMPENSATION TO INDIVIDUALS' CONTRIBUTIONS TO THE LONG-TERM VIABILITY OF THE FIRM

An important point, rarely mentioned, is the current system's odd focus on current cash flow. To state the obvious, cash flow differs from the bottom line, which is a measure of the difference between revenue flow and expenses. Consultants sometimes circle around this, as when they note that partners in practice areas with higher profit margins should be rewarded financially.

To quote the Brian W. Bell of Hildebrandt Baker Robbins: "Very often celebrity lawyers...will...say 'They're not paying me enough money. I brought in $2 million worth of business.' I'll look into it and I'll often find that it costs $3 million to bring in that $2 million worth of business."

He continued: "If you measure hours, receipts and originations, that doesn't take into account whether the work is profitable or not."

Of course, cash flow is easier to measure than the bottom line. A particular challenge faced by law firms is that those who manage them typically have had no training in how to manage a large business organization—nor do most law firm

partners have an appreciation for what they did not learn by choosing not to go to business school. The lack of sophisticated management in the part feeds skepticism about the potential for sophisticated management in the future. The result, notes David Maister, is an absence of trust that leads to "extreme short-term orientations of many law firms. If partners don't believe the firm will remember or value contributions to future success, why would they make any investment that they may ultimately not get credit for?"

The basic principle is easy to articulate: "Compensation theory generally says that you ought to be rewarding people for the behaviors that you are trying to elicit," notes Joel F. Henning, the Senior Vice President and General Counsel of Hildebrandt Baker Robbins. The typical approach in most business settings is to link compensation to the individual's annual goals, which in turn reflect the organization's strategic plan. One survey respondent noted that her firm had instituted such a system outside of the compensation context: "Individual must meet the specific written elevation criteria and reflect/support standards set forth in the firm's strategic plan." Other comments offer intriguing hints of systems designed to reward teamwork when asked what factors into compensation: "Cross-office fertilization (ability to generate work for lawyers in other offices); ability to generate marketing and billable opportunities for lawyers in other practice groups."

Law firms' failure to link partners' compensation to lawyers' contributions to the long-term viability of the firm has a disproportionate impact on women, for several reasons. Most important, women lawyers often are under significant informal pressures to make such contributions, for example through service on committees related to recruitment, associate development and diversity. In addition, due to women's history of gender discrimination in the profession, women may feel a greater obligation than do men to mentor women, and to help other women develop their careers—contributions that help develop a firm's human capital, but rarely play a significant role when partner compensation is set.

A straightforward fix is for firms to reward all of the different kinds of contributions partners are asked to make to the firm, both through mentoring and other programs, and through committee work, on the theory that if the firm requires partners to make this type of contribution, it is important enough to the long-term future of the firm be recognized when compensation is set—and that if a given type of contribution is not important enough to recognize when compensation is set, perhaps it is not important enough to be required.

How these factors are taken into account also matters. For example, we suspect that most firms represented by lawyers in our survey say that they take into account, when setting compensation, partners' contributions to diversity, associate development, etc. Yet many of our respondents were notably skeptical; evidently many felt that their firms gave lip service, but did not actually, take such activities into account to a significant extent when compensation was set. This finding may indicate that firms need to communicate better now they actually do take

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"Law firms' failure to link partners' compensation to lawyers' contributions to the long-term viability of the firm has a disproportionate impact on women, for several reasons."

these types of contributions into account. Alternatively, firms may need to set up more formal systems than they currently have; it may be that existing informal recognition ("it's in the mix; we just don't quantify it") translate good intentions into few results.

More sweeping than a mechanism for adding additional factors into the mix in setting law firm compensation is to shift to the type of compensation systems adopted long ago. For example, Ernst & Young's compensation system weighs partners in four different arenas: quality, people, markets, and operational excellence.

Quality is, quite simply, the quality of the partners' work—something rarely considered explicitly in law firm compensation systems. At Ernst & Young, detailed assessments of quality are performed for each major "engagement," as client matters are called.

"People" concerns whether a partner is "actively involved in attracting growing and training our people," said Cathy Salvatore, Director of Career Development, "because our people are the only thing we have." Partners can choose how they will contribute to human capital development of others in the firm: "I tell them, these are the people who are going to pay for your retirement," Salvatore said. Some partners choose to focus on recruiting, either on-campus or experienced hire recruiting. Individuals are given responsibility for recruiting from their alma maters. "They own it. It is their responsibility to see that we get what we need, and to make sure the relevant professors are happy." Other partners focus on inclusiveness and diversity, or serve as Service Program leaders, teaching in-house training programs, and recruiting others to do so. Also included is how a partner interacts with his or her team. "How they are going to engage with people on the job? It is very easy for a partner to never be on the scene—to come in at beginning, at the end, and other than that only if there's a problem. Younger people love to see the partners," Salvatore noted. But a partner who spent all his or her time with their engagement team, who was totally invisible at office events and "was not driving anything cross functionally" would be penalized under the "People" category. The focus is on strategic development: "how are you contributing to what E & Y needs to do to make sure we have the strongest workforce, period—across all accounts not just your account." A single respondent reported a law-firm system that reflects some of these concerns: her firm's partner compensation took account of associate evaluations of partners.

"Markets" includes revenue generated, but goes far beyond that. It measures the extent to which a partner engaged in strategic development of new markets—not only for him or herself but also for the firm as a whole. Markets also measures whether the partner has brought in work, and worked strategically to penetrate new markets or develop new products. One consideration is "account planning—how you prepare to get your teams ready

> "Quality is, quite simply, the quality of the partners' work—something rarely considered explicitly in law firm compensation systems."

to deliver whatever service has been contracted for," Salvatore noted. It also includes strategic work to penetrate a new market: "Who are we going to go after and how are we going to go after them."

Operational excellence focuses on whether work is performed, and revenues are collected, efficiently and in a timely manner. So if a partner has "a lot of days of revenue sitting uncollected," or has a significant number of write-offs, this would show up in the operational excellence metric. Also considered is "fee-sharing": efficient deployment of the person with the relevant skill set who is closest to the geographical locale of the engagement. This discourages partners from using people they know over and over again because it may be more cost-efficient to use someone closer to the client," said Salvatore.

A straightforward approach would be to adopt this kind of system: law firms who inquire will find that many of their larger clients have a similar system. Firms that feel this is too large a leap could adapt their current systems by awarding points for a variety of institutional investments (from management to developing the firm's human capital). A third alternative is to set aside a specific percentage of firm profits to be distributed based on institutional investments.

DESIGN A COMPENSATION SYSTEM THAT DOES NOT PENALIZE PART-TIME PARTNERS

In some cities, the number of women partners who are working as part-time partners is fast approaching 20%. And although the numbers remain small, the number of partners working part time has almost tripled in the last 15 years. These numbers indicate an increasing demand for part-time work even at the partnership level and firms that support these flexible arrangements "are going to be able to hire from a larger pool of applicants, save recruiting costs by hiring fewer new lawyers, retain a diverse group of lawyers, reduce attrition costs, attract new clients, and increase the satisfaction of their current clients." In addition, supporting part-time partners is often seen as a "powerful message of a firm's commitment to diversity." Given the increase in part-time work for law firm partners, coupled with the benefit that supporting it can bring to a firm, it is important that law firms understand how to design compensation systems for these part-time partners. It is also immediately relevant as 14% of part-time partners in one study felt that "their compensation was unfair" while a full 40% reported feeling stigmatized or devalued

The essential goal of the firm should be to recognize part-time partners' contributions fairly, since "[un] fairness—whether real or perceived—will

"In some cities, the number of women partners who are working as part-time partners is fast approaching 20%."

undermine the success of any part-time partner arrangement." Suggestions for creating equitable systems that do not penalize these part-time partners include:

- Avoiding the "haircut" scenario by making sure that compensation for part-time partners is proportional. The "haircut" occurs when there is a disproportionate differential in pay and part-time partners who work, for example, 80% in terms of hours receive less than that percentage in pay. A fair system would mean being paid proportionally to the number of hours billed, not awarding fractional shares to part-time partners, and not indexing compensation to the actual number of billable hours if there is a tiered system.

- Compensating part-time partners for hours that they work in excess of those agreed upon. Similarly, if part-time partners end up having billings and/or originations that are comparable to full-time partners, they should be compensated accordingly. Ultimately, this means designing a system in which part-time partners' compensation increases in conjunction with any increase in billable hours.

- Taking into account the non-billable contributions that part-time partners make to firm life. Part-time partners are often highly involved in firm governance and serve as managing partners, on compensation and hiring committees, and in associate training and mentoring programs. These activities build a strong firm and should be both recognized as valuable service and taken into account in compensation decisions.

> "Avoiding the "haircut" scenario by making sure that compensation for part-time partners is proportional. The "haircut" occurs when there is a disproportionate differential in pay and part-time partners who work..."

Fair Measure: Toward Effective Attorney Evaluations

As law firms increasingly abandon lockstep and move toward competency-based systems, it becomes even more important to control for implicit bias in performance evaluations. An effective bias-free performance evaluation process has a positive and direct impact on advancement and retention. But, what is an "effective bias-free evaluation process" and does your law firm have one?

The ABA Commission on Women's second edition of *Fair Measure: Toward Effective Attorney Evaluations* authored by Joan C. Williams, Co-Founder of The PAR Research Institute, and Consuela A. Pinto, former Director of Education for The PAR Research Institute. This completely revised second edition manual contains a comprehensive review of the current social psychological literature on hidden gender bias and outlines a step-by-step process for implementing and conducting performance evaluations that are free from bias.

Additionally, it includes a checklist for evaluating the effectiveness of a firm's current evaluation program, sample evaluation forms and policy, performance evaluation training checklist and materials for supervising attorneys, a summary of the various forms of gender bias, tips for writing an evaluation and conducting the evaluation interview and an instruction packet for completing performance evaluations.

16 Tips For Writing a Bias-Free Performance Evaluation

- **Best Practice #1:**
  Draft the comments before selecting a score from the rating scale.

- **Best Practice #2:**
  Provide clear, detailed, and factual examples of behavior that either exemplifies proficiency in a certain objective or a need for improvement.

- **Best Practice #3:**
  Consider only performance during the period of time under review. Base your comments on actual performance and not potential or effort.

- **Best Practice #4:**
  Comment on every skill or attribute that you had an opportunity to observe during the review period. Do not simply give a score.

> "An effective bias-free performance evaluation process has a positive and direct impact on advancement and retention."

(cont.) 16 Tips For Writing a Bias-Free Performance

- **Best Practice #5:**
  Weigh individual competencies similarly for all evaluatees.

- **Best Practice #6:**
  Consider how you may have contributed to the attorney's performance in either a positive or negative way, particularly in conjunction with examples of poor performance.

- **Best Practice #7:**
  Avoid using derogatory, disrespectful, or overtly biased comments.

- **Best Practice #8:**
  Avoid basing scores and comments on the evaluatee's adherence (or lack of) to gender stereotypes.

- **Best Practice #9:**
  Be accurate; do not exaggerate.

- **Best Practice #10:**
  Be consistent with the feedback you provided to the attorney throughout the year.

- **Best Practice #11:**
  Identify strengths and weaknesses using concrete examples of past performance.

- **Best Practice #12:**
  Use a positive tone.

- **Best Practice #13:**
  If appropriate, state where the attorney stands in terms of partnership.

- **Best Practice #14:**
  Identify areas for improvement and professional development goals for the coming year.

- **Best Practice #15:**
  With respect to assigning ratings, rely only on actual performance during the period under review. Do not base your decisions on effort or potential.

- **Best Practice #16:**
  Finally, review the evaluations before submitting them to the next level. Look for consistency among the evaluations, accuracy, and biased comments. Check for implicit gender bias by looking objectively at (1) the ratings given to male and female associates to see if certain competencies are given greater weight in the evaluations of males; (2) whether the actions of female associates were reviewed more harshly; and (3) whether female associates' achievements were not accorded the appropriate level of significance.

> "Identify strengths and weaknesses using concrete examples of past performance."

Key Metrics for Assessing Progress on Diversity

In *New Millennium, Same Glass Ceiling: The Impact of Law Firm Compensation Systems on Women*, co-authored by The PAR Research Institute's co-founder Joan C. Williams, one best-practice recommendation was to establish baseline information on where women and diverse attorneys fall in the compensation system, along with regular monitoring and analysis of that data. Dewey & LeBoeuf, a large, international law firm, recently took its metrics to the next level. This firm, like many others, has long tracked the demographics of its associate population and has measured utilization of associates in terms of billable hours. The firm's Diversity Chair came to the conclusion that a better method was needed because aggregate data does not reflect the relative success of different demographics, nor whether individual associates have been provided the opportunity for meaningful career development.

The firm's new metric divides its associates into four categories:

- Associates billing at 1800+ hours who have worked for at least 100 hours (annualized) on a top-ten matter for his/her practice group ("top ten" is measured by revenue);

- Those billing at 1800+ hours who have not worked on any top-ten matters;

- Those billing fewer than 1800 hours who have worked on a top-ten matter; and

- Those billing fewer than 1800 hours who have not worked on any top-ten matters

The firm looked first at all of its associates in the United States, and then at the sub-groups: white male associates, female associates, ethnically diverse associates, and LGBT associates. The resulting data have already proved valuable both in reviewing the opportunities provided to individual associates and in reviewing the relative success of the various demographic cuts of the associate population. Going forward, the data will serve as a baseline for progress in its retention and promotion of diverse and female associates.

> "...The firm looked first at all of its associates in the United States, and then at the sub-groups: white male associates, female associates, ethnically diverse associates, and LGBT associates."

Work Allocation Systems

In the current off-the-shelf model for law firm management, associate workflow is through informal assignment systems – "hey you" tasking or the free market model. Informal workflow systems align to partners' needs to get work done efficiently, setting up the motivation to give a task to someone who has done it before and has shown to do it well. While this type of system works well for some, research suggests it works less well for women and people of color, resulting in uneven utilization and associate development. Formal work allocation systems are more effective in providing equal access to development opportunities. This is especially important under merit-based compensation and promotion systems, which are becoming increasingly common.

Vernā Myers, a nationally recognized expert on diversity in law firms, has set forth some of the critical components of a successful system. These include tracking assignments, benchmarking against core competencies, and managing through workflow coordinators, who communicate with both associates and partners and ensure that all are held accountable. Several law firms have been moving towards these kinds of best practices.

> *Goodwin Procter uses a home-grown tracking system, in which associates report weekly on what they are working on and what they would like to work on, as well as track their progression on the firm's competencies. When an associate reports that he or she is working on an assignment that did not come through the staffing manager, the staffing manager follows up with the associate. The staffing manager can then discuss the matter with the partner and even take it off of the associate's plate and re-allocate it if necessary. Goodwin has found that this work allocation system offers a variety of advantages. It helps control for uneven workflow. It makes staffing more efficient. It also provides for early feedback opportunities. For example, if a partner indicates that he or she does not want to work with a particular associate, the staffing manager is able to discuss the issue with the partner and ensure that feedback on past performance is delivered. The system also allows the firm to monitor how much time is written off and enables better tracking of utilization and realization.*

Farella Braun + Martel LLP has devoted substantial resources to building an effective work allocation system for its litigation associates. The firm's Director of Professional Development serves as staffing manager and is

"Formal work allocation systems are more effective in providing equal access to development opportunities."

the first point of contact for partners who need associates to work on a given matter. The Director of Professional Development confers with the Practice Group Leader or Department Chair when a new case or matter needs staffing. The two work together to review the available associates to staff the case and communicate the decision to the partner.

Benchmarking is a key component of Farella Braun + Martel's system. The firm collects information about associates' cases and workloads to confirm that associates are getting opportunities to develop the skills in the firm's experience guidelines and competencies checklists and are meeting utilization goals. In addition, associates send in monthly workload reports to review what they are working on, what they anticipate is coming up, and what kinds of experiences they would like to get. These reports enable the Director of Professional Development to match up cases and assignments with associates in an effort to offer equal opportunity for development and advancement.

Another role that the Director of Professional Development plays is to serve as a liaison between the partners and associates. As an attorney who can talk to partners and associates about their cases, the Director of Professional Development uses his own litigation experience to match the clients' and partners' needs with associates' skills, interests, and workloads. The firm is able to better distribute work thus evening out utilization across the litigation group.

A second firm with a robust work allocation system is Goodwin Procter LLP. Taking lessons learned from staffing in the consulting world, Goodwin has instituted a new position: Manager of Staffing & Professional Development handles assignments for each group of fifty associates. The managers support a particular practice group and work with one or more of the firm's offices. These staffing managers, former-practicing lawyers, identify staffing needs, monitor associates' workloads and professional development, and allocate the work for the group. Partners contact their respective staffing manager when a new matter comes in or when they have an assignment that needs to be completed. The manager then gives the partners different staffing options. This system enables managers to monitor for inappropriate assignment patterns and hear about serious issues quickly.

The role of the staffing manager is linked closely to the business needs of the firm. The managers deliver more resources, better and faster, to partners in need, and have thus become trusted advisors to the partners. To facilitate this relationship further, the departments fund the managers from their budgets, and the managers report directly to their respective practice group leaders.

A final benefit of the kinds of work allocation systems adopted by firms such as Farella Braun + Martel and Goodwin Procter is to control the

"Benchmarking is a key component of Farella Braun + Martel's system. The firm collects information about associates' cases and workloads to confirm that associates are getting opportunities."

kinds implicit biases that have been shown to affect the retention and promotion of women and diverse attorneys. Research shows that, without any evil intent, automatic biases will and do creep into a variety of workplace systems, including work allocation processes, unless processes are designed in ways to check automatic bias. Both firms dedicated the time and resources needed to put a well-working system into place. The PAR Research Institute is actively studying workplace allocation systems, and would welcome hearing from any other legal employer that has implemented a system that seems to be working well.

The bottom line: the last thirty years has dramatized that good intentions do not guarantee progress towards diversity and flexibility goals. By changing basic organizational systems, including the work allocation, performance evaluation, and compensation systems, firms can create a level playing field for all attorneys. Simply counting and recounting the number of diverse and women attorneys has not proved a recipe for progress. The PAR Research Institute's goal with our "Diversity Beyond the Body Count" initiative is to provide legal employers with best-practice systems already in use that will lead to concrete progress on diversity goals.

"The bottom line: the last thirty years has dramatized that good intentions do not guarantee progress towards diversity and flexibility goals."

TEACHING DIVERSITY SKILLS IN LAW SCHOOL

VERNELLIA R. RANDALL*

Interviewer: Thanks for doing this interview. Could you tell us something about yourself?

Professor Randall: Absolutely! I have been teaching law for over 20 years. During those 20 years, I have taught Remedies, Professional Responsibilities, Torts, Criminal Law, Race and Racism in American Law, and Gender and the Law. I appreciate the opportunity that *Saint Louis University Law Journal* has provided me to discuss not only the importance of teaching diversity skills in traditional courses, including civil rights courses, but also the "how" of teaching diversity. Lawyers practice in a diverse society. Certainly, lawyers need to be able to appreciate and assist people of all backgrounds. As my colleague Thaddeus Hoffmeister said:

> There is the obvious benefit . . . , but what about other not so obvious benefits? For example, who is going to be the better first-year associate, the attorney who knows healthcare law or the attorney who knows healthcare law and how it impacts folks based on their race, gender, religion, etc. If I were a senior partner, I would want the latter because that associate can help me work with and bring in diverse clients. In addition, that same associate could also broaden the firm's understanding of certain legal problems. Thus, a lawyer who was acutely aware of diversity issues would be more marketable than one who wasn't.[1]

But perhaps more importantly, lawyers need a broad range of diversity skills in order to practice law effectively and to fulfill their responsibility to ensure a just society.

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1. Quote by Professor Thaddeus Hoffmeister, University of Dayton School of Law (Sept. 28, 2009) (on file with author).

Interviewer: Right. Right. So what are diversity skills?

Professor Randall: I call them diversity skills for lack of a better term, not because it's a good term. I don't know what else to call them: diversity skills or knowledge. So, diversity skills means incorporating the outsider's views and perspective into the analysis of the law.[2] I'm generally talking about groups that are marginalized by race, gender, class, religion, sexual orientation, or ability. I'm not saying that those are the only ways diversity can be recognized, because you could, for instance, teach diversity skills in terms of geographical or cultural difference. For instance, people in Alaska would have a different perception of the same law from, say, people in Louisiana. Americans have a different perception of the law than the French. Race, gender, class, sexual orientation, religion, and class aspects of diversity tend to have a significant impact on different groups of people.

So, then the question is, what constitutes diversity skills and knowledge? It seems to me that there are a couple of things. Obviously, diversity skills include communication skills: the ability to speak and write persuasively to people from marginalized groups on legal matters. Diversity skills also include critical thinking and knowledge.

First, as lawyers, it is our responsibility to work effectively with the law and with all kinds of groups and individuals. If you take the approach that there is only one law, and one size fits all—here is the law and every single person who comes through the door is going to have that law put on them to wear it (or not) the best they can—you are not teaching students the analytical skills in diversity that they need. Unfortunately, though, that is the way most professors teach the law and lawyering skills.

Except in some limited areas of law (such as discrimination) we ignore race, gender, class, and sexual orientation and we just look at the facts that go to our legal theory. We then assume that the legal theory can be applied to any person without regard to his or her background.

In fact, the people and the problems they bring, and how the law applies to their problems, may be affected by race, class, or gender. So, a lawyer needs to be able to see the potential factors in a person's background that may affect the legal analysis that should be applied and then be able to perform legal

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2. *See, e.g.,* Julie Davies, *Teaching Diversity Skills in Law School: One School's Experience,* 45 J. LEGAL EDUC. 398, 399–400 (1995). *See generally* Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering, in* RACE, CULTURE, PSYCHOLOGY, & LAW 47–62 (Kimberly Holt Barrett & William H. George eds., 2005); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education,* 11 NAT'L BLACK L.J. 1 (1989); Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching,* 32 WILLAMETTE L. REV. 541 (1996).

analysis that recognizes that these factors may affect the application of law, the choice of the legal theory to apply, the choice of defense, the choice of rules and the application of the rules, and then how to argue it before the court. Diversity skills impact all these interactions with others. It is a skill to recognize that there are differences in the way legal matters should be handled for different clients. It is a skill to understand how diversity matters, and it is a skill to then utilize diversity factors appropriately and effectively in the practice of law. Lawyers are not going to be able to practice effectively if they are not taught these skills.

Another diversity skill is the ability to analyze how certain groups are affected negatively by the law or the lack of law. Lawyers need to understand that bias exists and they need to know how to recognize bias in the law and in its administration.[3]

Interviewer: What do you mean by "traditional courses?"

Professor Randall: What I mean by "traditional courses" are substantive courses, stand-up courses, doctrinal courses. Law school courses tend to fall into three categories:

- Substantive courses: Contracts, Civil Rights, Property, Corporations, Agency and Partnership, Health Care Law, Remedies, Professional Responsibilities;
- Clinical courses and "skills" courses: Externships, Moot Court, Interviewing and Counseling, Negotiation, Alternative Dispute Resolution;
- Seminar courses: a lot of them tend to be "the–and" courses. You know, Law and Humanity, Law and Education, Race and Racism and the Law, Gender and the Law.

Interviewer: So how does teaching diversity skills relate to the category of courses?

Professor Randall: Of the three categories of courses (traditional, clinical, and seminar), in terms of diversity skills, clinical courses tend to deal with them more as an integral part of what they are teaching. Clinical courses often address diversity communication skills, but not diversity analytical skills.

Whether seminar courses tend to deal with diversity skills as an integral part of the course depends on the nature of the seminar course. So, certainly "Race, Racism, and the Law," "Gender and the Law," and "Disability Law"

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3. Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 3 (2003).

may naturally deal with diversity skills more than say, an intellectual property seminar. So it depends more on what the substantive area is. On the other hand, traditional or doctrinal courses almost never deal with diversity skills as an integral part of the teaching.

So, my argument is that diversity skills are essential to being a good lawyer, essential to the community, and are thus important to the student, and they should be important to the teacher. Like teaching writing skills across the curriculum, we should be teaching diversity skills across the curriculum. We shouldn't rely on any particular course to teach these skills. All of us should be teaching these skills.

Interviewer: So, how do you teach diversity skills?

Professor Randall: To start, the teaching of the skill requires the teacher to get the students to recognize that differences matter.

Interviewer: How do you do that in a large, traditional classroom?

Professor Randall: Well, this is the hard work for the faculty. To start, it is not going to happen if the teacher hasn't engaged in thinking about it. As with other skills, to teach it, you have to have it. Unfortunately, because most law teachers never learned the skills in college or law school, they will have to acquire the skills themselves. In making the decision to teach diversity skills, fortunately, a teacher doesn't need to be an expert.

So, teachers need good course planning techniques.[4] That is, they must know what their own goals are and what they are trying to achieve in that classroom. If teaching diversity skills is important, it should be a part of the stated goal for the class.

And then the teacher has to make this clear to the student. For instance, my website states my philosophy of teaching.[5] I've been doing this since I've been teaching. My philosophy has the following three major components: (1) I want to have to have an educationally sound pedagogy; (2) It's my responsibility to teach substantive law. Students are in my course because they want to learn remedies, criminal law, contracts, whatever it is, and I have a

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4. *See, e.g.,* Gerald F. Hess, *Improving Teaching and Learning in Law School: Faculty Development Research, Principles, and Programs,* 12 WIDENER L. REV. 443 (2006); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching,* 38 SAN DIEGO L. REV. 347 (2001).

5. Vernellia R. Randall, Remedies, http://academic.udayton.edu/legaled/remedies/00 Syllabus/02philosophy.htm (last visited Mar. 20, 2010); Vernellia R. Randall, American Health Care Law, http://academic.udayton.edu/health/syllabi/health/Syllabus/philos.htm (last visited Mar. 20, 2010); Vernellia R. Randall, Professional Responsibility, http://academic.udayton.edu/legaled/profresp/00Syllabus/philos.htm (last visited Mar. 20, 2010).

responsibility to make sure that they do; (3) Finally, it is my goal to engage in a diversity-conscious legal pedagogy. Here are the goals that are part of my syllabus:

C. Teaching Objectives #3: Diversity-Conscious Legal Pedagogy

Class, disability, gender, race, and sexual preference issues are such an integral part of our society (and the legal profession) that we often overlook how the law has different effects on individuals with different backgrounds. In a diverse society, such as ours, awareness of how class, disability, gender, race, and sexual preference are affected differently by the law is essential. This is true for defendants, plaintiffs, lawyers, jurors, judges, or law students. Diversity awareness should be a normative part of the value system of the practicing attorney. An education that is aware of diversity:

• Explores how racial, ethnic, gender, class, disability, cultural, and sexual orientation are related to and impacted by the structure of law. In particular, it illuminates the connection between racial and gender issues and the values, interests, rules, and theories that appear to be neutral, but are in fact a representation of the values of the dominant culture;

• Broadly frames classroom discussion so that we step outside the doctrinal bounds of the law to critique the rules and legal practice; and,

• Focuses discussion on problems, interests, and values that reflect a broad range of perspectives.

Interviewer: So, the very first thing to do is be sure students are aware of your diversity conscious pedagogy?

Professor Randall: Yes, I have integrated it into my courses' goals and objectives. I have made this clear to my students. I have them read the syllabus and acknowledge that they are aware of my pedagogy and don't have any questions.

Syllabus Survey Question

I have read the section on Philosophy of Teaching. [Yes][No]

I understand that this course focuses not only on teaching substantive law, but also on diversity issues in remedies.

I [do] / [do not] have any questions.[6]

Teaching diversity skills cannot be happenstance. Don't try to sneak it in by bringing in a case here or a comment there. Doing that is like trying to teach a skill by not approaching the skill straight up and saying that today

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6. Vernellia R. Randall, Remedies Syllabus Survey, http://academic.udayton.edu/legaled/remedies/00Syllabus/SyllabusSurvey.asp (last visited Mar. 20, 2010).

we're going to learn knitting, but what you are doing is teaching them basketball, but every now and then you throw in something about a stitch.

Such an approach is not only ineffective, but is disconcerting to the students. Students get justifiably upset because they think it's coming out of the blue. They do not see or understand the reason for teaching diversity skills and knowledge. So my very first step is to make sure everybody understands why I am teaching diversity skills and knowledge, why it's important to them, and that it will be well integrated into the class.

Having said that, the next thing I have to do is choose my materials wisely. Students are less likely to challenge the integration of diversity skills if the materials have cases and materials that address some aspect of diversity. If a casebook never, ever mentions anything about diversity, then I will be defying the casebook, and students are more likely to believe that I am pushing a political agenda.

Interviewer: So, you have found that there are casebooks out there that address diversity?

Professor Randall: To a limited extent. Not as many as I would like. But I make that the criterion more than anything else. I will choose casebooks that I don't care for that much, maybe they cover things that I don't think necessarily need to be covered, but if they cover diversity, even in a limited way, I will choose them.

If traditional legal theory is not quite covered in the casebook, I can add a reading on that and no one is going to question me about it. The students are not going to think that I'm trying to politicize them.

Whatever course I am teaching, I take all the books and evaluate them on how they deal with diversity skills and knowledge. I have been successful in getting the authors of some of my casebooks to add diversity-related exercises to the casebooks I use.[7]

Interviewer: So, you said that it's a specific goal at the beginning of the semester and you choose material that incorporates diversity. What specific steps do you take throughout the semester to ensure that you are teaching diversity skills?

Professor Randall: Once I choose the book, what I want students to do is to recognize how the law for that course will be affected by these diversity factors. In achieving that, I ask specific questions. I give them credit when

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7. *See, e.g.,* BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST & ROBERT L. SCHWARTZ, HEALTH LAW: CASES, MATERIALS AND PROBLEMS (6th ed. 2008).

they raise diversity issues without my having to point them out. If you are going to teach diversity skills you have to make progressive technological choices. You can do it in a large, traditional classroom where you just ask a question of six people out of 100. Let's say that I was teaching Professional Responsibility and talking about the rule on confidentiality and communication. I may ask them a specific question within a small group.

In that case, actually thinking about how diversity is going to affect people requires students to do more than listen. In the traditional large classroom, people listen more than they think.

Interviewer: That's true.

Professor Randall: You say they are supposed to be thinking. Well, they are thinking about what the person is saying. They are not thinking independent thoughts, because they have to listen. So, the person who is asked the question is the person who is thinking about the question. Everyone else is just listening to and thinking about the answer. If you want people to think about the question, you have to structure the classroom so that it will force them to think and answer the question, which is why I use small groups and a course-management tool called Moodle.[8] Moodle allows me to ask a discussion question in an online forum and require everyone to answer before they can see anyone else's response. I have found the quality and quantity of participation to be significantly better than in-class discussion.

Interviewer: But isn't having small groups difficult in large classes?

Professor Randall: It definitely takes more planning and the professor spends more time managing the environment, more a guide on the side than a sage on a stage, but I have done small groups with 200 people. I have gone to conferences, and people have said "we can't do the small groups in such a large classroom," and I will reply "I'm going to do a small group exercise right here." I put them into small groups. I give them a problem and I have them talk among themselves. I have them return and then we have a large classroom discussion. So, the size of the classroom doesn't foreclose the ability to use small groups.

Of course, strategic decisions need to be made. If you want to make sure that every single person talks in a short amount of time, people have to be in groups of no more than four. The larger the group, the more time you have to give to the discussion. If you go over four people, you are going to have free riders: people who won't say anything, because there will be enough other

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8. LawschoolMoodle, http://lawschoolmoodle.org (last visited Mar. 20, 2010); Moodle, http://moodle.org (last visited Mar. 20, 2010).

people talking. It is hard to not talk in a group of four. You become very noticeable if three people are talking and you aren't. If you put them in groups of three, that's a good group size and it takes less time, maybe five to seven minutes instead of twenty. In seven minutes, everyone can talk two minutes. If you want, you can do one-minute exercises, with "pair and share." My point is that teaching diversity skills requires a different pedagogical approach from just reading cases and calling on six or seven people in a 50-minute period. In teaching diversity skills you need to have students analyzing legal situations for the diversity issues (problems), and get students talking and critiquing each other (small groups).

Interviewer: So, it would be a problem relating to whatever substantive course you are teaching and it would raise a possible diversity issue?

Professor Randall: Exactly. But even if the problem does not expressly raise diversity issues, the students are still expected to raise any relevant diversity issues.

Interviewer: How are you able to assess students' mastery of the skill?

Professor Randall: Well, I give students credit for raising diversity issues as part of class participation. Class participation counts for 20% to 30% of the grade.

Students do self-evaluations, and that is another way I raise the diversity issue and make them aware of its importance. The self-evaluation form, which I will include here, has a top grade of 93, 87, and 83. The distinction between a 93 and an 87 is raising diversity issues. You can get an 87 without raising diversity issues. You cannot get a 93 without raising diversity issues. So, if you come to class, I'm not going to penalize you in terms of failure to raise diversity issues, but you are never going to make an A in my class without raising them. I think diversity is that important. I let students know that to get an A in this class, they are going to have to think about and raise diversity issues. Here is an excerpt from my class participation evaluation form:

Check one:

Evaluate Your Class Participation for Today

Remember: don't forget to award the Karma Points!![9]

93 I was thoroughly prepared. I significantly contributed readily to the conversation but didn't dominate it. I made thoughtful contributions that

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9. "Karma Points" are points students can award to other class participants for "exceptional participation" in class. *See, e.g.,* Class Participation—Karma Points, http://academic. udayton.edu/legaled/remedies/00Syllabus/grade01b.htm (last visited Mar. 20, 2010).

advanced the conversation. I showed interest in and respect for other views; and I participated actively in small groups; and I either took notes or reported for the small group. I raised diversity issues related to the topic at hand. My participation was exceptional.

87 I was thoroughly prepared and contributed readily to the conversation. I contributed occasionally without prompting. I showed interest in and respect for others' views. I participated actively in small groups. While my contributions may have been less well developed, they nevertheless advanced the conversation without being hostile or overtly rude. I raised diversity issues related to the topic at hand. My participation was very good and above average.

83 I was prepared, but I did not voluntarily contribute to discussions and gave only minimal answers when called on; I did not raise appropriate diversity issues. Nevertheless, I showed interest in the discussion, listened attentively, and participated actively in small groups. My participation was good and average.

I also have students do weekly reflections on what they learned and I ask a specific question about diversity.

Interviewer: I would think students would have a difficult time, if they have not been explicitly taught that skill before.

Professor Randall: Yes, of course, that means that I have to train them because in the beginning, I had one student who thought that he was raising diversity issues just by pointing out potential discrimination. I replied: "No, no, no. That could be a diversity issue if discrimination is a part of the problem, but what we're talking about is how the law affects different people differently around the issues like race and class and how the law should be changed, if it should be changed." Just pointing out that certain people are discriminated against is not a diversity issue within the context of, for instance, my Professional Responsibility course, unless you want to talk about why there is a lack of diverse legal representation within the legal profession, which then puts a responsibility on lawyers as to how they handle their professional responsibilities. So, students are evaluated on a daily basis; they evaluate themselves. I have an online class participation component to all my courses because I find that I can ask specific questions and have everybody think about it. I do a lot of my diversity stuff there.

Interviewer: That gets me to my next question. Have you found students, for lack of a better word, who are a little uncomfortable discussing these issues in open forum? If so, how do you counteract that?

Professor Randall: Students' reception to being taught diversity skills in traditional courses is split. Some students resent having to discuss these issues. I know students find it difficult to do this because they have said to me that before taking my courses they had never had to do this.

In any class I will have a couple of students whose majors were in areas where they were required to think about diversity, but that doesn't mean that they thought about other perspectives outside of their major. They may not have thought about disability or religion. Religious studies majors, for example, may think about how different religions impact the world differently, but they haven't actually thought about how different racial groups may look at religion differently. So, I find a huge amount of discomfort. And one of the downsides for a faculty member is that if you have an elective course, it affects the number of students that may take the course because you are being explicit. You are not trying to sneak it in. So, because of that, they decide not to take this course.

On the other hand, if you have a required course, then you may have a large number of students who will resent it because they think you are politicizing them. Because of the failure to integrate the teaching of diversity skills across the curriculum, many students believe that it is not an appropriate part of the course. In my required courses, about 50% of the students don't agree with the following statement: "Discussion of race, gender, socioeconomic class, sexual orientation, religion, and other diversity issues is an important part of understanding this substantive area of law." Some students explicitly state their objections:

> No. This professor is incompetent and an embarrassment to the teaching profession. She has forced her propaganda down our throats and does not allow people to disagree. Way too much busy work on diversity which [sic] is NOT relevant to the MPRE. This was a required class and our money should be refunded to us with an apology. Worst teacher ever in the history of teaching. By not using anonymous grading she held the class hostage to her illogical demands.[10]

Others, I believe, are more implicit and demonstrate a level of anger that is not commensurate with the structure of the course:

> I truly believe this class was a complete waste of my money. I do not understand how Prof. Randall ever got tenure (?) and is able to teach at UDSL! By far, worst class and professor I have ever had in law school, college, K-12![11]

Because doing diversity skills education can affect student evaluations, to the extent possible, you need to have your dean and faculty on your side. You

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10. Student evaluation on file with author.
11. Student evaluation on file with author.

need to make sure you articulate your objectives clearly. Well, I shouldn't say "on your side." You need to make sure that everyone in authority knows what you are doing and knows why you are doing it, rather than wait until a student complains.

You need to say to your dean: "Here's my philosophy of teaching." What I have done for over 20 years is included in all my materials, in my evaluation, in my pre-tenure materials my philosophy and approach on teaching diversity skills.

I'm always surprised, though, because no matter how explicit I am, I get students who take the course not knowing what the course is about. I have tried over the years to make sure that they know, because I don't want people being surprised. I have students not only read my syllabus, but I have them fill out a questionnaire in which they say they've read my syllabus and that they have no questions. Part of my questionnaire is: "Did you read my philosophy of teaching? Did you understand the component parts of my philosophy of teaching, yes or no?" "Do you have any questions, yes or no?" Day one, students know that diversity is a part of my teaching. Nevertheless, I get students who are angry about it and they complain to the dean. So, explicitly engaging in diversity skills training is not for the faint of heart.

Interviewer: Do you think it's the result of race and gender?

Professor Randall: My being a black woman has a lot to do with it. My Afrocentric dress affects students' reactions. Being six-feet tall with a commanding voice also contributes. For many students it is the first time they have had an African-American woman teach them. That's disconcerting to them, and then to be the only teacher addressing diversity skills issues delegitimizes the content for them. They think that if diversity skills were so important, then the white males in other courses would be doing it. They think that I am abusing my authority, using my position to promote my own political views.

Interviewer: Really? That's why I was interested in the type of feedback you've received after the course.

Professor Randall: Generally it's easy, and you pointed this out to me once already, to focus on the most immediate, most negative feedback. But given the demands of my courses, the feedback is positive. I'd say half and half in a course in which people have to take it. Half the class is thankful and thinks they learned skills that they know are crucial and that they have not learned anywhere else. I have had students come back to me or e-mail me and say that they are really learning that they need these skills even more once they get out and practice. In elective classes, overwhelmingly, the person who does not

think it's important is an exception. Because people already want, acknowledge, or know that there's a need for this, they select me and they are open to discussion of diversity issues. I find evaluations where people self-select my course to be really high. In the last couple of years, I have been doing my own evaluations and I ask them whether they think diversity is an important component of what should be taught and what they thought about the mix in my course. Do they think I do too much or too little? Overwhelmingly, they have said it's about right. So, they have it integrated in the book. The books aren't these heavy diversity books; it's just that periodically these issues are raised. On every lesson, especially online, there will be at least one diversity question. They get better grades if they raise diversity issues themselves, and so they become conscious of thinking about that. Then I give them a large diversity assignment before the end of the semester that is 10% to 15% of their grade.

Interviewer: Give me an example of a large diversity assignment.

Professor Randall: In Professional Responsibility, they have to critique the ABA model rules on an aspect of diversity and discuss how well the ABA model rules deal with the diversity issue. So, I have people looking at disability, immigrants and communication skills, religion, and religious lawyering. I let them select the topic. I give them a bibliography of potential law review articles and tell them to select a topic on which to critique the ABA rules. That, in and of itself, is a thinking skill because they have to think about what is an appropriate topic for this course. For Criminal Law, we actually had case materials[12] where I had them look at a particular death penalty case and talk about race. For Health Care Law, they are going to have to write a paper on racial health disparities and how the health care reform is going to eliminate them. Sometimes the assignment is to look at a narrow part of the law in a specific group, and sometimes the assignment is to look at the whole scheme of the law and analyze the whole scheme based on the diversity aspect. It just depends on how, as a teacher, I'm feeling or what I'm thinking, and what's going on at the time that makes me think this is what we need. It's a part of their assignment from the beginning. I'm working on Remedies right now. The problem is that I have not really found a good Remedies book, so I don't have the materials and there hasn't been a lot written about it. This has probably been the most difficult course that I have had to work with in terms of diversity issues. Because I'm only in my third year of teaching Remedies myself, I am still trying to figure it out because it takes a certain level of substantive expertise on the part of the teacher to be able to analyze where the

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12. Case materials on file with the author.

diversity issues will come in unless they have a book to help. For instance, there is a really good article on corporate law that says "here is where you can think about truth and diversity issues."[13] A corporate law teacher can read that article and not have to be as tuned in to diversity. The most I have in Remedies right now is that there have been some discussions of damages and how damages are impacted by race and gender differences.[14] It's a start. If you want to incorporate diversity skills in your substantive course, you do have to have baseline knowledge of the subject.

Interviewer: So a teacher has to understand what she is teaching and then she has to step back so that she can illuminate this for her students.

Professor Randall: Exactly. But you need not have full knowledge or understanding or expert diversity skills. You have to realize that you are going to be teaching a skill that you are learning. You weren't taught it, and so when teaching skills and knowledge that you are learning, you are literally going to be one step ahead of your students in the beginning. That's like teaching law, because when you first teach law you are just one step ahead of your students. You don't really have that wealth of knowledge that comes from having taught for six, seven, or ten years. You went to law school, you took one course in torts and now you are teaching torts. So, being one step ahead should not make you feel uncomfortable, but you do need to realize, for a really new teacher, you may want to wait for your second or third year before you start trying to integrate diversity skills. I didn't wait. I could teach other people even though I didn't know the substantive law all that well, because I already had strong diversity skills in terms of critical thinking about how the law affects others. That was largely self-taught. You can learn these skills on your own, just by saying "I'm going to force myself to ask the question, how does civil rights law affect people of different genders, races, sexual orientations, religions, classes, etc." You know, that's the first step, and then you can get more specific as you go into the course.

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13. *See, e.g.*, Alfred Dennis Mathewson, *Race in Ordinary Course: Utilizing the Racial Background in Antitrust and Corporate Law Courses*, 23 ST. JOHN'S J. LEGAL COMMENT. 667 (2008); Leonard M. Baynes, *Foreword: The Intersection of Race, Corporate Law, and Economic Development*, 77 ST. JOHN'S L. REV. 701 (2003); Kellye Y. Testy, *Adding Value(s) to Corporate Law: An Agenda for Reform*, 34 GA. L. REV. 1025 (2000).

14. *See, e.g.*, Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998) (demonstrating inequities based on race and gender in damage awards received by plaintiffs in tort suits); Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 REV. LITIG. 37 (2007) (providing a historical overview of bias in tort damage awards).

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Interviewer: Thank you for taking the time to do this interview.

Professor Randall: I hope that you and the readers find the interview helpful.