What Gets in Our Way?

The Challenges of Achieving Diversity, Equity, and Inclusion in the Legal Profession

By CECIL J. THOMAS AND KAREN DEMEOLA

"Not everything that is faced can be changed, but nothing can be changed until it is faced."
–James Baldwin, *The Cross of Redemption: Uncollected Writings* (2010).

Our profession has wrestled with its diversity, equity, and inclusion challenges for a long time now. Bar associations have often contributed to these issues, and have served as somewhat of a proxy for our profession's slow journey towards greater diversity, equity, and inclusion (DE&I). For example, the American Bar Association (ABA), founded in 1878, was originally only for white, male lawyers. In 1912, the ABA admitted three Black lawyers by mistake, and then promptly sought to rescind their membership.[1] The ABA determined that they had admitted Black lawyers "in ignorance of material facts" and acknowledged that "the settled practice of the Association has been to elect only white men as members."[2] The ABA ban on the admission of Black lawyers was formally ended with a resolution in 1943, but it was not until 1950 that the ABA admitted a Black lawyer to its membership.[3] It was not until 55 years later, in 2005, that Dennis Archer, the former mayor of Detroit, served as the first Black president of the ABA.[4]

What can we learn from this brief examination of the history of the ABA? First, that our profession's history of explicit and direct exclusion and discrimination is still very recent. Second, the road from discrimination and exclusion, to more equitable rules, to diversity in numbers and initial inclusion, and then to meaningful inclusion through growth and advancement, is a long and difficult one. Third, while we can celebrate individual and organizational progress and achievement, we need to do much more to achieve a true culture of belonging for all attorneys, in acceptance of all of our different identities. Finally, creating that culture of belonging requires fundamental transformation, which may be immensely challenging in a profession that values the stability of precedent and tradition. How might we apply some of these lessons to our own legal organizations here in Connecticut? What really gets in our way?

In our last article, we talked about measuring diversity and inclusion within our legal organizations. We encouraged organizations to assess not only the number of diverse attorneys, but also the organizational culture and climate, by creating safe environments and mechanisms for the provision of candid feedback on how attorneys and other members experience your organization. Receiving such candid feedback can be difficult, particularly for those who are responsible for setting that culture and climate, but is necessary to understand positive aspects of office culture as well as the opportunities for improvement. It is critical to hold up the mirror and examine internal culture, processes, and practices that may frustrate your diversity, equity, and inclusion efforts. The individual experiences of diverse attorneys within your organization are the ultimate measure of your commitment to DE&I. Without a culture of inclusion and belonging, organizational statements, policies, and participation in external diversity initiatives are, at best, incomplete measures.

On both the individual and organizational levels, critical DE&I feedback is difficult to hear and process, because this feedback may cause dissonance in our self-perceptions. We maintain certain deeply-held narratives about ourselves, about our organizations, our work, and our values. These narratives make us proud, define us, drive the expenditures of our energies, and give us joy in our associations. As organizations, we extol our commitments to diversity, equity, and inclusion as core organizational values. As individuals, and particularly as lawyers, we pride ourselves on our egalitarianism. As a result, we often struggle with the premise that we are contributing to systems and cultures that exclude or marginalize individuals of diverse identities.

Too often, when we are confronted with diversity, equity, and inclusion challenges, we choose to revert to our idealized organizational and personal narratives, rejecting in the process any experience, uncomfortable interaction, or troubling fact that seem contrary to those narratives. We succumb to a temptation to view our individual and organizational diversity, equity and inclusion commitments as absolutes, leading to a perception of narrative conflict when we are challenged or confronted with "contrary" information. In our first article in this column, we emphasized that your DE&I commitment is to the journey, to an evolutionary process. This necessarily means that you have and will make mistakes along the way. Embracing that vulnerability will allow you to see candid feedback as a necessary aid to your development, that will make you and your organization stronger as you become more equitable and inclusive.

Our defensiveness about our organizational and individual DE&I narratives manifest in common, but often subtle or even unconscious defensive maneuvers. For example, we often talk about "fit" when hiring or making personnel decisions. When an organization lacks meaningful diversity, "fit" may actually be code for a desire for conformity with the majority. An organization that is meaningfully inclusive should not be concerned with whether the individual fits the organization. Rather, an organization committed to DE&I should be focused on whether it has created an environment where that individual can grow, thrive, and contribute to the collective mission from the fullness of their individual experiences and identities. Common subjective assessments, such as the "ability to connect with clients" or the determination of who is best to be the "public face" of an organization may also be fraught with subtle biases for or against certain identities.

Diversity retention and attrition issues are often reframed as organizational "success stories," thereby co-opting the narratives of those individuals in an effort to avoid addressing the organization's lack of DE&I progress. Alternatively, legal organizations resort to broad and generalized statements about retention issues, claiming that they cannot find qualified diverse applicants, that qualified diverse attorneys do not have connections to Connecticut or do not want to live in Connecticut. Often they rely on stereotypical "norms," or claims that diverse attorneys are not interested in certain work or career aspirations, or are unlikely to remain with the organization for long-term growth and advancement. In our years of teaching and presenting on DE&I issues, we have sadly heard all of these statements. These subjective assessments, which are frequently repeated, given excessive credence, and then take on the appearance of generally accepted facts, are immensely harmful.

Our professional focus on liability or potential litigation may also pose challenges; preventing us from addressing DE&I challenges with a more empathetic and vulnerable approach. When confronted with DE&I issues, an organization may begin a process of creating a negative narrative around the individual to avoid wrestling with the organization's lack of commitment and progress. This "it's not me, it's you" mentality is immensely destructive to DE&I efforts, and reinforces the common perception that silence or false affirmation are the only options for diverse attorneys who may be struggling with negative experiences.

How we tell our stories can subtly but perceptibly reinforce our profession's exclusionary tendencies. Consider, for example, the effects of portraits hanging in the halls of our courts, our firms, our law schools, and bar associations. Each of these images, particularly those that harken to a time when our profession was expressly discriminatory, confirm certain stereotypes, express certain biases, and convey a message. Each image serves as a subtle message about who belongs, and who does not. If our present-day images of our organizational leaders, of our high-achievers, and of our most celebrated individuals are similarly homogenous, those simply reaffirm a long and present reality of exclusion, regardless of how many DE&I investments, statements, and commitments we might make. Here again, we see a battle of narratives, between one narrative that celebrates DE&I, and another one that appears to only portray competence, accomplishment, and potential in certain majority identities.

We opened this piece with an examination of the ABA's history of racial discrimination and exclusion. There are additional lessons that we might draw from that narrative. The ABA now openly acknowledges those past acts of exclusion and discrimination in its "ABA Timeline," as part of its public-facing story of itself. This acknowledgement appears alongside organizational milestones and accomplishments. That fuller, more vulnerable, more truthful acknowledgement is part of the key to successful DE&I efforts, except that we must have the self-awareness to bring that vulnerability to the present. We cannot just be honest about troubling facts that appear in our history, drawing comfort that those were the acts of another generation, or another time. Those individuals likely lacked the self-awareness to fully see the harm and long-term impact of their acts of discrimination and exclusion. They likely justified their actions with resort to the defensive myths and commonly-held assumptions of the day. We may not be much different today.

While our own present DE&I challenges are less overt and explicit, our diversity metrics tell us that we still have much work to do. Do we have the present honesty and vulnerability to acknowledge the shortcomings of our efforts? Can we acknowledge our own acceptance of norms, traditions, and stereotypes that have perpetuated our profession's DE&I crisis? Or will we continue to rely on the comfort of our own narratives, until some future generation tells our story in a more honest, and less flattering light, as part of their own narrative?

The Rev. Dr. Martin Luther King, Jr. taught us that "the time is always right to do what is right." As a profession, we are capable of solving our DE&I challenges. In the process, we must be ready to be vulnerable, to tell the fuller story of ourselves and our institutions, to put away our defensiveness, and to seek forgiveness and reconciliation. Future generations will tell

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Time To Go Pro Bono

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to Counsel in Summary Process Proceedings," Proposed Senate Bill No. 531; "An Act Establishing a Pilot Program That Will Provide Legal Counsel to Tenants in Eviction Proceedings," Proposed Senate Bill 523 (2021)

8. Conn. Gen. Stat. 47a-26c ("All pleadings, including motions, shall advance at least one step within each successive period of three days from the preceding pleading or motion.")
9. Connecticut Advisory Council on Housing Matters, Report to the General Assembly (January 6, 2021), Appendix C-3
10. Conn. Gen. Stat. 47a-35 ("Execution shall be stayed for five days from the date judgment has been rendered….")
11. Connecticut Advisory Council on Housing Matters, *Report to the General Assembly* (January 6, 2021), Appendix C-8.
12. *Id*. at Appendix C-6.
13. "The Devastating Impact of Evictions on Connecticut Families," *CT Lawyer* magazine, Vol. 31, No. 3 (January/February 2021).
14. Nat'l Low Income Hous. Coal, *Costs of COVID-19 Evictions* (Nov. 19, 2020), nlihc.org/sites/default/files/costs-of-covid19-evictions.pdf. *See also* Children's HealthWatch, *Behind Closed Doors: The Hidden Health Impacts of Being Behind on Rent* (2011), childrenshealthwatch.org/wp-content/uploads/behindcloseddoors_report_jan11-.pdf.
15. NYC Office of Civil Justice, *Universal Access to Legal Services: A Report on Year Three of Implementation in New York City* (Fall 2020), www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2020.pdf.
16. Oksana Mironova, *NYC Right to Counsel: First Year Results and Potential for Expansion*, Cmty. Serv. Soc'y (Mar. 25, 2019), www.cssny.org/news/entry/nyc-right-to-counsel#_edn3.
17. Stout Risius Ross, *The Economic Impact of an Eviction Right to Counsel in Baltimore City* (May 8, 2020), cdn2.hubspot.net/hubfs/4408380/PDF/Eviction-Reports-Articles-Cities-States/baltimore-rtc-report-final-5-8-2020.pdf .
18. Stout Risius Ross, *Economic Return on Investment of Providing Counsel in Philadelphia Eviction Cases for Low-Income Tenants* (Nov. 13, 2018), cdn2.hubspot.net/hubfs/4408380/PDF/Cost-Benefit-Impact-Studies/Philadelphia%20Evictions%20Report_11-13-18.pdf.
19. *See* n. 18.
20. *See* n. 17.
21. www.ctbar.org/members/volunteer-today/CBA-pro-bono-connect/for-attorneys. To learn more about how to navigate Pro Bono Connect, please see Time to Go Pro Bono Column. *CT Lawyer*, September/October 2020. www.ctbar.org/docs/default-source/publications/connecticut-lawyer/ctl-vol-31/1-septoct-2020/ctl-sept-oct-20---column---time-to-go-pro-bono.pdf?sfvrsn=e06b274a_6

Supreme Deliberations

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discretionary tasks, but rather permitted juries to impose negligence liability where municipal employees had abused their discretion when carrying out a discretionary task. Indeed, in *Tetro*, a unanimous Court upheld a damages award based on negligent police conduct during a pursuit.

But what about the majority's point that *Tetro* is irrelevant because the defendants had not raised the immunity issue in that case? Justice Ecker had "great difficulty believing" that the *Tetro* defendants "would have overlooked the most basic and common defense in the municipal playbook had it been viable." Instead, the fact that the *Tetro* defendants had not raised the defense supported Justice Ecker's conclusion that, prior to the judicial intervention of the past few decades, immunity was not available in such situations. Stated another way, "the fact that municipal immunity was a nonissue in Tetro almost certainly was a function of a failure to litigate the obvious [rather] than a failure to raise and decide the issue."

Justice Ecker also criticized the majority's determination that the identifiable person-imminent harm exception did not apply under the facts of *Borelli*. After conducting another historical review, Justice Ecker concluded that, among other things, the current understanding of the exception is far too narrow. For example, the "legally compelled presence" requirement, properly understood, is a sufficient condition for the exception to apply, not a necessary one.

On the issue of whether the contemporary understanding of this exception has strayed from its doctrinal underpinnings, Justice Ecker may not be alone. Justice D'Auria, in his concurring opinion, expressed his willingness to reevaluate the contours of the exception in a future case. And Chief Justice Robinson, in his concurring opinion, observed that "[i]n a precedential vacuum … no one would be more of an identifiable person subject to imminent harm than the occupant of a car being pursued by police…." Nevertheless, Chief Justice Robinson concluded that, as a policy matter, the exception should not apply to passenger "presumed to be in cahoots" with a fleeing lawbreaker.

So where does this leave us? After *Borelli*, a claim attacking an officer's decision to start a chase is likely to fail. But given the separate opinions of Chief Justice Robinson and Justice D'Auria, as well as Justice Ecker's dissent and the care that the majority took to limit the scope of its holding, we can't say for sure that a suit challenging the manner in which an officer conducted a pursuit, or an officer's conduct during a nonemergency situation, would meet the same fate. *See also Cole v. City of New Haven*, ___ Conn. ___ (Oct. 15, 2020) (reversing summary judgment order where, among other things, evidence indicated that city and police department policies may have imposed ministerial duty governing officer's conduct during a pursuit). Perhaps the Court is primed for a dramatic reversal of its recent municipal immunity jurisprudence. We may not have to wait long to find out. *See Daley v. Kashmanian*, 335 Conn. 939 (2020) (granting certification to address whether § 52-557n confers governmental immunity from liability for damages arising from personal injuries caused by an officer's negligent operation of a vehicle during on-duty surveillance). ■

DE&I

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our story from a fuller, and perhaps less flattering perspective. It is up to us as to whether they will tell a story of fundamental transformation towards a more diverse, equitable, and inclusive legal profession for the future. ■

NOTES

1. Lawrence M. Friedman, *A History of American Law (4th Edition)* Oxford University Press (2019), p. 707-708.
2. American Bar Association, "ABA Timeline," https://www.americanbar.org/about_the_aba/timeline/ (last retrieved on February 9, 2021)
3. *Id*.
4. *Id*.