

# Measuring the Intangible: The Necessity of Assessing Diversity, Equity, and Inclusion

By CECIL J. THOMAS AND KAREN DEMEOLA

**T**here is an old adage that “what gets measured, gets done.” That is certainly true for diversity, equity, and inclusion efforts (DE&I), which must be strategic, consistent, and accountable, to achieve meaningful progress. Organizational statements, policies, and external affirmations may create a sort of *de jure* commitment to DE&I, while metrics and assessments allow us to evaluate our *de facto* implementation of these principles. Measuring and assessing these commitments, on the organizational and the individual levels, is crucial. The results of those assessments should then motivate a sustained commitment and strategic response, but may also pose a temptation to be reactive, to engage in tokenism, or to implement a primarily performative series of measures.

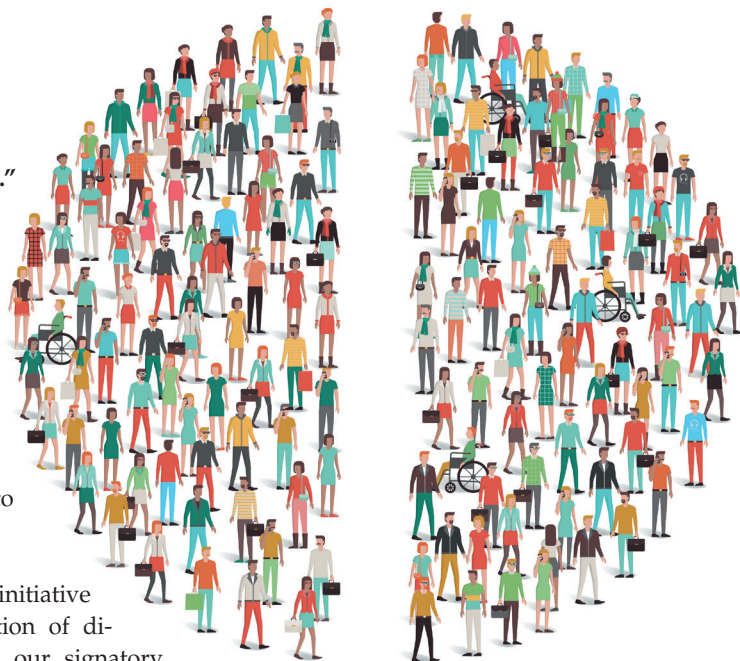
In our last article, we presented our working definitions of the terms “diversity,” “equity,” and “inclusion.” **Diversity** we defined as a matter of numbers: the representation, within your organization, of those diverse identities that have been historically excluded from our profession, and marginalized within our society. **Inclusion** refers broadly to organizational culture and the nature of that representation: an evaluation of where those diverse individuals are represented within your organization, what roles they hold, and whether they are valued and respected equally. **Equity** speaks to the fundamental fairness of organizational policies and procedures, as stated, implemented, and applied. Now that you have committed to meeting those ideals, how do you take stock of the state of your DE&I? How do you assess your progress? This is where metrics and assessments as well as focusing on numbers, representation, culture, and individual experience become so important.

In 2016, the CBA launched the Connecticut Legal Community’s Diversity and Inclusion Pledge and Plan.<sup>1</sup> One of the

hallmarks of this initiative is the annual collection of diversity metrics from our signatory organizations, reported out annually at the CBA’s Diversity and Inclusion Summit. This annual assessment is primarily a “headcount” evaluation, a snapshot of the aggregate representation of diverse attorneys within different sectors of the Connecticut legal community. Drawing from this information, the CBA is able to report on certain demographic trends. For example, the leadership and equity partnerships of our larger Connecticut private law firms are still overwhelmingly white, and predominantly male. There has been progress in the representation of female attorneys and overall numbers of female partners in Connecticut have exceeded the National Association for Law Placement (NALP) national trends in recent years.<sup>2</sup> Women are still predominantly represented within the income partner ranks, however, and are significantly less represented at the equity partner level. The partnership and leadership ranks of these organizations still lack meaningful racial, ethnic, LGBTQ+, and disability representation. There is potential for the future,

though, as the associate classes have been gender-balanced for a number of years, and have also included greater levels of racial and ethnic diversity. We have been able to take similar snapshots of our Connecticut legal aid organizations, as well as government and corporate legal aid organizations, to track demographic trends in representation and leadership. Connecticut’s legal community has a long way to go before it can be said to be truly diverse, equitable, and inclusive, but we applaud the signatory organizations for their commitment to accountability and transparency in their DE&I efforts.

Law firm diversity metric studies, such as those done by the CBA, NALP, the Minority Corporate Counsel Association,<sup>3</sup> or the New York City Bar Association,<sup>4</sup> are just part of an overall effort to shed further light on our profession’s DE&I challenges. Similar reports illuminate DE&I trends in law school admissions and enrollment,<sup>5</sup>



the federal judiciary,<sup>6</sup> state supreme courts,<sup>7</sup> and numerous other sectors of the profession. Studies such as these, focused primarily on metrics, are crucial, but also have limitations. A law firm or legal organization could have significant numeric diversity, and yet not be inclusive or equitable. For example, imagine a legal organization that describes its DE&I commitment as follows: “We embrace DE&I. Thirty percent of our team members are racially and ethnically diverse.” If most of those racially and ethnically diverse individuals hold administrative and support roles, while the organization’s power structures are predominantly white, some may say that the organization should examine the role bias plays in hiring diverse attorneys, and in the processes for determining professional growth and advancement. Conversely, that same organization could have a relatively small number of diverse individuals represented within its various hierarchies, but maintain a serious commitment to an inclusive culture and equitable policies, practices, and procedures. In that case, the organization can be said to be inclusive and equitable, and will likely achieve meaningful numeric diversity in a number of years as those commitments take effect.

Measuring inclusion and equity is just as important as demographic head counts, but is much more involved, and may raise difficult issues. At the 2020 Annual CBA Diversity and Inclusion Summit, our workshop presenters, Paolo Gaudio and Lisa Magill from Aleria,<sup>8</sup> compared inclusion to health. Our assessments of our own health are likely part objective and part subjective, driven by known facts, temporal influences, and overall feelings of wellbeing (or the lack thereof). When we present and teach on these topics, we describe DE&I as a combined sense of belonging, a state wherein all individuals that make up the organization feel valued and respected; able to contribute to the organization, and draw the proportionate benefits of those contributions. Most importantly, we speak of organizations that allow an individual to bring his or her full and authentic self to the organization. Assessing organizational DE&I

requires a more complicated assessment, using experiential surveys and confidential interviews in an effort to understand how all individuals experience your organization, and see themselves within its fabric. Such assessments require vulnerability, a recognition of the existence and impact of power dynamics, the creation of a safe environment for individuals to share their positive and negative experiences, and a commitment to respond productively, no matter how uncomfortable the outcome.

Experiential studies of our profession reveal that our DE&I challenges go far beyond mere lack of numerical representation. These studies, which are too plentiful to fully summarize here, reveal that diverse attorneys face significant discrimination, harassment, and sexual harassment in the practice of law;<sup>9</sup> socioeconomic bias in law firm hiring;<sup>10</sup> racial bias in legal writing review;<sup>11</sup> frequent microaggressions and application of negative assumptions and stereotypes;<sup>12</sup> and higher attrition and greater obstacles to advancement.<sup>13</sup> The CBA recently surveyed Connecticut attorneys to understand their experiences with discrimination, harassment, and sexual harassment. The results of that survey were deeply troubling, with a significant number of Connecticut attorneys reporting that they had experienced discrimination, harassment, and sexual harassment in professional contexts.

If you have followed us so far, you have taken time to understand the importance of DE&I, and to wrestle with the definitions of those concepts. Now it is time to conduct a full evaluation of the state of your DE&I, first by collecting your organization’s diversity metrics, but then moving towards a deeper assessment and understanding of culture and climate. Take similar stock of your individual relationships and networks. Who is in your trusted circle? Who are your go-to team members? Who are your closest personal and social connections? How diverse are the people included within those groups? These processes will necessarily involve difficult conversations and reckonings. You may discover some hard truths, and

experience periods of discomfort and stress. Work through it, respect the feedback you receive, accept it as true and valid, and commit to necessary change. Ultimately, you, and your organization, will come out the stronger for it. ■

## NOTES

1. Diversity & Inclusion Pledge & Plan | Connecticut Bar Association (ctbar.org/pledgeandplan)
2. National Association of Law Placement, “Report on Diversity in US Law Firms” (2019) *NALP Report on Diversity* (last retrieved on November 21, 2020)
3. Vault/MCCA Law Firm Diversity Report (2019), www.nalp.org/reportondiversity (last retrieved on November 21, 2020).
4. New York City Bar Association, “Diversity Benchmarking Report” (2016) www.nycbar.org/serving-the-community/diversity-and-inclusion/benchmarking-reports-law-firm-diversity
5. Li, Miranda and Yao, Phillip and Liu, Goodwin, *Who’s Going to Law School? Trends in Law School Enrollment Since the Great Recession* (March 30, 2020). 54 U.C. Davis Law Review, Forthcoming, Available at SSRN: [ssrn.com/abstract=3559213](https://ssrn.com/abstract=3559213)
6. Federal Judiciary Center, “Diversity on the Bench,” www.fjc.gov/node/7491 (last retrieved on November 21, 2020).
7. Bannon, Alicia and Adelstein, Janna, *State Supreme Court Diversity*, February 2020 Update, Brennan Center for Justice, www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-february-2020-update (last retrieved on November 21, 2020)
8. Aleria, *Measuring Inclusion*, aleria.tech/
9. See e.g., *Still Broken: Sexual Harassment and Misconduct in the Legal Profession* (2020)

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CBA’s Diversity and Inclusion Committee, having previously served as co-chair of the Committee from 2015 through 2018, including with Attorney DeMeola in 2017. Attorneys Thomas and DeMeola have been instrumental in the development of many of the CBA’s diversity and inclusion initiatives, and regularly speak and teach on diversity, equity, and inclusion in the legal profession.

## President's Message

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- Justice Gorsuch is the first to have served as a member of the Supreme Court alongside a justice for whom he clerked.
- [www.archives.gov/founding-docs/constitution-transcript](http://www.archives.gov/founding-docs/constitution-transcript)
- William H. Rehnquist, 2004 Year-End Report on the Federal Judiciary, January 1, 2005, available at [www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf](http://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf).
- [www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf](http://www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf)
- [www.ctbar.org/about/diversity-equity-inclusion/pathways-to-legal-careers](http://www.ctbar.org/about/diversity-equity-inclusion/pathways-to-legal-careers)

## Lincoln

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- "My best friend is the man who will get me a book I have not read."
- See Michael Burlingame, *Abraham Lincoln: A Life*, Volume 1, p. 36 (2008).
  - "The judgments of the Lord are true and righteous altogether."
  - See Robert Bray's comprehensive study, "What Abraham Lincoln Read," *Journal of the Abraham Lincoln Association*, Volume 28, No. 2 (2007), and Bray's *Reading with Lincoln* (2010).
  - Harkness, supra note 1.
  - Harold Holzer, *Lincoln at Cooper Union: The Speech that Made Abraham Lincoln President* (2006).
  - Professor Masur points out that Lincoln had little military experience, but, as president, he read several treatises on warfare to improve his knowledge of tactics.

## Technology and Ethics

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- Bray, p. 56.
- Poe had published "The Murders in the Rue Morgue" in 1841, and this story and subsequent Poe works appealed to Lincoln.
- He would recite "A Man's a Man for A'That" and "Auld Lang Syne."
- See Burlingame, Vol. 2, p. 47, who assumes that Lincoln relied on Dickens for the phrase.
- Bray is not sure of how much Lincoln read of *The Pickwick Papers*, but Harkness states that Lincoln read the book.
- This was a "heart balm" suit that Connecticut abolished in 1967. See General Statutes Sec. 52-572b. England followed the American trend by ending such suits in 1970. Gilbert and Sullivan's *Trial By Jury* also satirized a breach of promise action.
- See Mark E. Steiner, *An Honest Calling* (2006).
- Mr. Pickwick became the central figure in the Broadway play *Pickwick*, with its hit song, "If I Ruled the World."

## DE&I

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- [womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf](http://womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf); "First Phase Findings From a National Study of Lawyers With Disabilities and Lawyers Who Identify as LGBTQ+" (2020), [www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/bbi-survey-accessible.pdf](http://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/bbi-survey-accessible.pdf); International Bar Association, "Us Too? Bullying and Sexual Harassment in the Legal Profession" (May 2019) [www.ibanet.org/bullying-and-sexual-harassment.aspx](http://www.ibanet.org/bullying-and-sexual-harassment.aspx)
- Lauren A. Rivera, András Tilcsik, "Class Advantage, Commitment Penalty: The Gendered Effect of Social Class Signals in an Elite Labor Market," *American Sociological Review*, Vol. 81, No. 6 (2016)
  - Dr. Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills* (2014) [nexitions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf](http://nexitions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf)
  - You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession* (ABA, MCCA 2018) (Executive Summary) [www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.pdf](http://www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.pdf)
  - See e.g., Destiny Peery, Paulette Brown, and Eileen Letts, *Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color* (2020), [www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf](http://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf); Chung, et al. *A Portrait of Asian Americans in the Law*, Yale Law School/National Asian Pacific American Bar Association (2017) [APortraitofAsianAmericansintheLaw.apaportraitproject.org](http://APortraitofAsianAmericansintheLaw.apaportraitproject.org)

## Supreme Deliberations

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solved because of Mr. Foisie's death and by operation of Conn. Gen. Stat. § 46b-40 (a marriage is dissolved by "the death of one of the parties"); and 3) if the marriage was automatically dissolved based on the death of Mr. Foisie, the court could not then re-dissolve it based on the motion to open. "That's some catch...."

The flaw in the trial court's analysis was, according to the Court, in step number one, because a motion to open a dissolution judgment only for the limited purpose of reconsidering the financial orders does not reinstate the parties' marriage.

The motion to substitute was controlled by Conn. Gen. Stat. § 52-599, which states, with three exceptions, that a civil action will not abate upon the death of one of the parties. The exception at issue in *Foisie* applied to any proceeding, "the purpose or object of which is defeated or rendered useless by the death of any party...." Getting to the meat of the matter, the Court noted that it has permitted substitution where the death of a party would have "no effect on the continuing vitality of the proceeding because the estate could fill the shoes of the decedent, such as when the pending civil case sought monetary damages...." Contrast this to cases where the action "sought specific relief that was

unique to the parties, such as seeking an injunction for specific performance" and, in which case, substitution would not be appropriate.

Within these contours, the Court had little trouble concluding that Ms. Foisie's motion to open sought only reconsideration of the financial orders and not reinstatement of the marriage. And because the end result would involve only money, the action would not be "defeated" or "rendered useless" by the death of Mr. Foisie. Thus, once the map became clear, the end result became obvious. ■