Diversity Committee Newsletter

Vol. 3, No. 2 — January 2017

Welcome to the New Year!

by Christine Kim Neeman, Diversity Committee Co-Chair

Happy 2017! We hope everyone had a wonderful holiday and had an opportunity to catch up with friends and family. It is unbelievable how fast time is passing by. We are already halfway through the 2016-2017 year! We are so proud of our accomplishments so far this program year.

In Sept. 2016, the Diversity Committee welcomed the second Leadership Academy fellows. The fellows are: Onome Adejemilua, Alnisa Bell, France Casseus, Diana Fredericks, Christina Fulton, James La Rocca, Nicole McFarland, Sharie Robinson, Maritza Rodriguez, and Cheyne Scott. Once again, this is a diverse group of fellows from small to large firms, and from local to federal government. The Diversity Committee would like to thank the Leadership Academy committee members and the selection committee members for their hard work. We are so proud to continue the Leadership Academy, and we wish the fellows the very best of luck!

On Nov. 17, 2016, the Diversity Committee co-sponsored a job fair and networking event. At the gathering, there were legal recruiters, public sector agencies, and small firms, who were all looking to hire qualified candidates. The event also included presentations by Chris Filip, Pam Etzin, Lloyd Feinstein, and Cedric Ashley. The topics of the presentation ranged from interview and resume tips to how to dress successfully and how to understand your social and emotional intelligence. We want to thank everyone who participated in the job fair and networking event.

On Nov. 30, 2016, we had the honor and privilege to welcome John W. Marshall, the first African-American director of the United States Marshals Service, former secretary of public safety for Virginia, and the son of the late Justice Marshall. The continuing legal education (CLE) program started with Marshall sharing his perspective of his father and the historic role he played in the Civil Rights Movement in the United States. He also

participated in a panel discussion with Hon. Lawrence M. Lawson (ret.), Hon. Paula T. Dow, John J. Farmer, and Donita Judge. NJSBA President Thomas H. Prol served as the moderator. This was a unique, once in a lifetime experience!

Immediately following the John W. Marshall event, the Diversity Committee hosted its annual Minority Judges Reception. As always, it was a great event!

The Diversity Committee ended 2016 with the annual Holiday Reception. We want to thank everyone who attended the event, and we hope you had a wonderful time!

Although the holidays are over and 2017 has just begun, the Diversity Committee has plenty of programs coming up. We hope to see you at a number of them!

Like trivia?

Want to win a free ticket to the Diversity Committee's Mel Narol Award Luncheon at the 2017 Annual Meeting and Convention at Borgata Hotel Casino & Spa in Atlantic City? Be the first person to email Christine Kim Neeman at chriskim32@gmail.com with the correct answer to the following question:

Who were the recipients of the Mel Narol Excellence in Diversity Award in 1999?

Need a new year's resolution?

What about getting more involved in the NJSBA and the Diversity Committee? It's easy—just contact one of the co-chairs or the director of diversity initiatives, Denise Sharperson.

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Diversity Committee or the New Jersey State Bar Association.

The Requirement to Post Prices in New Jersey

by Nicholas Kant

Many people may be unaware of the statutory requirement to post prices in New Jersey. The specific provision, which has been on the books since 1973 and is a part of the New Jersey Consumer Fraud Act (CFA), states as follows:

> It shall be an unlawful practice for any person to sell, attempt to sell or offer for sale any merchandise at retail unless the total selling price of such merchandise is plainly marked by a stamp, tag, label or sign either affixed to the merchandise or located at the point where the merchandise is offered for sale.[1]

As defined by the CFA: "The term 'merchandise' shall include any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale."[2]

A person violating the CFA shall "be liable to a penalty of not more than $10,000 for the first offense and not more than $20,000 for the second and each subsequent offense."[3] Further, in an action or proceeding brought by the attorney general or a private party under the CFA, "the Attorney General shall be entitled to recover costs for the use of this State" and "the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit."[4] Also, consumer restitution can be obtained in a superior court action brought by the attorney general or in an administrative proceeding.[5] Additionally, if a private party demonstrates an ascertainable loss, "the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained"[6] Finally, after an administrative hearing, a violator can also be ordered "to cease and desist or refrain from committing said practice in the future," and in the superior court a judge can enter an injunction prohibiting such practices.[7]

Turning to the details of the price-posting requirement, one may note that it gives the option of posting the price in one of two places: "affixed to the merchandise" *or* "located at the point where the merchandise is offered for sale."[8] While 'affix' is not defined by the statute, the legal dictionary defines it as to "attach, add to, or fasten on permanently."[9]

The second clause was the subject of a published New Jersey Appellate Division opinion in 2010 by the presiding judge of the Appellate Division, Joseph F. Lisa.[10] Johnny Popper, Inc., a used car dealer located in Clementon, was cited by the New Jersey Division of Consumer Affairs for violating the price-posting requirement.[11] Johnny Popper had not affixed a sale price to any of its vehicles, nor were prices posted anywhere in the lot.[12] Instead, a price list was maintained inside the building, which consisted of two letter-sized pages.[13]

Johnny Popper admitted that prices were not affixed to the vehicles, but claimed they were "located at the point where the merchandise is offered for sale" and thus satisfied the statute.[14] The initial hearing was before the director of the division, who "concluded that the point where an item is 'offered for sale' is the place where the item is located, not where the sale transaction occurs," and, thus found the statute was violated.[15]

On appeal, the Appellate Division analyzed the legislative history of the price-posting requirement and found "a clear intent that consumers should be able to know the price of an item as they look at it and without having to inquire or interact with a salesperson."[16] The car dealer's principal testified before the director of the division, and the Appellate Division stated that the practices described at the hearing "illustrate the evil this provision was designed to eliminate." The Appellate Division then quoted extensively from that testimony:

Q. Consumers come to your business and they look around at the cars on the lot, correct?

A. Yes.

Q. And then your salespeople approach the consumers and speak with them?

A. Yes.

Q. Outside in the lot, right?

A. Yes.

Q. And if the consumer asks for a price, the salesperson will tell them the price, right?

A. Wrong.

Q. No?

A. No.

Q. What happens when a consumer asks for the price?

A. We go right up to the consumer and say how are you, do you know anything about how we do business, how we recondition the cars or the financing that we offer? They say no for the most part because they don't. We say come on inside, we'll sit down and explain to you everything we do and that's what we do and if they don't follow in, they go back in their car and leave and that's how the salespeople are instructed. There is just too much to go over, too much to do to be babbling in the lot.

Q. So a consumer who is outside looking at cars wants to know the price of a car, your salespeople don't tell them the price outside?

A. We don't discuss anything until we sit down at the desk to do business.

Q. So your salespeople as far as you know never tell consumers the price outside?

A. I would just about stake my life on it because they would lose their job. We have a way that we run the program.[17]

The Appellate Division then interjected that "Although [the principal] asserted that if a customer persists in learning the sale price before getting a sales pitch the price will be provided, he also gave this testimony":

Q. So once the consumer asks for the price, you take them inside, then the salesperson tells them the price?

A. No.

Q. No?

A. No.

Q. What happens?

A. First thing we do we sit down and tell them how we do things, which if the tires are on the used car are 50 percent or more it gets tires, the battery two years or more, it gets a battery, explained the warranty and so on and so forth and then if they are interested, we do a budget to make sure they can afford it because if they can't afford it, it's going to be a recall and that's not fair.

Q. What does the budget consist of?

A. What their income is and what their out go is.

Q. They are telling you their income and other information before they know what the price of the vehicle is?

A. They are not particularly interested in the price of the vehicle, they want to know if they are going to get the loan and what vehicle will be.

. . . .

Q. I believe you find out all this information like income before they ever find out what the price is?

A. Unless they ask for the price.

[*Director*]: Mr. Marter, yes or no.

The Witness: Yes.[18]

The Appellate Division then further analyzed the purpose of the price-posting requirement, such as providing "independent and certain price information to the consumer...without the necessity for interaction with a salesperson," and to facilitate "the desirable practice of comparison shopping by consumers without the need to interact with salespersons."[19] The Appellate Division thus stated that its analysis "supports the construction that if the sale price is not affixed to the vehicle, the alternative allowable place where it must be posted is in close proximity to where the customer finds the vehicle such that the customer can independently know the price while looking at the vehicle."[20] The Appellate Division concluded that allowing "a comprehensive price list kept at the register" would defeat the purpose of the price-posting requirement, and affirmed the decision of director of the division.[21]

Since that time, the division has continued to investigate violations of the price-posting requirement. For example, between Dec. 2015 and March 2016, the division settled with at least seven companies after investigators allegedly found merchandise was offered for sale without a tag or label with the total selling price.[22]

Nicholas Kant is a graduate of the University of Colorado School of Law, Class of 2006. He is an attorney admitted to practice in the state of New Jersey.

Endnotes

1. N.J.S.A. 56:8-2.5.
2. N.J.S.A. 56:8-1(c).
3. N.J.S.A. 56:8-13.
4. N.J.S.A. 56:8-8, -11 and -19.
5. N.J.S.A. 56:8-8, -11 and -19.
6. N.J.S.A. 56:8-8 and -19.
7. N.J.S.A. 56:8-8 and -18.
8. N.J.S.A. 56:8-2.5.
9. *Black's Law Dictionary* 71 (10th ed. 2014).
10. *In re Johnny Popper, Inc.*, 413 N.J. Super. 580 (App. Div. 2010).
11. *Id*. at 582.
12. *Ibid*.
13. *Id*. at 582-3.
14. *Id*. at 583.
15. *Ibid*.
16. *Id*. at 585.
17. *Id*. at 586-7.
18. *Id*. at 587.
19. *Id*. at 588.
20. *Ibid*.
21. *Id*. at 589-90.
22. *See* New Jersey Division of Consumer Affairs Reaches Settlement with AutoZone Addressing Allegations of Pricing Violations; Prior Actions Against 'Advance Auto' and 'Pep Boys' Remain Pending, available at http://www.njconsumeraffairs.gov/News/Pages/03292016.aspx; and Consent Orders, available at http://www.njconsumeraffairs.gov/ocp/Legal%20Filings/20160118_crespo.pdf and http://www.njconsumeraffairs.gov/ocp/Legal%20Filings/Jemma%20Loan%20Company%20Inc%20.pdf.

The Impact of the Lack of Diversity in the Journalism and in the Legal Profession

by Cheyne R. Scott

While the professions may seem to be different, journalists and lawyers have more in common than one would think. Both lawyers and journalists must use their words to convey facts to a particular audience. Both professions demand a particular attention to detail. Both provide a service in high demand to society. Additionally, both professions have gained attention within the last decade for a lack of diversity.

The Numbers

The Atlantic noted that in 2014, minorities made up 37.4 percent of the U.S. population but only made up 22.4 percent of television journalists, 13 percent of radio journalists, and 13.3 percent of journalists at daily newspapers.

On the legal side, the American Bar Association (ABA) statistics show that in the 2013-2014 academic year, 28.5 percent of JD-enrolled students were of a minority race and 47.8 percent were female. However, according to the 2015 *Washington Post* article entitled *Law is the Least Diverse Profession in the Nation, and Lawyers Aren't Doing Enough to Change That*, minorities make up less than seven percent of law firm partners and nine percent of general counsels of large corporations. In major law firms, only three percent of associates and less than two percent of partners are African-Americans.

The Theories of Why

The disparity of minorities in both journalism and the law begins with hiring practices and ends with both professions' inability to retain minority talent.

Law firms and newsrooms often seek to hire candidates who graduated from particular schools, obtained certain internships or clerkships and come from certain networks that employers are familiar with. This can be a difficult hurdle for recent journalism and law graduates to clear. For example, minorities may be less likely to be able to afford to take on an unpaid internship than their non-minority classmates. However, unpaid internships are invaluable tools for the networking, skill-building and resume-building necessary to set oneself apart in an extremely saturated hiring pool.

Another issue for minorities who are hired in the journalism or legal field is there is often difficulty retaining this talent. The lack of mentorship opportunities, lack of advancement opportunities and feelings of isolation are all reasons minorities have cited for leaving their respective professions. For example, a 2009 report of the New Jersey State Employment and Training Commission found that most women lawyers felt unsupported in their work environment due to a lack of mentoring and lack of advancement opportunities. Young lawyers need mentors in order to get invaluable feedback on work product, in order to navigate and immerse into the law firm culture and to gain an understanding of the path to partnership. Similarly, young journalists need mentors in order to get feedback on work product, in order to navigate and immerge into the newsroom and to gain an understanding of the path of advancement within the newsroom.

The lack of mentorship opportunities, lack of advancement opportunities and feelings of isolation in both professions can be attributed to unconscious bias. In Stanford University studies conducted by psychologists Claude Steele and Joshua Aronson, it was determined that unconscious racial bias can negatively impact how individuals perform on tests. For example, if a black student was asked to mark his or her race at the beginning of a test, he or she was likely to perform at a lower level than if he or she had been presented with no racial prompt. The Society of Professional Journalists (SPJ) noted this study demonstrates the way people are unconsciously affected by stereotypes. This unconscious bias can negatively impact a minority's ability to find a mentor. Specifically, SPJ noted that a senior white male journalist may avoid having professional relationships with people of a specific minority group out of an unconscious fear of making a mistake or being judged by other senior white males in the same field. This fear may also be attributed to senior white lawyers. Unfortu-

nately, without these mentorship opportunities, minority journalists are less likely to be in the position to get high-quality assignments, have their ideas valued in the newsroom or have access to promotional and advancement opportunities.

Why Diversity is Important in Newsrooms

While there are several reasons diversity is important in newsrooms and in law firms, the ability to effectively communicate with diverse communities and clients stands out as one of the most practical reasons.

In 2014, Anya Kamenetz, National Public Radio's education blogger, accidently tweeted a complaint on NPR Education's official Twitter account that when she reaches out to diverse sources they fail to return her calls. This tweet caused some controversy among fellow journalists, who suggested her lack of relationship building in minority communities may contribute to the lack of that community's responsiveness. One response in particular came from Eric Kelderman, a reporter for *The Chronicle of Higher Education* in Washington, DC, who tweeted, "as a white guy, who has covered [Historically Black Colleges] for a while, you have to work to develop trust. Many minorities don't trust the media to get it."

Kelderman's tweet brings up a very important issue that most non-diverse newsrooms do not appreciate: There is a level of distrust toward the media in minority communities. And while it is easy to pass blame off on minorities, the understanding that relationship building is crucial in certain communities is something that is often overlooked.

Jay Scott Smith, a broadcaster who works for WHYY, the NPR affiliate in Philadelphia, understands the tone deafness that can occur in non-diverse newsrooms.

"It's not always being tone deaf in an overt sense," said Smith, who has been in professional newsrooms for nearly 20 years. "Often, newsrooms simply don't realize that they're missing opportunities to reach out.

"The reason diversity is important to a newsroom is not just for optics, but for the free movement of ideas," he added. "The number of times I've introduced something that would appear to be common knowledge to me and other African-Americans, but catches a room full of white reporters by surprise is almost embarrassing."

Smith has been the only reporter of color in a number of newsrooms, and says that newsrooms that are more diverse often, but not always, lead to better relationships and stories.

"It's all about effort and balance, on both sides," he said. "It's not enough to have five black reporters and three Latino or Asian reporters, if you're no allowing for a diversity of ideas. Further, if an effort is not made to reach out—or that effort is ignored—that just compounds the problem."

Why Diversity is Important in Law Firms

As the ABA noted in its recent publication *Diversity and Its Impact on the Legal Profession*, diversity represents reality. The ABA went on to note that a diverse corporation, municipality or individual will notice whether a firm it is considering hiring is diverse as well. Furthermore, when interacting with diverse individuals within a corporation or municipality, many diverse employees are likely to be more comfortable and candid with diverse attorneys within those law firms.

The Solutions

When law firms began to recognize the importance of diversity, other big law firms will begin to follow suit. A 2016 study conducted by Peterson Institute for International Economics, a nonprofit group based in Washington, and EY, the audit firm formerly known as Ernst & Young, determined that women in corporate leadership roles lead to higher profits. Also, according to the May 2016, American Bar Association Commission on Women in the Profession report, women make up 36 percent of the legal profession and 44.7 percent of the associates in private practice. Finally, a large number of BigLaw firms have implemented diversity initiatives, training and mentorship programs that directly benefit minorities.

Leaders in journalism and law can also acknowledge that a disparity in minority hiring and retention exists instead of pretending it is not a problem. One of the ways this can be accomplished is by implementing some form of unconscious bias training so leaders can be made aware of the influence stereotypes have on their hiring and interaction with minorities in the workplace. For example, the Litigation Section of the ABA launched an Implicit Bias Initiative website, which provides resources to ABA members and their clients to learn more about implicit bias and provide training with these resources.

Another solution to the lack of diversity in journalism and law is accountability. The magazine *Diversity Inc.* ranks the top 50 U.S. companies for best practices in diversity based on advocacy and management measures. Many of those companies are comprised of newspaper

and journalistic publications. On the legal side, the ABA releases statistics regarding diversity annually. These statistics put these industries on notice regarding their progress, or lack thereof, in minority hiring and retention.

Finally, pipeline initiatives that seek to reach out to diverse individuals and to develop people for leadership positions may be a helpful solution. Pipeline programs that help journalism or law students obtain internships, mentors, or give them access to career development workshops can put these candidates in a better position to be hired, and can lead to the support necessary for those candidates to be retained in newsrooms and law firms. ■

Cheyne R. Scott is a civil litigation attorney working with Chasan Lamparello Mallon & Cappuzzo, PC, focusing her practice on contracts, governmental entity representation, and labor and employment law, and she represents individuals, municipalities, counties, authorities, and school boards in various litigation and compliance matters arising under New Jersey's Tort Claims Act (Title 59). Additionally, she is currently serving as housing prosecutor for the township of North Bergen.

Three Tips to Institute an Effective Diversity Training Program

by Kenneth Sharperson

"You can have diversity but if you don't have inclusion then where are we?"

These words were spoken by Carlotta Wells Lanier at the New Jersey State Bar Association's first diverse speaker series, and they ring true when it comes to the legal profession.

Lawyers are considered engineers of social justice. As engineers of social justice, lawyers should be leading social progress not obstructing it. Yet when it comes to our profession, we are one of the least ethnically and racially diverse groups in the United States.[1] Indeed, even though the American workforce consists of approximately 33 percent ethnically and diverse persons, less than 12 percent of lawyers are diverse.

While there has been progress, and many legal employers, such as law firms, are superficially diverse because efforts have been made to include diversity as an internal initiative, the issue of inclusion remains. The analogy that has been used is that for a diverse lawyer, working at a major law firm is often like being invited to a party but not being asked to dance. Indeed, while it is clear that most law firms recognize the benefit of hiring diverse attorneys, diverse attorneys often are not given 'plum' assignments or opportunities to work high-profile matters. The solution is not easy, and the great majority of lawyers are not inherently biased against diverse attorneys. Many law firms, however, have not implemented effective and long-lasting diversity training programs for their employees, which would help get more diverse attorneys on the dance floor.[2]

That said, diversity training alone will not solve the panoply of issues affecting the diversity problem in the legal profession, but a properly implemented diversity training program is a step in the right direction. The failure of law firms to consider the link between appropriate training and firm-wide diversity goals generally correlates with the failure of the organization to establish an inclusive and diverse law firm. A good diversity training program doesn't just focus on societal problems, such as discrimination and harassment, but also provides stakeholders with knowledge and a skill set that leads to both increased business opportunities and talent optimization, all of which benefit the law firm. This begs the question, how does a law firm do diversity training right?

Sometimes the best way to learn is by knowing what not to do. I recall sitting in my high school's wrestling room on Saturday mornings watching game film of the prior night's football game. My coach, Robert Hardage,[3] used to remind us that the "eye in the sky don't lie" when he would point out a missed tackle or the wrong lead step taken on a block.[4] But that feedback would prepare us for the upcoming weeks and identify the weakness we needed to work on to become better student-athletes, both on and off the field.

Likewise, this article will provide a few tips on how to implement and design a quality diversity training program through examples of what not to do. In fact, all we have to do to the learn about the best practices for developing a diversity training program is to not follow the lead of everyone's favorite boss, Michael Scott from Dundler Mifflin, of the award winning series *The Office*. Visit https://youtu.be/f5mAMDZYElE for a brief snippet of the episode.

The second episode of season one was called "Diversity Day." In that episode, a diversity consultant, Mr. Brown, arrives to teach a seminar on racial tolerance and diversity in the workplace. Michael implies that it was his idea, while in reality his offensive behavior necessitated the training. When Brown has a staff member reenact one of Michael's past indiscretions, Michael, not satisfied with the consultant's workshop, decides to hold his own racial teach-in later that afternoon. The irony is that while Michael was attempting to teach his co-workers about diversity, he was actually the most ignorant of them all. The episode is extremely funny, and also teaches us

important lessons about implementing diversity training.

Before I discuss the lessons learned from the Diversity Day program, it is important to set some context. In formulating *his* plan for diversity training, Michael advises: "Hi. I'm Michael Scott. I'm in charge of Dunder Mifflin Paper Products here in Scranton, Pennsylvania but I'm also founder of Diversity Tomorrow, because today is almost over. Abraham Lincoln once said that, 'If you're a racist, I will attac' you with the North.' And those are the principles that I carry with me in the workplace."

You can obviously see why we can use Michael's flaws to address how to 'do the right thing' with respect to diversity training.

Lesson 1: Buy in from the Top—Inclusive Leadership

"Today is diversity day and someone's gonna come in and talk to us about diversity. It's something that I've been pushing, that I've been wanting to push, for a long time and Corporate mandated it. And I've never actually talked to Corporate about it. They kind of beat me to the punch, the bastards. But I was going to. And I think it's very important that we have this. I'm very excited." — Michael Scott

The importance of having a diversity training program supported by the leadership of a law firm cannot be overstated. The message that diversity is important must come from the top, and all employees must understand that the diversity and inclusion initiatives are being pushed by the executive team. Likewise, senior managers, such as Michael, must be engaged and support the firm's vision to help lead the firm's implementation of its diversity initiatives and demonstrate 'buy-in' for the associates and staff. Michael's attitude toward diversity training does not seem consistent with corporate, and such an attitude is counterproductive and should not go unnoticed by firm leadership because such behavior will undermine the firm's goals.

Lesson 2: Diversity Training Programs Must Not Reinforce Negative Stereotypes

"Why? Because Martin Luther King is a hero of mine. There's this great Chris Rock bit about how streets named after Martin Luther King tend to be more violent. I'm not going to do it but its..." — Michael Scott

"I have something here. I want you to take a card. Put it on your fore...Don't look at the card. I want you to take the card and put it on your forehead and...Take a card, take a card, any card. UM...And I want you to treat other people like the race that is on their forehead. OK? So everybody has a different race. Nobody knows what the race is, so...I want you to really go for it because, cause this is real. You know, this isn't just an exercise. This is real life. And...I have a dream that you really really let the sparks fly. Get er' done." — Michael Scott

A law firm must be careful with the diversity trainer that it hires because there have been instances where diversity trainers have promoted racial stereotypes, and lawsuits ensued.[5] As a result of these lawsuits, one court noted that "diversity training sessions generate conflict and emotion," and that "diversity training is perhaps a tyranny of virtue."[6] Clearly, proper vetting of the hired diversity trainer is necessary so that a trainer who simply espouses racial stereotypes is not hired.

That said, it is absolutely essential that diversity training allow the participants to gain an awareness of each individual's diversity in terms of biases and understanding the impact of the individual's behavior and how the individual views the world. A good diversity training program also allows participants to learn about the diversity around them and the dangers of stereotypes. Further, diversity training should not focus solely on women and people of color to the extent of making white men guilty as the stereotypical 'bad guy.' Instead, diversity training should engage white men and show them how to be part of the solution. Although Michael's dialogue and purpose for engaging in stereotype training appears on its face to be counterproductive, it can actually be helpful to allow participants to understand why their own values may be contributing to the lack of firm-wide inclusiveness.[7]

Lesson 3: Diversity Training is a Weapon

"I am a salesman, okay. And I don't think we should be doing this on prime sales hours. If you can prove that diversity is going to help my sales, I'll go elephant running with James Earl Jones." — Dwight Schrute

Although "diversity training is perhaps a tyranny of virtue," by making diversity a company-wide initiative, all law firm employees will have the opportunity to increase their knowledge and respect and build a more inclusive environment. In 2017, it is not enough to have a diversity link on your webpage and say your law firm values diversity when nothing has been implemented proving your commitment. A diversity training program that emphasizes: 1) the importance and benefit of diversity within the law firm, 2) teaching how to understand different cultures and groups, and 3) recognizing the external benefit of diversity to the law firm as part of the

law firm's diversity strategy will increase success of the firm's organizational goals such as recruitment, retention and increased business. An effective diversity training program is not 'one and done,' but must be done on a regular basis, even if during 'prime sales hours,' for the program to be a success. By making diversity a firm-wide intuitive, all employees will be participants and will help widen the appeal of diversity in the law firm.

In sum, diversity is not simply about making sure certain diverse groups receive special opportunities, it is ensuring that all who are invited to the party are asked to dance. An effective diversity training program is crucial to success in today's legal marketplace because clients demand their work be performed by a diverse legal team. With an effective diversity training component added to the overall law firm diversity strategy, law firms will move from being on the bottom of the barrel with respect to their diversity numbers to the top of the heap. But, one must remember the lessons learned (of what not to do) from Michael Scott.

Kenneth E. Sharperson is an attorney in the New Jersey office of Weber Gallagher. His practice concentrates on the defense of national insurance carriers and corporate clients in insurance coverage disputes.

Endnotes

1. Bureau of Labor Statistics data.
2. https://www.youtube.com/watch?v=IvlFcjGz5zk (Just Another Day in The Office ……Lawyers Dancing).
3. "Bob Hardage was the best, most successful football coach in Northern Virginia history." See *The Father of Atomic Energy Virginia coaching legend calls it quits for good*, at http://www.washingtoncitypaper.com/articles/32872/the-father-of-atomic-energy
4. Annandale was the high school national champion in 1978 and continues the tradition of excellence to this day. See https://www.youtube.com/watch?v=AqpZAWpvOTE and https://brobible.com/sports/article/annandale-football-hype-video/.
5. In *Hartman v. Pena*, 914 F. Supp. 225 (N.D. Ill. 1995), the Federal Aviation Administration was sued for sexual harassment after it subjected employees to three days of diversity training that made white males feel like scapegoats. A federal judge refused to dismiss the case and the FAA had to pay out a settlement to the white male employee who sued.
6. *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1262-63 (10th Cir. 1995) ("Plaintiffs Laurie Fitzgerald, a white female, and Aaron Hazard, a black male, claim that U.S. West discriminated against each of them based on their color or race by not entering into contracts with them as diversity trainers.").
7. There have been instances where diversity training has led to lawsuits. *See* Diversity Training Backfires, https://cei.org/blog/diversity-training-backfires (last visited Oct. 31, 2016).

Jury Diversity: A Relevant Theme in American Jurisprudence

by Christine Smith Fellows

When your *jury venire* is a homogeneous sea of citizens, unconnected to a criminal defendant in terms of race, religion, age, ethnicity, gender or sexual orientation, does this inconsistency disenfranchise a defendant from receiving a fair and impartial jury trial and, if so, is greater juror diversity the answer?

Nationally, the trend is to attain jury diversity, and efforts are underway to achieve that goal; however, jury diversity is not statutorily or constitutionally guaranteed. In all criminal proceedings, both the United States Constitution[1] and the New Jersey State Constitution[2] guarantee a criminal defendant the right to a speedy and public trial by an *impartial jury*[3] of the state and district wherein the crime shall have been committed.[4] The concept of juror diversity, then, does not appear to be specifically constitutionally guaranteed; rather, a defendant is entitled to an impartial jury panel only. There is a strong implication, however, that a criminal jury must consist of a jury of one's peers. However, that concept is not found within the scope of either constitution and, despite some suggestion to the contrary, the constitutional right to an impartial jury does not necessarily translate into guaranteeing a jury of one's peers.

The idea of a jury of one's peers first materialized in, and is found in one of the lasting principles of, the Magna Carta,[5] wherein it states, "No freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment *of his peers* or by the law of the land." During the American Revolution, colonists believed they were entitled to the same rights guaranteed in the Magna Carta and, as a result, those rights were subsequently embedded into the laws of their states and later into the United States Constitution and Bill of Rights.[6] The idea of a jury of one's peers has evolved from English common law into our constitutional guarantee of an impartial jury. Today, however, the concept of an impartial jury is believed to be best achieved through the presence of juror diversity. This initiative, consequently, has emerged as a relevant theme in contemporary American jurisprudence.

Today's defendant expects to have a *jury venire* consistent with his or her own race, religion, age, ethnicity, gender or sexual orientation. Unfortunately, the current dilemma facing defendants across the country is the measurable absence of a diverse jury pool, which often gives the appearance of an unfair judicial proceeding. In an effort to rectify that problem, jurisdictions nationally are struggling to provide defendants with *jury venires* that accurately reflect the defendant's "peers."[7] "Criminal defense attorneys are often presented with a jury that features a majority of white, upper-middle class individuals who are then responsible for judging the guilt or innocence of a defendant who does not share their same characteristics or background."[8]

Current social science research, suggests that heterogeneous juries make better decisions.[9] A recent study found that diverse juries had longer deliberations, discussed more case facts, made fewer inaccurate statements, and were more likely to correct inaccurate statements.[10] Moreover, when it comes to issues of race, a more diverse jury was more likely to discuss race-related topics and raise questions about racism.[11] Additionally, further research demonstrates how jury composition can influence both the perceived fairness of the trial and the perceived accuracy of the jury's decision.[12]

Historically, minorities have been disproportionately excluded from jury service, a result of a combination of factors at each stage of the juror identification process.[13] At the initial stage, juror notification methods, usually by regular mail, often fail to identify or reach minorities for the simple reason that they generally are more transient.[14] At the *venire* stage, those minorities who actually receive notification report for jury duty at a lower rate than the majority because they tend to disregard the jury summons.[15] At the petit jury stage, minorities are often eliminated through the use of both peremptory and for-cause strikes.[16]

In New Jersey, the juror selection process begins with the preparation of a juror source list, which is statutorily mandated.[17] A jury population is then selected from a list of county residents whose names and addresses are obtained from a merger of registered voter lists, licensed drivers, filers of state gross income tax returns and filers of homestead rebate or credit application forms.[18] Although the use of multiple lists would appear to produce a more diverse jury pool, nationally the reverse appears to be the case.

In 1995, the Eastern District of Pennsylvania joined several other federal districts in a two-year project to determine whether using multiple lists improved minority representation, specifically African-Americans and Hispanics, in the jury selection process.[19] Curiously, the overall conclusion was that supplementation of the primary source list (voter registration lists) with one additional list (drivers' license lists) resulted in the actual increase of under-representation of those minorities.[20]

In an effort to increase juror diversity, many states have endeavored to supplement their primary source lists; however, each additional list came with its own limitations. When Colorado considered using utility customer lists to expand their primary source list, the proposal was rejected as age, gender and economically biased, noting that most utility listings are under the name of the male member of the household.[21] Similar issues existed with the use of telephone directories and property tax records, both of which under-represented young adults. New York is most similarly situated to New Jersey in that it combines various lists (voter registration, drivers' license, income tax payers, welfare and unemployment compensation recipients) in populating its jury pool.[22] It is unclear, however, if the expansion of New York's primary source list is truly effective in creating real juror diversity.[23]

Another shortfall in securing a diverse *jury venire* appears to be juror non-responsiveness.[24] Individuals who believe nothing would happen if they fail to appear for jury service are less likely to appear than those who believe a consequence would result from their nonappearance.[25] In 2013, the national non-response rate was between 20 percent to nearly two-thirds.[26] The lack of jury diversity has been linked to juror non-responsive rates, and some federal courts are taking steps to address the problem.[27] For example, Eastern District of Michigan Judge David Lawson ordered those jurors who failed to appear for jury duty to appear in his court, warning them that their continued absence would result in arrest, jail time or a monetary fine.[28] His colleague, Judge Denise Page Hood, took an educational approach and required those who failed to appear for jury service to appear in her courtroom and observe the jury selection process in its entirely.[29] It appears that many courts agree the sanction for failing to appear for jury duty, or the mere threat of sanction, effectively increases juror turnout.[30]

In 1997, a pilot project initiated in Eau Claire, Wisconsin, found that increasingly aggressive steps to follow up with nonresponsive individuals reduced the juror non-response rate from 11 percent for the first mailing to five percent after a second mailing, with the rate falling below one percent after a third mailing that included an order to show cause and warrant.[31] The Los Angeles County Superior Court had equally similar results from its Summons Sanction Program.[32] The failure to appear rate for jury summonses on the first mailing was 41 percent; however, follow-up efforts significantly reduced the final non-response rate to merely 2.7 percent.[33] Additionally, the National Center for State Courts obtained detailed information from more than 1,400 state courts about their jury operations from 2004 through 2006, and found that 80 percent of state courts conducted some form of follow-up on non-responders and jurors who failed to appear.[34] Courts that reported sending a second summons or notice showed non-response and failure to appear rates 24 to 46 percent less than courts that reported no follow-up after a first notice.[35] These results strongly suggest that when courts take affirmative steps to enforce a jury summons, the nonresponsive rate drops significantly.[36] Since nonresponsive rates directly impact achieving a diverse *jury venire*, decreasing nonresponsive rates would suggest the availability of a more diverse *jury venire*.

Even if there is full minority representation in a *venire*, the judicial system still allows for the exclusion of minorities from sitting juries through the exercise of peremptory challenges.[37] In an effort to remedy uncontrolled discrimination through the use of peremptory challenges, however, the Supreme Court, in *Batson v. Kentucky*,[38] stated that the equal protection clause of the 14th Amendment of the United States Constitution guarantees that a jury is "selected pursuant to nondiscriminatory criteria."[39] In so doing, the Court explicitly prohibits a prosecutor from using a peremptory strike for the purpose of removing a juror based solely upon their race.[40] The Supreme Court has expanded *Batson* to include gender as well as races other than African-American.[41]

This issue was also addressed by the New Jersey Supreme Court in *State v. Gilmore*.[42] In *Gilmore*, the Court cited the New Jersey Constitution,[43] which protects fundamental rights independently of the United States Constitution, and referred to federal constitutional law only as establishing the floor of minimum constitutional protection.[44] The Court observed that the right to a trial by an impartial jury does not require that petit juries actually chosen must be an exact microcosm of the community, but rather the guarantee that the state's use of peremptory challenges may not unreasonably restrict the possibility that the petit jury will contain a representative cross section of the community.[45] In *State v. Osorio*, the New Jersey Supreme Court implemented the employment of a three-step process whenever it has been asserted that a party has exercised peremptory challenges based on race or ethnicity.[46] With these guarantees in place, the actuality of achieving a truly diverse jury panel, if the *venire* contains a true amalgam of individuals, is more probable than not.

Despite no specific constitutional guarantee that a jury must consist of one's peers, steps are in place nationally to ensure a defendant receives a more diverse jury panel. Whether it is through the expansion of jury source lists, imposed sanctions for failing to appear for service, or through motion practice, defendants are now entitled to a heterogeneous jury. Nationally, it is recognized that homogenous *jury venires* pose a perceived, if not very real problem, in achieving justice.

Christine Smith Fellows is an assistant prosecutor for Cape May County, a New Jersey State Bar Association Leadership Academy fellow and a member of the NJSBA Legislative Committee.

Endnotes

1. U.S. Const., Art. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.")
2. N.J. Const., Art. I, Para. 10. ("In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.)
3. N.J. Const., Art. I, Para. 10.
4. U.S. Const., Art. VI.
5. Magna Carta, 1215.
6. National Archives and Records Administration, https://www.archives.gov/exhibits/featured_documents/magna_carta/ (last visited August 29, 2016).
7. Ashish S. Joshi and Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences,* ABA Section of Litigation, 2015.
8. *Id*., *citing,* Hong Tran, Jury Diversity: Policy, legislative and legal arguments to address the lack of diversity in juries, *Defense*, May 2013, at 6.
9. *Id*.
10. Samuel Sommers, On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations, 90 (4) *Journal of Personality and Social Psychology* 597 (2006).
11. Sonia Chopra, Ph.D., Preserving Jury diversity by Preventing Illegal Peremptory Challenges: How to Make a Batson/Wheeler Motion at Trial (and Why You Should), *The Trial Lawyer*, 12 (Summer 2014).
12. Leslie Ellis & Shari Seidman Diamon, Race, Diversity and Jury Composition: Battering and Bolstering Legitimac, 78 (3) *Chicago-Kent Law Review* 1033 (2003)

13. Edward S. Adams & Christian J. Lane, Constructing a Jury That is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection, 73 (3) *New York University Law Review* 703 (1998).
14. *Id*.
15. *Id*.
16. *Id*.
17. N.S. Stat. §2B:20-2 (2016). Presently, in New Jersey the eligibility requirements for jury service are established in N.J.S.A. 2B:20-1 and specifically state that, "Every person summoned as a juror shall be 18 years of age or older, shall be able to read and understand the English language, shall be a citizen of the United States, shall be a resident of the county in which the person is summoned, shall not have been convicted of any indictable offense under the laws of this State, another state, or the United States, and shall not have any mental or physical disability which will prevent the person from properly serving as a juror."
18. *Id*.
19. Hong Tran, Jury Diversity: Policy, legislative and legal arguments to address the lack of diversity in juries, *Defense*, May 2013, at 8.
20. *Id*.
21. *Id*.
22. *Id*.
23. Statement of Prof. Valerie P. Hans, Public Hearing on Jury Diversity, Assembly Standing Committees On Judiciary and Codes, New York State Assembly, New York NY (April 30, 2009).
24. John B. Bueker, Jury Source Lists: Does Supplementation Really Work?, 82 *Cornell L. Rev.* 390 (Jan. 1997).
25. *Id*.
26. Ronald Randall, James W. Woods and Robert G. Martin, Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool, *Justice System Journal* 29, no. 71:75 (2008).
27. Joshi and Kline, *supra*.
28. Tran, *supra*.
29. *Id*.
30. *Id*., *citing*, Hong Tran, Jury Diversity: Policy, legislative and legal arguments to address the lack of diversity in juries, *Defense*, May 2013, at 8.
31. Paula Hannaford-Agor, Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded, 59 *Drake Law Rev.* 762, 785 (2011).
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*.
37. Adams and Lane, *supra*, at 720-721.
38. 476 U.S. 79 (1986).
39. Adams and Lane, *supra*, at 722; *citing*, *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986).
40. Adams and Lane, *supra*, at 722; *citing*, *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).
41. Adams and Lane, *supra*, at 723. *See also, Georgia v. McCollum*, 505 U.S. 42 (1992); *Powers v. Ohio*, 499 U.S. 400 (1991); *Holland v. Illinois*, 493 U.S. 474, (1990); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).
42. 103 N.J. 508 (1986).
43. N.J. Const. art. 1, ¶¶ 5, 9, and 10.
44. *State v. Gilmore*, 103, N.J. 508, 523-524 (1986).
45. *Id*. at 529.
46. *State of New Jersey v. Oscar Osorio*, 199 N.J. 486, 492 (2009). (Step one requires that the party contesting the exercise of a peremptory challenge make a *prima facie* showing that the peremptory challenge was exercised on the basis of race or ethnicity. The burden of proof only requires the challenger to tender sufficient proofs to raise an inference of discrimination. If that burden is met, step two is triggered and the burden shifts to the party exercising the peremptory challenge to prove a race or ethnicity neutral basis supporting the execution of the peremptory challenge. The trial court must then decide whether that party has presented a reasoned, neutral basis for the challenge or if the explanation tendered is pretext. Once that analysis is completed, the third step is triggered and requires the trial court to weigh the proofs adduced in step one against those presented in step two and determine whether, by a preponderance of the evidence, the party contesting the exercise of a peremptory challenge has proven that the contested peremptory challenge was exercised on unconstitutionally impermissible grounds of presumed group bias.).

The Numbers Do Not Lie: Five Steps Biglaw Firms Can Take to Foster a Culture of Inclusion

by Natalie S. Watson

Law is the least diverse profession in the nation and lawyers aren't doing enough to change that….Eighty-eight percent of lawyers are white. Other careers do better—81 percent of architects and engineers are white; 78 percent of accountants are white; and 72 percent of physicians and surgeons are white....Part of the problem is a lack of consensus that there is a significant problem. Many lawyers believe that barriers have come down, women and minorities have moved up, and any lingering inequality is a function of different capabilities, commitment and choices. The facts suggest otherwise....

— Deborah L. Rhode, Ernest W. McFarland Professor of Law, Center on the Legal Profession, Director of the Program in Law and Social Entrepreneurship, Stanford University

The numbers do not lie. In a field where diversity and inclusion efforts have lagged, it is critically important for firm management to walk the walk when it comes to inclusion initiatives. If diversity and inclusion are not woven into the very fabric of day-to-day practice within a firm, it will be virtually impossible to recruit, retain, and promote the best and brightest attorneys.

It is also important to update and implement programming for attorneys, staff, and the community if there are to be any significant, longstanding gains in developing a diverse environment.

This article provides an overview of six of the most successful initiatives McCarter & English LLP has developed in the past five years that have helped to strengthen and solidify the firm's culture of inclusion.

Link Your Diversity and Inclusion Committee to Your Firm's Executive Committee

Diversity and inclusion initiatives succeed only when there is meaningful support from the top down. McCarter's Diversity & Inclusion Committee is charged with educating the firm's lawyers and staff on diversity and inclusion issues, supporting and promoting diverse candidates, and sponsoring/representing the firm at diversity-related events. A member of the firm's Executive Committee sits on the Diversity & Inclusion Committee as a formal liaison, which promotes cooperation and collaboration between the two committees and sends a powerful message throughout the firm regarding the value and importance of diversity and inclusion initiatives.

Host a Yearly Diversity Retreat for Junior and Senior Associates and Partners With Rainmaking Opportunities

Cultivating networking and rainmaking among affinity groups in the firm builds firm spirit while strengthening the chance that associates and partners will succeed. McCarter hosts a yearly, day-long event for junior and senior associates and partners alike. It also provides an opportunity for diverse lawyers to get together in person, catch up in a casual environment and provide informal mentoring and advice to one another. The firm's managing partner and chairman attend the event each year and allocate time to a free-form open conversation with the firm's diverse lawyers. Outside speakers are occasionally invited to present to attorneys at the retreat. Thus, the retreat serves an educational and teambuilding purpose, while also allowing associates and partners to network toward business development.

Don't Just Mentor, Sponsor

While mentors are essential to all professionals, a sponsorship program can also be critical for the long-term success of junior diverse lawyers. Sponsors take the mentoring function to a new level by actively using their gravitas to impact the career path of their protégés in a positive way. Sponsors work with their protégés to build and maintain a full and substantive day-to-day workload, which enables the protégés to develop the requisite skill set of a strong associate and a potential partner. Sponsors help their protégés along the path to becoming leaders

in and out of the firm by helping them build meaningful relationships with other lawyers and clients, skills that are essential to long-term success in a law firm. The sponsorship program is important to the firm because it ensures that the pipeline to partnership is inclusive and diverse, giving all lawyers a chance to succeed.

Creating a Pipeline

Two years ago, McCarter instituted a diversity initiative focusing on first-year law students. For the past two years, the firm has hired five 1L students from diverse backgrounds for a 10-week period over the summer. The program is modeled after traditional law firm summer associate programs. In addition to substantive research and writing assignments, the interns are exposed to the day-to-day life of a practicing attorney. They join lawyers for court appearances, closings, client meetings, etc. This provides invaluable experience to law students at the earliest possible point in their careers, so they may build upon the experience as they move toward graduation and entry into the workforce. The program also allows the firm to access the pipeline of diverse talent coming out of law schools.

On a high school level, for several years the firm has partnered with NJ LEEP, Schools That Can (Newark), St. Vincent's Academy and Christ the King Preparatory School, participating in student workshops and career days, hiring interns, and hosting mentoring luncheons and other events. Firm attorneys are encouraged to mentor students and to participate in programs with these and other organizations.

Honest Training about Key Problems

The firm hosted live diversity training for all lawyers and staff, which was mandatory. The topic of the three-hour sessions was unconscious bias. The firm plans to host more training sessions in the future and work on what was learned in moving forward.

Foster a Robust *Pro Bono* Program

McCarter's *pro bono* program helps attorneys build close connections with each other and with the communities surrounding each office, and it helps build a culture of inclusion within the firm. The firm provides legal services on a *pro bono* basis to low-income individuals from all walks of life. For example, McCarter attorneys helped to build and launch New Jersey's first *pro bono* legal project for victims of human trafficking, in partnership with Volunteer Lawyers for Justice. The firm represents asylum-seekers from all over the world who come to the U.S. for refuge, and assists veterans seeking benefits from the Veterans Administration and with a range of civil problems. The firm also provides legal services on a *pro bono* basis to the nonprofits who serve low-income and marginalized communities. ■

Natalie S. Watson is a member of McCarter English, LLP, where she focuses on advising pharmaceutical companies and other manufacturers on how best to satisfy the specific state and federal regulations necessary to bring a device, drug, or supplement to market. She serves on the firm's Diversity & Inclusion Committee and is a member of the steering committee for the firm's Women's Initiative. She also serves on the Diversity Committee of the NJSBA.

Commentary:
Taking a Knee: The Intersection of Patriotism, Civil Disobedience and Race

by Grant C. Wright

Colin Kaepernick, the on-again, off-again quarterback for the San Francisco 49rs, has remained at the forefront of the national conversation for his ongoing acts of civil disobedience. His deeds earned him vilification. He is booed at stadiums nationwide. His life is threatened. Kaepernick's protest began with kneeling during the singing of the national anthem to bring attention to the multiple shootings of African-Americans at the hands of police and the absence of any prosecutorial consequence. He has since become outspoken concerning his perception of racial injustice and inequality.

The face of our nation has been etched by those whose dissatisfaction with the role and reach of government was demonstrated by very public, often very violent, acts of defiance. There is a dignity imputed to the epic of the nation's inception by dissidents. Considering these foundations, there can be no more patriotic an act than that of civil disobedience undertaken in protest of what Henry David Thoreau deemed the "great and unendurable" inefficiencies of a government.[1]

Professional sport is a primary stitch in our national fabric. The modern star athlete is, for the most part, Jay Gatsby: a quixotic, unabashedly public millionaire. Rarely does a modern athlete receive the national spotlight for non-criminal, non-athletic feats. The visceral allegiance to teams and individual players sunders familial, social and regional ties. More deeply entrenched in our society, and more critically divisive, is the ideal of American patriotism. These two seemingly unrelated facets of our common experience become inextricably bound by the athlete's civil disobedience.

The professional athlete is no stranger to civil protest. Muhammad Ali's conscientious objection to the Vietnam War had an undeniable effect on the course of our national development in the wake of the Civil Rights Movement. For his part, Ali was stripped of his title, threatened with death and had to petition the Supreme Court for relief.[2] Equally as impactful were John Carlos' and Tommie Smith's civil protest at the 1968 Summer Olympics. Their efforts netted them ejection from the U.S. Olympic Team.

Despite popular sentiment, NFL players are not required by league rules to stand for the national anthem. Kneeling or sitting during the anthem breaches no contractual obligation on the player. It violates no law. However, Kaepernick's unironic exercise of his constitutional right to protest violations of the constitutional rights of a victimized swath of the American populace has not earned him the moniker of patriot. That comes as no surprise in light of our hyper-jingoistic society. The centrifugal force of the recent Kafkaesque presidential campaign and the centripetal force of an increasingly unstable international landscape have separated the gray areas into their constituent parts of black and white.

Kaepernick makes no self-aggrandizing speeches filled with triggering rhetoric. He offers no promise to return the country to its halcyon days. He is, however, mounting a seemingly unwinnable fight against the government's practice as usual while purporting to represent an under-served and oft-ignored group. In the absence of a gray area, it could be possible for the same section of the population to revere one such civil dissident while demonizing another given no salient difference but the ethnicity of the messenger.

Nevertheless, when it comes to Kaepernick's displays, there is no patience for his perception of the government's failure. He is viewed by some as racially polarizing and dismissive of law and order. His protest is not embraced as a purely American act. It is instead considered a rejection of the nation's values and disrespect of its most ardently 'patriotic' citizens. In sum, Kaepernick is being scrutinized for the manner of his civil disobedience and the cause for which he protests.

The Supreme Court's decision in *West Va. State Bd. of Educ. v. Barnette,*[3] specifically those comments offered by Justice Hugo Black, may provide perspective and give pause to the rhetoric. After the U.S. entered World War II, at a time when patriotic sentiment was at its summit, two siblings attending a West Virginia public school refused to recite the pledge of allegiance. They were summarily expelled from the school district. In support of a decision for the respondents, Justice Black found that the freedom to refrain from the ceremony infringed on no right of those who desired to participate. He admonished, in the midst of the genocide in the European theatre, that we must be mindful of attempts to coercively silence those opinions with which we disagree lest we too reach the frightful point at which we attempt to silence dissenters. He reinforced the maxim that the Bill of Rights cannot be used simultaneously as a shield for the privilege of remonstration and as a sword to silence one's detractors.

The use of peaceful protest to address a perceived failure of governance is a sublime act of patriotism. That the messenger in this instance is an athlete is not out of character with our recent history. Too much has been made of the manner of the protest and the objector. Perhaps those energies would be better served if directed to the issues giving rise to the demonstration. Entrenched in our history and our laws is the promise that the civil dissident will be given both platform and voice. That allowance makes room for the preservation and equal application of the principles underlying the conflict memorialized in our national anthem.

Grant C. Wright is counsel with the law firm of Hill Wallack, LLP, at its Princeton office. He is a member of the firm's litigation and insurance defense group, and co-chair of Hill Wallack's Diversity and Inclusion Committee.

Endnotes

1. Thoreau, Henry D., *Civil Disobedience* (1849).
2. See *Clay v. United States*, 403 U.S. 698 (1971).
3. 319 U.S. 624 (1943).

Commentary:

A Numerical Introduction to Islam in Relation to the Inadequate Number of Identifying Muslims and Women, Particularly Muslim Women, Who Sit as Judges in New Jersey State Courts

by Rajeh A. Saadeh

Islam is a monotheistic religion to which many people throughout the world adhere. Shortly after its founding over 1,400 years ago, Islam rapidly spread from the Arabian Peninsula thousands of miles in all directions attracting converts from both sexes and numerous races and ethnicities in four continents. For hundreds of years after its inception, and until the Americas were colonized, no religion in the world had more followers than Islam.

Adherents to Islam are called Muslims. As of 2010, there were approximately 1.6 billion Muslims in the world.[1] As of the same year, approximately 23 percent of the world's population was Muslim.[2] This makes Muslims the second-largest religious group in the world.[3] Notwithstanding Islam's origin in the Arabian Peninsula, the five countries with the largest Muslim populations in the world are neither Arab nor have Arabic as an official language. These countries, in descending order respecting their Muslim populations, are Indonesia, India, Pakistan, Bangladesh, and Nigeria.[4] In the United States, approximately one percent of people identify as Muslim.[5] Not considering that there are Muslims who do not disclose their faith, this makes Muslims the third-largest religious group in the United States.[6]

Islam is and has long been the fastest growing religion in the world.[7] It is estimated that Muslims will make up over 30 percent of the world's population by the year 2050.[8] This would nearly tie Muslims as the largest religious group in the world.[9] By the same year, it is projected that Muslims will become the second-largest religious group in the United States.[10] By the end of this century, it is estimated that Muslims alone will again be the largest religious group in the world.[11]

New Jersey is home to approximately nine million people.[12] Over 51 percent of New Jersey residents are women.[13] Approximately three percent of New Jersey residents identify as Muslim.[14]

As of Nov. 14, 2016, there were 484 individuals who sit as judges in New Jersey state courts.[15] These judges sit in the New Jersey Tax Court and the various divisions of the New Jersey Superior Court.[16] Of all New Jersey state court judges, 158, or approximately 33 percent, are women. Applying the percentage of women who live in New Jersey to the number of judges who sit in New Jersey state courts, there should be at least 245 judges who are women. Of all New Jersey state court judges, four, which is less than one percent, identify as Muslim. Applying the percentage of identifying Muslims who live in New Jersey to the number of judges who sit in New Jersey state courts, there should be at least 14 judges who identify as Muslim. All four of the New Jersey state court judges who identify as Muslim sit in the superior court. As of the date of this article, no New Jersey state court judge who identifies as Muslim has tenure.[17]

As of Sept. 1, 2016, there were 34 judges, excluding those who are temporarily assigned, who sit in the Appellate Division of the New Jersey Superior Court.[18] Of them, 12, or approximately 35 percent, are women. Applying the percentage of women who live in New Jersey to the number of judges who sit in the Appellate Division, there should be at least 17 Appellate Division judges who are women. No Muslim sits or has ever sat as an Appellate Division judge. Applying the percentage of identifying Muslims who live in New Jersey to the number of judges who sit in the Appellate Division, there should be at least one Appellate Division judge who identifies as Muslim.

There are 21 counties in New Jersey. No Muslim sits as a superior court judge in 18 counties. Of the superior court judges who identify as Muslim, two sit in Essex County, one sits in Passaic County, and one sits in Somerset County. Of the superior court judges who identify as Muslim, two sit in the family part, and two sit in the criminal part. No Muslim sits or has ever sat in the general equity or probate parts of the superior court. No Muslim sits as a judge in any civil part of the Law Division of the Superior Court. No Muslim, man or woman, sits or has ever sat as a judge of the New Jersey Tax Court. And, no women who identify as Muslim sit or have ever sat as judges in the New Jersey Superior Court.[19]

Of the seven justices who sit on the Supreme Court of New Jersey, two, or approximately 29 percent, are women. Applying the percentage of women who live in New Jersey to the number of justices who sit on the Supreme Court of New Jersey, there should be three or four justices who are women. Women have never comprised a majority of the members of the Supreme Court of New Jersey. Of the 93 justices who have ever sat on the Supreme Court of New Jersey, six, or approximately six percent, have been women. There have been 18 chief justices of the Supreme Court of New Jersey. Of them, one was a woman, which means approximately 94 percent of chief justices in the history of the Supreme Court of New Jersey have been men. No Muslim, man or woman, has ever sat on or been considered for appointment to the Supreme Court of New Jersey.

The statistics respecting the history of the relative lack of women who have sat as judges in New Jersey state courts or justices on the Supreme Court of New Jersey can be explained in numerous ways. In the recent past in the United States, including New Jersey, women have been ostracized from undergraduate and graduate schools, including professional schools such as law school. As a result, historically, there has been a dearth of female attorneys compared to male. Consequentially, there has been a relative lack of female judges and justices historically. Also, the differences between men and women have been exploited, especially by men, to deter and restrict women from seeking and obtaining many professions, including those in the law as attorneys. This contributed to the relative lack of women who sit or have sat as judges or justices. Finally, misogynistic laws, policies, and employers as well societal, cultural, familial, and even internal pressures have caused women to take career or life paths outside of lawyering that were thought of as more suitable for them based on their sex. This further contributed to the relative lack of women who sit or have sat as judges or justices.

Some may attempt to rationalize the relative lack of female judges today by claiming that it is a vestige of past suppression of women. Or, instead of trying to understand why there is a relative lack of female judges today, some may attempt to take intellectual and moral refuge in the fact that there are more female judges today, both gross and percentage-wise, than there were in the past. Neither of these attempts answer the question of why, today, there remains a significantly fewer number of New Jersey state court judges who are women compared to men. The reason why this question is avoided is because there is no justifiable answer; there is no valid, defensible reason why there are any, let alone significantly, less female judges sitting in New Jersey state courts than men today. As a result of this avoidance, the disparity is not seen as a problem. Victims of the disparity, specifically women, are therefore not generally motivated to take meaningful steps to rectify it, and those who have benefitted from the disparity, specifically men in various roles such as employers, politicians, colleagues, spouses/partners, relatives, and aspiring judges, are therefore not generally moved or called upon to correct it.

Despite their relatively small numbers in New Jersey and the United States, Muslims have been disproportionately visible and discussed, particularly negatively, in both politics and the media. Almost all of these portrayals and discussions were not made by or had with Muslims. Similar to women, there is no justifiable reason why there are significantly less judges per capita sitting in New Jersey state courts who identify as Muslims than the population at large. Until recently, Muslims have not been generally motivated to take meaningful steps to rectify it, and those who have benefitted from the disparity, specifically non-Muslim employers, politicians, media, colleagues, and aspiring judges, are therefore not generally moved or called upon to correct it.

The importance of a diverse Judiciary derives from the role of judges in administering justice in relation to the litigants and lawyers who seek it. Setting aside prejudice and discrimination, the life experiences of judges in their racial, ethnic, religious, societal, economic, and sexual makeups provide background and positive resources from which to draw to understand, handle, and adjudicate a particular matter. If judges were not diverse, then the non-diverse litigants and lawyers before whom

they appear would always have an advantage based on their similar life experiences, and the diverse litigants and lawyers before whom they appear would be at a disadvantage based on the lack of common life experiences. Also, non-diverse judges would be disadvantaged in properly administering justice by not sharing a similar life experience as the diverse litigants and lawyers who appeared in these judges' courtrooms. Of course, the individual experiences of a particular judge cannot be perfectly tailored for every or any particular litigant or lawyer. But, when considering the Judiciary as a whole, the only way that it can fairly and appropriately administer justice for all is if it is truly and appropriately diverse.

Diversity in the Judiciary provides legitimacy to our justice system. This is especially true when the public perception of government requires it. A diverse Judiciary also provides added sophistication to decisional law by providing a better-informed approach to establishing precedent, applying established legal principles, and articulating existing legal standards. The diversity of the New Jersey state Judiciary, compared to other states, has contributed to its excellent reputation nationally.

Only recently has it become axiomatic that there are numerous, qualified women who are willing, able, and fit to serve as New Jersey state court judges. Whether or not it is yet recognized, there are also numerous, qualified Muslims who are willing, able, and fit to serve as New Jersey state court judges. Many Muslims, men and women, practice law in New Jersey privately and in the public sector. There are Muslims who work for some of the largest firms in New Jersey, in-house at companies of various sizes, and as solo and small firm practitioners. There are Muslims who work in New Jersey for nonprofit corporations as well as in various facets of government. In New Jersey, there are more Muslims, men and women, who sit as judges of municipal courts than state courts. This is not a new occurrence; Muslim attorneys have been a visible presence in the New Jersey legal community for decades.

Given the projected growth of the Muslim population, the relative female and Muslim populations in New Jersey, the absence of any valid or justifiable reason for why there are significantly less judges per capita sitting in New Jersey state courts who are women or identify as Muslims than the population at large, the availability of women and Muslims who are qualified, willing, able, and fit to serve as New Jersey state court judges, and the importance of a diverse Judiciary, it is indefensible that there is an inadequate number of women, insufficient number of identifying Muslims, and no Muslim women sitting as state court judges in New Jersey. For the same reasons, significant, *bona fide* efforts must immediately commence to compile and submit a list of multiple identifying Muslims and women, particularly Muslim women, who are qualified, willing, able, and fit to serve as New Jersey state court judges for recommendation to the governor for nomination. ■

Rajeh A. Saadeh is the sole member of The Law Office of Rajeh A. Saadeh, L.L.C., in Somerville, a firm dedicated to family law and real estate transactions and litigation, including foreclosure prevention. He is the immediate past president of the New Jersey Muslim Lawyers Association and a member of the Diversity Committee of the New Jersey State Bar Association. Any positions taken in this article do not necessarily reflect those of the New Jersey State Bar Association or the Diversity Committee.

Endnotes

1. http://www.npr.org/sections/thetwo-way/2015/04/02/397042004/muslim-population-will-surpass-christians-this-century-pew-says.
2. http://www.npr.org/sections/thetwo-way/2015/04/02/397042004/muslim-population-will-surpass-christians-this-century-pew-says.
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4. http://www.pewforum.org/2015/04/02/muslims/pf_15-04-02_projectionstables74/
5. http://www.pewforum.org/religious-landscape-study/.
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11. http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/.
12. http://www.census.gov/quickfacts/table/PST045215/34.
13. http://www.census.gov/quickfacts/table/PST045215/34.
14. http://www.pewforum.org/religious-landscape-study/religious-tradition/muslim/.
15. http://www.judiciary.state.nj.us/directory/judgtara.pdf.
16. http://www.judiciary.state.nj.us/directory/judgtara.pdf.
17. By the time of this article's publication, one New Jersey state court judge who identifies as Muslim may have been granted tenure.
18. https://www.judiciary.state.nj.us/appdiv/partslist.pdf.
19. As of the date of this article, one woman who identifies as Muslim was nominated by the governor, subject to the advice and consent of the state Senate, to sit as a judge on the New Jersey Superior Court.