

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

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August 25, 2016

Hon. Betty Weinberg Ellerin
Chair, NYS Continuing Legal Education Board
c/o Alston & Bird LLP
90 Park Ave.
New York, NY 10016-1387

Re: Diversity & Inclusion CLE requirement for New York State attorneys

Dear Judge Ellerin:

Thank you for taking the time to speak with me and Maria Cilenti recently regarding the proposal that New York modify its existing CLE requirement (calling for 24 hours of training every two years, of which at least four must be directed to ethics), by adding a further required allocation to training in enhancing diversity and inclusion and promoting the elimination of bias in the legal profession. As explained in our July 21 letter to Chief Judge DiFiore, this proposal is modeled after ABA Resolution 107 passed by the House of Delegates in February, 2016.¹ This letter represents an effort to provide some further context for this proposal, in a manner responsive to points you raised in our call.

The Problem

As news events of the past year have dramatically illustrated, issues of race – including issues related to economic disparity, unequal access to opportunities, statistically disproportionate outcomes in the criminal justice system, educational differences, mistrust of minority ethnic groups or religions, bias crimes, police conduct, overt discrimination, and even implicit or unintended bias by well-meaning people – remain among the most critical and divisive issues of our time. Our country’s defining national commitment to equality, tolerance and embrace of differences has always been, and remains today, in fundamental tension with our historical legacy of racial discrimination and segregation, and with the continuing current effects of that legacy. That incongruity warrants continued effort to promote equal opportunity, to attack and remedy discrimination and to promote and celebrate diversity. That need exists not

¹ The City Bar’s July 21 letter is available at <http://bit.ly/29On4j9>.

only with regard to race discrimination, but also with regard to treatment based on gender, religion, national origin, sexual orientation, age, disability and other categorizations that have led to intentional or unintentional discrimination.

The legal profession has recognized that it must participate in this effort, engaging in critical self-analysis regarding the persistent underrepresentation of minorities in its ranks, a topic that has been the subject of bar association reports and public discussion in recent years.² While lawyers have been in the forefront of efforts to combat discrimination – through innumerable instances of claims advanced, laws advocated for and enacted, programs developed, judicial decisions issued and positions taken in support of promoting diversity, inclusion and equality of opportunity – the legal profession has fallen short, too, particularly as a model for professional development. Studies show that members of minority groups continue to lag white males significantly in hiring, retention and leadership within the legal profession – more even

² Rhode, Deborah L, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, May 27, 2015, available at https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.c047d0733fbd (“Women constitute more than a third of the profession, but only about a fifth of law firm partners, general counsels of Fortune 500 corporations and law school deans. . . . Although blacks, Latinos, Asian Americans and Native Americans now constitute about a third of the population and a fifth of law school graduates, they make up fewer than 7 percent of law firm partners and 9 percent of general counsels of large corporations. In major law firms, only 3 percent of associates and less than 2 percent of partners are African Americans.”);

Jackson, Liane, *Minority women are disappearing from BigLaw – and here's why*, March 1, 2016, available at http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why (“Studies and surveys by groups such as the ABA and the National Association of Women Lawyers show that law firms have made limited progress in promoting female lawyers over the course of decades, and women of color are at the bottom.”);

Greene, Michael, *Minorities, Women Still Underrepresented in Law*, April 16, 2015, available at <https://bol.bna.com/minorities-women-still-underrepresented-in-law/> (“Based on Department of Labor Statistics, the IILP [Institute for Inclusion in the Legal Profession] found that ‘aggregate minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs.’”);

National Association for Law Placement Press Release, *Women, Black/African-American Associates Lose Ground at Major U.S. Law Firms*, Nov. 19, 2015, available at <http://www.nalp.org/uploads/PressReleases/2015NALPWomenandMinorityPressRelease.pdf> (noting in particular that the percentage of African-American firm associates has declined each year since 2009);

American Bar Association, *Summary Report and Recommendations From 2009 ABA Study of the State of Diversity in the Legal Profession, examining Race and Ethnicity Gender Sexual Orientation Disabilities*, April 2010, available at http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011_authcheckdam.pdf (citing as a top disappointment that “[t]he legal profession is less racially diverse than most other professions, and racial diversity has slowed considerably since 1995.”);

Lam, Bourree, *The Least Diverse Jobs in America*, June 29, 2015, available at <http://www.theatlantic.com/business/archive/2015/06/diversity-jobs-professions-america/396632/> (citing data from the U.S. Census showing that 81% of lawyers are white, topping the list);

New York State Bar Association, *Judicial Diversity: A Work in Progress*, Sept. 17, 2014, available at http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html (“People of color and women remain significantly under-represented on the bench. This under-representation most starkly manifests in our upstate judicial districts, but can also be observed in certain downstate districts with large minority populations”), at p. 8.

than in other professions – and that women and people of color make up a far smaller portion of the legal community than of the population generally.³ While representation of women and minorities in legal jobs has improved over the past few decades, the rate of progress has been very slow, and some recent evidence has suggested the movement has not been steadily forward.

For example, the City Bar’s 2014 Diversity Benchmarking Report of results from 55 firms that have signed a public statement of commitment to enhance diversity and inclusion presented results reflecting “multiple setbacks for minority attorneys, with small declines in representation at key levels, reduced racial and ethnic diversity across the associate pool, and a small increase in the percentage of signatory firms with no attorneys of color on the management committee. Additionally, the prevalence of attorneys of color in non-equity versus equity roles increased in 2014.”⁴ Despite broadly asserted support for diversity and inclusion goals, New York City law firms continue to experience higher rates of attrition among minority and women attorneys: 23.6% of minority attorneys and 21.3% of women of all levels of seniority left signatory firms in 2014, for example, compared to 14.7% of white men. These firms obviously represent only a portion of the New York State legal marketplace, but these disappointing results may be particularly notable, and possibly even somewhat better than the overall legal market, because they come from legal enterprises that have made public commitments to diversity, have allowed their results to be counted and generally have had larger numbers to work with.

These results do not arise in a statistical vacuum. Minority and women lawyers at law firms and other legal offices consistently confirm believing that their professional experiences are adversely impacted by their “otherness” and unfamiliarity to the white male majority, by implicit bias and sometimes by outright instances of discriminatory speech or conduct.⁵ Those lawyers also bring to their law firm environment their experiences of implicit or explicit bias outside their offices. (As just one example, at a recent discussion of racial issues at my firm, a highly regarded Black member of our staff reported that police officers have stopped and aggressively questioned and/or frisked him dozens of times in the past few years, including within a block of our offices and when he was wearing a suit as he does every workday.)

³ See n. 2, *supra*.

⁴ New York City Bar Office of Diversity and Inclusion, *2014 Benchmarking Report*, available at <http://www.nycbar.org/images/stories/pdfs/diversity/benchmarking2014.pdf>

⁵ See, e.g., Strickler, Andrew, *How Minority Attorneys Encounter BigLaw Bias*, available at <http://www.law360.com/articles/795806/how-minority-attys-encounter-biglaw-bias>; Rhode, n. 1, *supra* (“Minorities still lack a presumption of competence granted to white male counterparts, as illustrated in a recent study by a consulting firm. It gave a legal memo to law firm partners for “writing analysis” and told half the partners that the author was African American. The other half were told that the writer was white. The partners gave the white man’s memo a rating of 4.1 on a scale of 5, while the African American’s memo got a 3.2.”); Negowetti, Nicole E., *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection*, University of Nevada Law Journal, Spring 2015, available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1600&context=nlj> (examining, at pp. 945-949, the relationship between implicit bias and lawyering and the impact on associate experience and retention: “[t]he nature of lawyering predisposes lawyers to evaluate each other using a subjective system of evaluation. Legal work contains discretionary judgment, a product of external factors and ‘the lawyer’s own character, insight, and experience.’ . . . Without specific metrics to objectively evaluate the quality of an associate’s work, stereotypes and implicit biases will influence one’s judgment.”); Reeves, A., *Diversity in Practice: What Does Your Brain See?*, Nov. 2012, available at http://www.nextions.com/wp-content/files_mf/1352727388_magicfields_attach_1_1.pdf (“The research effectively disproves that any of us are ‘color-blind’ or ‘gender-blind.’ We ‘see’ race and gender even when those characteristics are undefined.”).

Promotion of diversity, inclusiveness and non-discrimination will remain essential as the face of our country and of New York continues to change. Based on census data, the population of white New York State residents has decreased from 62% to 56% from 2000-2015, while the percentage of Black, Asian and Hispanic New Yorkers has increased roughly 3% each during that period.⁶ Legal clients are more diverse, practices are more international and multi-jurisdictional, and the judiciary continues to grow in its diversity. Lawyers need to be equipped to recognize cultural differences and biases that may impact their personal interactions in all aspects of their practice – not just as lawyers, but as arbitrators, mediators, advisors, employers, partners and officers of the court.

The Importance of Efforts to Increase Diversity and Inclusion and Promote Equality of Opportunity in the Legal Profession

Legislatures, bar groups, diversity professionals and law firms and other law offices have increasingly acknowledged the importance of leadership within the legal profession in promotion of diversity, inclusion and equal opportunity.

In January 2016, New York State’s Assembly Judiciary Committee and its Subcommittee on Diversity in Law held a roundtable to discuss strategies for promoting increased diversity in the legal profession. That roundtable arose directly out of views regarding the importance of ensuring that the legal profession be as diverse and inclusive as the population it serves, and in response to reports highlighting continued minority under-representation in the profession. The City Bar’s Director of Diversity and Inclusion and the Chair of our Diversity Pipeline Initiatives Committee provided testimony to discuss the work of the Association, its most recent law firm benchmarking report and its student pipeline initiative.

Studies of law firm and other enterprise dynamics have demonstrated that diversity in staffing promotes differences in perspective that enhance professional performance.⁷ Many law firms and law offices are already engaging in diversity and inclusion trainings, often through law firm professional development efforts, diversity offices and bar association programs. Some trainings are afforded CLE credits as ethics or practice management courses, but the granting of credit has been on an ad hoc basis.⁸ The U.S. Department of Justice also recently announced

⁶ For 2010-15 data, see <http://www.census.gov/quickfacts/table/PST045215/36>. Note that 2015 data is estimated. For 2000-10 actual census data, see “Comparison of 2000 and 2010 Populations by Race and Ethnicity” at <https://labor.ny.gov/stats/nys/statewide-population-data.shtm>.

⁷ Roellig, M., *Why Diversity and Inclusion are Critical to the Success of Your Law Department*, 2011, available at <https://www.massmutual.com/~media/files/why-diversity-and-inclusion-is-critical-to-the-success-of-your-law-department.pdf> (“Building a culture of diversity and inclusion in your legal team is critical because it will improve your team’s performance.”), at p. 1; Phillips, Katherine W., *How Diversity Makes Us Smarter*, *Scientific American*, Oct. 2014, available at <http://www.scientificamerican.com/article/how-diversity-makes-us-smarter> (“Decades of research by organizational scientists, psychologists, sociologists, economists and demographers show that socially diverse groups [that is, those with a diversity of race, ethnicity, gender and sexual orientation] are more innovative than homogeneous groups.”), at p. 2; Reeves, A., *Value Proposition for Diversity and Inclusion in the Legal Profession*, Summer 2010, available at <http://www.nextions.com/wp-content/uploads/ABA-Diversity-Voice-2.pdf>.

⁸ See, e.g., the following two most recent City Bar programs: April 22, 2016 Professional Development Workshop Series, *The Explicit Impact of Implicit Bias: Unpacking and Interrupting Implicit Bias to Create More*

(June 27, 2016 press release) the roll-out of a department-wide required Implicit Bias Training Program for 28,000 lawyers and investigators, predicating this step on views that “[t]he research is clear that most people experience some degree of unconscious bias, and that the effects of that bias can be countered by acknowledging its existence and utilizing response strategies.” On August 23, 2016, New York City Corporation Counsel Zachary W. Carter wrote to Chief Judge DiFiore in support of requiring CLE credit in diversity and inclusion and elimination of bias. Mr. Carter indicated that “[f]or the last ten years the Law Department has required all of its employees to participate in Diversity and Inclusion programs” and that the “evaluations of our programs by our participants have been overwhelmingly favorable, notwithstanding some initial skepticism.” The New York State Judicial Institute also offers diversity training for new judges as part of its curriculum.

One of the signatories to our July 21 letter is the Association of Law Firm Diversity Professionals, indicating institutional support for this initiative from law firms they represent. Legal Services NYC publicly supported this proposal in a letter to the New York Law Journal.⁹ Such widespread support and efforts reflect an environment in which many lawyers want to improve their understanding of diversity, inclusion and anti-bias issues and to contribute to improving the profession. These efforts are proceeding against a national backdrop that includes ongoing debate about how this country can best address perceived and indisputable racial disparities in our justice system, a challenge of particular importance to lawyers as essential champions and guardians of the rule of law.

The ABA has taken two major steps in the past six months to act on a broad consensus among the legal profession’s leadership regarding the importance of addressing nationwide concerns and reinforcing the profession’s commitment to diversity and equal opportunity. First, in February 2016 the ABA House of Delegates unanimously passed Resolution 107, encouraging states to require lawyers to participate in diversity and inclusion training as a standalone component of their CLE requirements.¹⁰ As explained in our July 21 letter, this can and should be done without increasing New York’s current 24-credit biennial requirement. Resolution 107 was co-sponsored by the ABA Standing Committee on CLE, reflecting its perceived importance as part of a lawyer’s continuing education. Resolution 107 was meant to expand on Resolution 110, passed in 2004, which encouraged states to require D&I training either as part of ethics or professionalism credits, or as a standalone credit. Resolution 107’s recommendation that D&I

Diverse and Inclusive Workplaces (featuring Dr. Arin N. Reeves and awarding 2.0 CLE credits in law practice management), and May 24, 2016 *Diversity and Inclusion Conference* (1.5 CLE credits in ethics). For a sample of “elimination of bias” CLE offerings, some of which are recognized in particular states, *see* <http://mcleblog.net/category/elimination-of-bias/>. *See also* Kang, Jerry, *Implicit Bias: A Primer for Courts*, Aug. 2009, available at <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf>.

⁹ Rasmussen, Raun J., *CLE Should Include Diversity Training*, New York Law Journal, Aug. 1, 2016, available at http://www.newyorklawjournal.com/id=1202764038752/CLE-Should-Include-Diversity-Training?cmp=share_twitter&slreturn=20160725141143.

¹⁰ Resolution 107 and the ABA’s related report are available at http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html.

CLE be a standalone credit was intended to increase overall attorney participation in D&I trainings.¹¹ Resolution 107's approach appears appropriate and sound.

Then, two weeks ago, on August 8, the ABA House of Delegates unanimously passed Resolution 109, which amends Model Rule of Professional Conduct 8.4 to provide that it is professional misconduct to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”¹² As explained in the Resolution's underlying report, “Discrimination and harassment by lawyers . . . undermines confidence in the legal profession and the legal system.” Although non-discrimination/non-harassment is only one component of the umbrella of diversity, inclusion and anti-bias concerns facing the legal profession, Resolution 109 reaffirms its importance to the legal profession as an institutional matter. While New York has not yet considered and determined whether to expand Rule 8.4 of the N.Y. Rules of Professional Conduct to mirror the language of Resolution 109, the sensibilities about how a lawyer should act as a professional that underlie this new language should be a matter of consensus.¹³

The Value of CLE in Advancing Diversity, Inclusion and Equality of Opportunity

CLE plays an important role in both the quality and public perception of our self-regulated profession.¹⁴ Like the mandatory allocation of at least four hours to ethics training, an allocation of a portion of the CLE requirement to D&I training will convey an important

¹¹ At present, only California and Minnesota have adopted standalone D&I CLE requirements. A representative from the Minnesota Board of Law Examiners reported that in 2014, 508 of the 12,619 courses approved for credit in Minnesota had at least one segment qualifying for elimination of bias credit. Given the speed of market reactions and plentitude of diversity training programs already in place, there is ample reason to expect that there will be numerous available offerings from which lawyers can satisfy a D&I training requirement. In addition, a diversity and inclusion segment could readily be included as part of a broader course and could be tailored to diversity issues particular to a lawyer's location or substantive practice area.

¹² Resolution 109 and the ABA's related report are available at http://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/109.html.

¹³ New York's judges are required to hold trial lawyers to a standard similar to the one expressed in Resolution 109. Therefore, judges also stand to benefit from diversity and inclusion training for lawyers. Judicial Code of Conduct Section 100.3(B)(5) states, “A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.”

¹⁴ See, e.g., Harris, C., *MCLE: The Perils, Pitfalls, and Promise of Regulation*, 40 Val. U. L. Rev. 359, 365 (Spring 2006) (citing a 2005 paper delivered by Professor Linda Sorenson Ewald “pointing out that for decades ABA committee and conference reports have reflected concern over the state of the profession and recommended MCLE as part of the solution. She describes this as a ‘**unanimous belief that continuing [legal] education has a role to play in addressing these concerns.**’”). (Emphasis added.)

message about the weight that the legal profession and those who oversee it attach to these values.

Mandatory CLE was initially conceived, supported and implemented as a way to enhance both lawyer competence and public trust in the profession. The ABA's 1992 MacCrate Report entitled "Law Schools and the Profession: Narrowing the Gap," which provided a platform for states considering whether to mandate CLE requirements, identified four basic values of professional responsibility. As described by one commentator in 1998:

"The [four] values are: '1) providing competent representation; 2) striving to promote justice, fairness and morality; 3) striving to improve the profession; and 4) professional self-development.' This [MacCrate] report helped to solidify the ABA's commitment to recommending MCLE programming. . . . The ABA and various state bar associations are talking seriously about what can be done to enforce the four values emphasized in the MacCrate Report. Michigan hired through bar dues a public relations firm to provide enhanced access to the media. This, however, only treats a symptom and does not focus on preventing the problem. The root of the problem is attorney behavior.... At least twenty-one bar associations have recognized that the public perception is based, with good reason, on how attorneys behave. The way to solve the problem is to provide better training for attorneys through MCLE programs aimed at professionalism and ethics."¹⁵

These values were expressed even earlier by the group of over 100 lawyers who attended what came to be known as the "Arden House Conference" held in New York in 1958. As described in a 1960 paper by then-City Bar President Harrison Tweed, who attended the conference:

"Until 1957 almost all of the education offered to practicing lawyers was designed to improve professional competence and to do nothing more. In the fall of that year, it was felt by many of those interested in the cause that something should be done to put new life into the movement. The formula adopted contained two innovations. First, putting the education offered to practicing lawyers on a somewhat professional basis.... Second, introducing education designed to equip the practicing lawyer to understand and meet his professional responsibilities beyond his primary obligation to be competent."¹⁶

¹⁵ Grigg, L., *The Mandatory Continuing Legal Education (MCLE) Debate: Is it Improving Lawyer Competence or Just Busy Work?*, 12 *BYU J. Pub. L.* 417, 430 (1998).

¹⁶ 15 *Rec. Ass'n B. City N.Y.* 481, 485 (1960) (available on HeinOnline).

Of particular relevance here, the lawyers who convened at the Arden House Conference developed a Final Statement that

“brought into the continuing legal education picture for the first time, and in bold relief, the importance that the educational opportunities should not be aimed simply at an improvement in professional competence but, in addition, should be designed to ‘help the lawyer to fulfill a wide range of professional responsibilities: to the courts, to the administration of justice, to law reform, to the law-making process, to his profession and to the public.’”¹⁷

Including a mandatory diversity and inclusion component as part of lawyers’ CLE obligations should advance all of these purposes. It should continue the ongoing education of the profession in one of the most foundational and important elements of our national self-definition and one of the core components of the rule of law. It should foster an ongoing increase in the vitality of diversity and inclusion, and ongoing progress in the slow erosion of discrimination and implicit bias. It should also convey an important public message, in a time of intense attention to matters of race and other forms of discrimination, regarding the legal profession’s institutional commitment to equality of opportunity.

Just as Justice Sandra Day O’Connor expressed in a 2003 opinion the hope that the need for legal protection for affirmative efforts to increase diversity in education would diminish or disappear in 25 years, *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), it is possible to hope that including diversity, inclusion and anti-bias training as a mandatory component of CLE will not necessarily have to be permanent. But history suggests that this focused effort will likely need to continue into the currently foreseeable future. As one commentator has observed, “The first thing to acknowledge about diversity is that it can be difficult. In the U.S., where dialogue of inclusion is relatively advanced, even the mention of the word ‘diversity’ can lead to anxiety and conflict.”¹⁸ Improvements in diversity, inclusion and avoidance of discrimination tend to come slowly.

We fully appreciate that even if there is broad consensus regarding the need for greater diversity and inclusion, greater equality of opportunity and less overt or unintended discrimination in the operations of the legal profession and in the administration of justice, some lawyers may resist the notion that an authority can properly require each individual lawyer to undergo further education on this subject over the course of a career. But just as the imposition of a particularized ethics requirement was intended, at least in part, to convey a message about priority and commitment rather than to imply that this requirement was needed because all lawyers were unethical, imposition of a diversity and inclusion requirement would reflect the profession’s formal public embrace of its aspirational best self. We expect that the passage of ABA Resolution 107 will spur numerous states to act, and we believe that New York should be in the forefront of these actions.

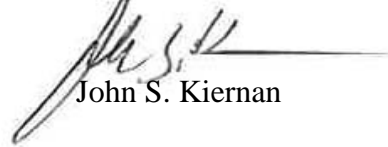
¹⁷ Id. at 486.

¹⁸ Phillips, *supra* n. 7 at p. 3.

We at the New York City Bar Association, and the other signatories of the July 21 letter to Chief Judge DiFiore, would welcome an opportunity to support and participate in further discussions regarding the Continuing Legal Education Board's consideration of this issue. The City Bar and many firms also have worked with numerous experts on these subjects, and we would be happy to make some of these resources available to the Board if you think that would be helpful.

Thank you for your consideration of this important matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John S. Kiernan", is written over a horizontal line. The signature is fluid and cursive.

Cc: Elise Geltzer, Esq., Counsel, NYS Continuing Legal Education Board
Hon. Rosalyn Richter & Nate Saint-Victor, Co-Chairs, New York City Bar Association
Enhance Diversity in the Profession Committee