



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #9

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Continuing Legal Education supporting a diversity and inclusion requirement in New York's mandatory continuing legal education regulations.

Attached is a report from the Committee on Continuing Legal Education supporting an amendment to the rules governing mandatory continuing legal education to provide for one credit hour of diversity and inclusion CLE as part of the 32 credit hours required for new attorneys and as part of the 24 credit hours required of experienced attorneys. The proposal is based on a proposal adopted by the American Bar Association's House of Delegates in February 2016. As set forth in the report, the changing demographics of the United States demonstrate a need for attorneys to be well versed in issues relating to the representation of minorities and other diverse individuals. The report sets forth a proposed definition of diversity and inclusion to encompass diversity and inclusion in both the legal profession and the practice of law.

The report notes that in July 2016, the New York City Bar Association submitted a letter, subscribed to by a number of other bar associations, supporting diversity CLE, followed by letters to Hon. Betty Weinberg Ellerin, chair of the New York State CLE Board. These letters are attached as Appendix A to the report. An Appendix B sets forth sample CLE programs focusing on diversity and inclusion.

This report was submitted on October 19, 2016 and posted in the Reports Community. It was presented on an informational basis at the November 5, 2016 House meeting, at which time a scheduling resolution was adopted to govern the submission of comments and presentation at the January 27, 2017 meeting. The scheduling resolution is attached. Comments submitted in accordance with the resolution are included in your materials under cover of a separate staff memorandum.

Following the informational presentation in November, the Continuing Legal Education Board of the Unified Court System published for 60-day review and comment its proposed amendment of the MCLE rule to provide a one-credit requirement addressing diversity, inclusion and elimination of bias. The request for comment from the Office of Court Administration and accompanying materials also are attached.

The proposal will be presented by Ellen G. Makofsky, chair of the Committee on Continuing Legal Education, and committee member Mirna M. Santiago.

**RESOLUTION TO GOVERN CONSIDERATION OF THE
REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON CONTINUING
LEGAL EDUCATION**

RESOLVED, that the House of Delegates hereby adopts the following procedures to govern consideration at the January 27, 2017 meeting of the House, and any subsequent meetings as may be necessary, of the report and recommendations of the Committee on Continuing Legal Education:

1. The report and recommendations of the Committee was circulated to members of the House, sections and committees, county and local bar associations, via the Reports Community on October 20, 2016.
2. **Comments on report and recommendations:** Any comments on or amendments to the Committee's report or particular recommendations contained therein must be submitted in writing to the Secretary of the Association at the Bar Center by January 13, 2017; otherwise they shall not be considered. All comments complying with this procedure shall be distributed to the members of the House in advance of the January 27, 2017 meeting.
3. **Consideration of the report and recommendations at the January 27, 2017 meeting and any subsequent meetings:** The report and recommendations will be scheduled for formal debate and vote at the January 27, 2017 meeting and considered in the following manner:
 - a. The Committee shall be given an opportunity to present its report and recommendations.
 - b. All those wishing to speak with regard to the report and recommendations may do so only once for no more than three minutes.
 - c. The Committee may respond to questions and comments as appropriate.
 - d. Procedural motions shall be considered out of order until debate on substantive issues is concluded.
 - e. A vote on the report and recommendations shall be taken at the conclusion of the debate.

REPORT OF THE NYSBA COMMITTEE ON CONTINUING LEGAL EDUCATION
Presentation to the House of Delegates November 5, 2016

Re: Proposed Diversity and Inclusion and Elimination of Bias CLE Requirement for
New York State Attorneys

A. The Proposed Mandatory Diversity and Inclusion and Elimination of Bias CLE
Requirement for New York State Attorneys

The New York State Bar Association (“NYSBA”) has a long history of encouraging and promoting diversity and inclusion and elimination of bias in the legal profession and in our society. Accordingly, we support the American Bar Association’s (“ABA”) proposal that diversity and inclusion and elimination of bias be made a mandatory part of the attorney continuing legal education (“CLE”) requirement in New York (“D&I CLE”), and propose a method to achieve this goal as described more fully in Sections E and F, below.¹

The issue of diversity and inclusion and elimination of bias was an agenda item at the ABA’s mid-year meeting in February 2016 as Resolution 107, which was approved unanimously and without opposition by the ABA House of Delegates.²

Resolution 107 in relevant part:

[E]ncourages all state, territorial and tribal courts, bar associations and other licensing and regulatory authorities that *currently* require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”).

California and Minnesota have already established D&I CLE requirements for their attorneys.³ We believe that New York should also.

¹ In July 21, 2016, the New York City Bar Association submitted a letter, subscribed to by a number of diversity bar associations, supporting the call for a mandatory D&I CLE requirement. This was followed by additional correspondence from the leadership of the New York City Bar to the Chair of the New York State CLE Board, Justice Betty Weinberg Ellerin. See Appendix A. Upon review, NYSBA decided to submit its own proposal based on the makeup and needs of its membership and the legal profession as a whole, rather than sign onto the City Bar letter. After a period of extensive review and discussion by the NYSBA CLE Subcommittee on Diversity, Mirna M. Santiago, Chair of the NYSBA CLE Subcommittee on Diversity, and H. Douglas Guevara, Senior Director of NYSBA CLE, drafted the proposal for the implementation of a D&I CLE requirement, which was reviewed and approved by the majority of the NYSBA CLE Committee and also approved without comment by the NYSBA Committee on Diversity and Inclusion.

² 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.

³ The California Bar’s website (<http://mcle.calbar.ca.gov/MCLE/OnlineCLE.aspx>) lists 34 online programs that qualify for “elimination of bias” credit and which are offered in a variety of formats, including on demand,

B. The Historical, Societal and Legal Profession Backdrop

Issues of race, ethnicity, gender identity and religion⁴ – including issues related to economic disparity, unequal access to opportunities, statistically disproportionate outcomes in the criminal justice system,⁵ 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. In addition, other diverse groups (such as the disabled and the elderly) are now a large segment of the population due to returning war veterans and “baby boomers” reaching retirement age.

Women continue to lag behind men with respect to earnings in the legal profession.⁶ A recent survey by Vault.com and The Minority Corporate Counsel Association showed that successful recruitment of minority lawyers continues at a glacial pace, with 15% of attorneys at surveyed firms in 2016 as compared to 13.8% in 2007. In addition, lawyers of color continue to leave their firms at a disproportionate rate⁷ and female attorneys of color, in particular, feel like they are being pushed out of Big Law.⁸ These statistics reflect a small part of the obstacles faced overall in the society at large by people of color and other diverse groups, including attorneys of color and others who do not fit within the norms recognized by society.

These findings, coupled with the changing demographics of the nation, where – as of 2014 – 50.2% of all children born in the United States were minorities,⁹ make it clear that lawyers – as thought leaders – must address the issues flowing from these historical and societal realities.

C. How Will Mandatory D&I CLE Increase New York Attorneys’ Professional Legal Competency?

CLEtoGo (podcasts), and self-study articles. The Minnesota State Bar Association also has an established D&I CLE requirement offering a wide variety of D&I/Elimination of Bias CLE courses through their website (<http://www.mnbar.org/cle-events/on-demand-cle/on-demand-elimination-of-bias-cles>). See Appendix B for a complete list of courses.

⁴ “Actions Speak Too: Uncovering Possible Implicit and Explicit Discrimination in the Employment Interview Process,” Therese Macan and Stephanie Merritt, *International Review of Industrial and Organizational Psychology* 2011, Volume 26 (2011).

⁵ Incarceration rates for men and women of color continue to be significantly higher than those of white prisoners. A 2013 U.S. Department of Justice report cited that non-Hispanic blacks (37%) comprised the largest portion of male inmates under state or federal jurisdiction as compared to non-Hispanic whites, while the imprisonment rate for black females was twice the rate of white females. <http://www.bjs.gov/content/pub/pdf/p13.pdf>

⁶ “Male partners make 44% more on average than female partners, survey finds,” *ABA Journal*, October 13, 2016. http://www.abajournal.com/news/article/male_partners_make_44_percent_more_on_average_than_female_partners_survey_f/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email

⁷ <http://abovethelaw.com/2016/03/high-minority-attrition-rates-continue-to-plague-large-law-firms/>.

⁸ A recent report in the *ABA Journal* showed that 85% of female attorneys of color in the United States will quit large firms within seven years of starting their practice, with a number surveyed stating that they “feel they have no choice.”

http://www.abajournal.com/mobile/mag_article/minority_women_are_disappearing_from_biglaw_and_heres_why

⁹ <http://www.usnews.com/news/articles/2015/07/06/its-official-the-us-is-becoming-a-minority-majority-nation>. See also <https://www.census.gov/quickfacts/table/PST045215/00> (showing declining numbers of “white alone” individuals in the United States).

NYSBA considers increasing diversity and inclusion and elimination of bias in the profession and in the practice of law to be essential to respond effectively to the needs of our changing society. The D&I CLE requirement proposed by NYSBA relates directly to professional legal competency because it is designed to educate lawyers to better serve their clients.

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.¹⁰

Including a mandatory diversity and inclusion component as part of New York lawyers' CLE obligations will help advance all four values, by providing attorneys with ongoing education in this important area while helping erode discrimination and implicit bias in the practice of law.

D. Other New York Bars' Support for D&I CLE

The New York City Bar Association has taken the lead in advocating for adoption of a D&I CLE requirement, initially focusing on the elimination of bias in attorney hiring, retention and promotion, advising the State CLE Board that a "required D&I CLE program would be an important tool to raise awareness of both explicit and implicit bias within the profession and to educate and empower those who can affect change, particularly law firm leaders."¹¹ The New York City Bar subsequently submitted two additional letters to the CLE Board, discussing the

¹⁰ 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).

¹¹ See note "1" above and Appendix A..

need for a D&I CLE requirement and the proposed scope of courses that would satisfy that requirement.¹²

There is agreement among the Amistad Long Island Black Bar Association, Association of Black Women Attorneys, Association of Law Firm Diversity Professionals, Dominican Bar Association, Hispanic National Bar Association, Jewish Lawyers Guild, LGBT Bar Association of Greater New York, Long Island Hispanic Bar Association, Metropolitan Black Bar Association, Muslim Bar Association of New York, Puerto Rican Bar Association, New York City Bar Association and South Asian Bar Association of New York that the adoption of a mandatory D&I CLE credit would be a positive development for attorneys in New York. The presidents of these organizations signed onto the letter sent by the New York City Bar to the New York State CLE Board in July 2016, recommending this action.¹³

E. NYSBA's Proposal

NYSBA recommends that all CLE providers should be encouraged to create a wide range of programs for all practice areas that incorporate diversity and inclusion, which would include the elimination of bias – whether dealing with other attorneys, clients, courts or anyone else in the legal system.

The NYSBA CLE Committee concluded that diversity and inclusion CLE need not be limited to employment decisions and trends in the legal profession or to the elimination of bias in the profession itself. As noted above, because of the changing demographics of the country, the need is apparent for attorneys to be fully versed in issues relating to the legal representation of minorities and other diverse individuals (e.g., LGBTQ, the elderly and the disabled). In discussions between NYSBA and the New York City Bar, a consensus was reached that any D&I CLE requirement should be broadly defined.

Based on a survey of existing offerings by accredited providers, it appears that courses that would satisfy a D&I CLE requirement fall into one or more of the following categories: (I) how lawyers perceive and interact with each other as employers, colleagues and partners; (II) how lawyers perceive and interact with those they come in contact with during the course of practicing law, such as court personnel, witnesses, jurors, judges and opposing counsel; (III) ways in which lawyers can better understand and represent their clients who face barriers, biases and discrimination; (IV) non-discrimination, non-harassment and competent representation as part of a lawyer's ethical obligations; (V) discrimination and bias in the broader legal and societal context and the role of lawyers in addressing them; and (VI) the law and legal issues as they relate to diverse groups and protected classes.¹⁴

F. How NYSBA Proposes the Mandatory CLE Be Implemented

The NYSBA CLE Committee proposes that one (1) or two (2) credit hours of D&I CLE be required for the biennial reporting period. We recommend that the diversity and inclusion

¹² Id.

¹³ See Appendix A.

¹⁴ See Appendix A (October 17, 2016 letter) and Appendix B.

CLE be a stand-alone (“floating”) CLE requirement, but not add to the thirty-two (32) credit hours required for new attorneys or the twenty-four (24) hours required for more experienced attorneys.¹⁵ The D&I CLE could count toward any of the required credit hours, including Ethics, Skills or Areas of Professional Practice/Law Practice Management.

To implement this change, NYSBA proposes that §1500.2 (Definitions) of the CLE Board Rules and Regulations be amended to include the following definition for “Diversity and Inclusion”:

Diversity and Inclusion must address diversity and inclusion in the legal profession and the practice of law of all persons regardless of race, ethnicity, national origin, gender, sexual orientation, gender identity, religion, age or disability and may include, among other things, how issues of diversity and inclusion may arise within the scope of the Rules of Professional Conduct, application within the procedural and substantive aspects of law practice, and law practice management, including elimination of bias. The diversity and inclusion requirement may be fulfilled through courses addressing diversity and inclusion within the existing categories of credit listed in §1500.2.

Should the D&I CLE rule be implemented, New York State accredited providers would continue to consider each program on its individual merits and decide whether to award skills, professional practice, ethics, law practice management or D&I credit, or some combination thereof. CLE providers make these assessments in the ordinary course of business and it is not anticipated that a different approach would be used in assessing D&I CLE programming for potential accreditation.

G. Conclusion

We urge the members of the House of Delegates to support this important initiative by voting in support of NYSBA’s recommendation to the New York State CLE Board.

¹⁵ For example, a one-hour program titled “Disparate Impact of Sentencing Guidelines” would fall under both the Professional Practice category and Diversity and Inclusion. The attorney would count that class as one credit (not two) that would count toward a practice area CLE and the aggregate biennial CLE requirement of 24 or 32 credits, but the attorney would also be able to attest in his/her biennial registration that s/he met his/her D&I requirement. Similarly, a one-hour program titled “The Ethics of Diversity and Inclusion” would count toward the Ethics requirement, but – again – the attorney also would be able to attest that the D&I requirement had been met.

Appendix A:

New York City Bar Association D&I CLE Proposal and
Subsequent Correspondence with New York State CLE Board

July 21, 2016

Hon. Janet DiFiore
Chief Judge of the State of New York
New York State Unified Court System
Office of Court Administration, Rm. 852
25 Beaver Street
New York, NY 10004

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

Dear Chief Judge DiFiore:

The undersigned bar associations respectfully urge the licensing and regulatory authorities governing attorney admission in New York State to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession and programs regarding the elimination of bias (“D&I CLE”).

This issue was an agenda item at the American Bar Association (ABA)’s mid-year meeting this past February as Resolution 107, which was approved unanimously and without opposition by the ABA House of Delegates.¹ The resolution expands upon a 2004 House of Delegates resolution—Resolution 110—which amended the language of the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education to provide that regulatory systems require lawyers—either through a separate credit or through existing ethics and professionalism credits—to complete programs related to racial and ethnic diversity and the elimination of bias in the profession. Resolution 107 **expands the definition** of diversity and inclusion to include all persons regardless of race, ethnicity, gender, sexual orientation, gender identity or disabilities; and it also encourages all licensing and regulatory authorities that currently require mandatory continuing legal education (MCLE) to include, **as a separate required credit**, D&I CLE. The resolution does not specify the number of hours of D&I CLE required or call for an increase in the total number of MCLE credits required per cycle.

¹ 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.

Of the 45 states that currently have mandatory continuing legal education, only two—California and Minnesota—have adopted stand-alone D&I CLE requirements. Thus, the resolution, if implemented nationally, would have a wide-ranging impact on attorneys licensed to practice law in the United States. Despite efforts by many New York City law firms to increase their engagement and investment in diversity progress and retention, the attrition rate of minority attorneys at those and other New York law firms remains disproportionately high. We must do more to reverse this trend.

Instituting D&I CLE as a separate required credit for attorneys licensed to practice in New York would be a significant step toward addressing this pervasive, but often unspoken, problem within our profession. We believe this change would be straightforward and easily understood by attorneys. Similar to the stand-alone ethics requirement under our current continuing legal education system, all lawyers renewing their New York State registration would certify that they had completed, as part of their required 20 hours of non-ethics credits, the required number of credit hours in D&I CLE during the immediately preceding biennial reporting cycle.

Moreover, we need not limit diversity and inclusion to the ABA's suggested definition. Rather, we suggest that the Board adopt the broader definition set forth in New York's Human Rights Law, which prohibits discrimination on the basis of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status or marital status (Executive Law § 296). Since New York has defined its protected classes under state law, any New York CLE program that educates lawyers on diversity, inclusion and the elimination of bias should follow suit.

The legal profession is grounded on principles of equality, access to justice and the rule of law. It therefore behooves us—as legal practitioners who advocate for these principles in the courtroom—to learn to recognize discrimination within our own organizations and law firms and to work toward eliminating bias in all aspects of the profession, including in our workplaces, in the courthouses and vis-à-vis our clients. CLE programs are an important tool to raise awareness of both explicit and implicit bias within the profession and to educate and empower those who can effect change, particularly law firm leaders. And, like the ABA, we believe that D&I

programs are appropriate for MCLE certification because their “primary objective [is] to increase the professional legal competency of the attorney in ethics and professionalism, skills, practice management and/or areas of professional practice.” See 22 NYCRR 1500.4(b)(2).

We stand ready to assist in whatever way will help the Board to implement this important addition to our state’s CLE requirements. Thank you for your consideration.

Respectfully,

Amistad Long Island Black Bar Association

Cherice Vanderhall, *President*

Association of Law Firm Diversity Professionals

Carlos Dávila-Caballero, *President*

Hispanic National Bar Association

Robert Maldonado, *National President*

LGBT Bar Association of Greater New York (LeGaL)

Meredith R. Miller, *President*

Metropolitan Black Bar Association

Taa Grays, *President*

Puerto Rican Bar Association

Betty Lugo, *President*

South Asian Bar Association of New York

Rippi Gill, *President*

Association of Black Women Attorneys

Kaylin Whittingham, *President*

Dominican Bar Association

Queenie Paniagua, *President*

Vianny Pichardo, *Director & President-Elect*

Jewish Lawyers Guild

Bruce Raskin, *Board Chair*

Shoshana Bookson, *President*

Long Island Hispanic Bar Association

Frank Torres, *President*

Muslim Bar Association of New York

Atif Rehman, *President*

New York City Bar Association

John S. Kiernan, *President*

Cc: Hon. Betty Weinberg Ellerin, Chair, NYS Continuing Legal Education Board
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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.

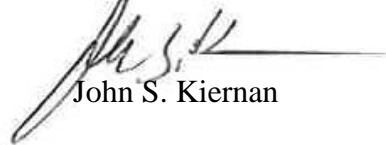
¹⁷ Id. at 486.

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

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

NEW YORK
CITY BAR

JOHN S. KIERNAN
PRESIDENT
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October 17, 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: Proposal that New York adopt a separate CLE requirement for diversity, inclusion and the elimination of bias (“D&I CLE”) as per ABA Resolution 107

Dear Justice Ellerin:

Thank you for your continued consideration of the proposal to modify New York’s existing CLE requirements (without increasing the total required hours) by adopting a separate CLE requirement for diversity, inclusion and the elimination of bias. I am writing in response to your request for information about programs that already are being offered for CLE credit either under the D&I category or, in those states that do not currently recognize a D&I category, under some other category for accreditation.

To respond to your request, we surveyed CLE program offerings that we believe providers would consider accrediting for a D&I CLE requirement in New York, as well as courses that already are accredited in California and Minnesota, the two states that have long required attorneys to fulfill separate D&I CLE requirements. We also reviewed multistate online D&I CLE offerings because they provide a good overview of the types of courses that will be accessible to lawyers regardless of the location or size of their practices.

Based on our survey of existing offerings, it appears that D&I CLE courses fall into one or more of the following categories: (i) how lawyers perceive and interact with each other as employers, colleagues and partners; (ii) how lawyers perceive and interact with those they come in contact with during the course of practicing law, such as court personnel, witnesses, jurors, judges, opposing counsel, etc.; (iii) ways lawyers can better understand and represent their clients who face barriers, biases and discrimination; (iv) non-discrimination, non-harassment and competent representation as part of a lawyer’s ethical obligations; (v) discrimination and bias in the broader legal and societal context and the role of lawyers in addressing them; and (vi) the law and legal issues as they relate to diverse groups and protected classes.

This letter provides an overview of CLE courses we believe may be relevant to your consideration of this proposal. We understand that definitional and apportionment issues among the accreditation categories – i.e., ethics and professionalism, skills, areas of professional practice, law practice management, and diversity, inclusion and the elimination of bias - may still need to be discussed and ironed out. We are happy to continue participating in those discussions if you think that would be helpful.

New York City Bar Association:

In 2016, the New York City Bar Association hosted two diversity and inclusion programs as to which we awarded CLE credit. In light of the City Bar's position as a New York State accredited CLE provider, the City Bar's programs are presumptively accredited after being reviewed by our CLE Department for compliance with the CLE Board's regulations. Because of the special nature of these programs, however, we engaged in a dialogue with the CLE Board staff to ensure "pre-approval" and to maintain our own best practices for program review.

On April 22, 2016, we hosted Dr. Arin N. Reeves as she presented, "The Explicit Impact of Implicit Bias: Unpacking and Interrupting Implicit Bias to Create More Diverse and Inclusive Legal Workplaces," for which attendees received 2.0 credits of law practice management. The program materials are attached. Dr. Reeves is in great demand for this type of programming and we hope to engage her for similar programming in the future. Her program was extremely well received and well reviewed.

On May 24, 2016, we hosted a full-day Diversity and Inclusion Conference, sponsored by our Enhance Diversity in the Profession Committee. We had originally advocated for accreditation of three separate segments: (i) "Intersectionality"; (ii) "From Bystanders to Upstanders: Activating Allies and Advocates for Inclusion"; and (iii) a General Counsel and Managing Partners Forum. We received approval for only the third segment because, in the view of the CLE Board, the first two were not sufficiently related to the legal profession or the practice of law, and did not have the required legal "wrapper". Therefore, for the third segment, attendees received 1.5 credits in ethics. The program materials are attached.

In addition, the City Bar frequently hosts programs that cover anti-discrimination laws, civil rights and legal issues pertaining to diverse groups and protected classes. These programs currently are typically accredited for professional practice credits.

We anticipate that, should New York adopt this proposal, our CLE Department would consider each program on its individual merits and decide whether to award skills, professional practice, ethics, law practice management or D&I credit, or some combination. CLE providers make these assessments in the ordinary course of business and we do not anticipate a different approach to assessing D&I CLE programming for potential accreditation.

New York State Bar Association:

A sampling of recent and upcoming offerings of the State Bar that appear to fall into one of the above-mentioned six categories include:

- Representing LGBT Clients After Obergefell
- Human Trafficking in NYS: Legal Issues and Advocating for the Victim
- Representing the Transgender Client Through the Arc of Life
- The Path to Marriage Equality & Beyond: Representing LGBT Clients in a Post-DOMA World
- Justice, Race and Police Force
- Contemporary Civil Rights in Relation to the 50th Anniversary of the Civil Rights Act
- The Impact of Implicit Bias on Lawyers and the Legal Profession

Timed agendas and outlines for these programs are attached.¹

American Bar Association:

The ABA² offers online D&I/elimination of bias CLEs, including, “Canaries in the Coalmine: Succeeding as Female Counsel in Male-Dominated Industries,” and recently hosted a webinar entitled, “Transgender Issues in the Legal Profession and its Impact on Diversity and Inclusion.” Furthermore, as part of Resolution 107, the ABA has pledged to assist in the development and creation of D&I CLE. Thus, we can anticipate additional relevant programming and materials to be offered through the ABA in the future. For instance, on October 6, 2016, the ABA held a program entitled “Implicit Bias: How to Recognize and Address It – and New Model Rule 8.4(g),” which awarded attendees 1.0 credit in the “elimination of bias” category.

California:

The State Bar of California website³ lists 34 online programs that qualify for elimination of bias credit and are offered in a variety of formats, including on demand, CLEtoGo (podcasts), self-study articles (review an article and answer 20 questions at the end—counts as 1 hour of credit) and webcasts.

Some programs focus on elimination of bias within the profession:

- Bias in the Legal Profession
- Discrimination and Bias: Strategies for Preventing and Responding in the Intellectual Property Bar
- Guess Who’s Coming to Court

¹ Questions regarding State Bar programming can be directed to H. Douglas Guevara, Senior Director, Continuing Legal Education, 518-487-5580 or dguevara@nysba.org.

² <http://www.americanbar.org/aba.html>.

³ <http://mcle.calbar.ca.gov/MCLE/OnlineCLE.aspx>.

- Recognizing and Addressing Implicit Gender Bias in the Arena of the Solo & Small Firm
- Avoiding Cultural Missteps

Other programs focus on elimination of bias across a broad range of practice areas, relevant to both large firm and solo practitioners, including criminal justice, environmental law, family law and litigation:

- Addressing the Needs of Persons with Disabilities in the Criminal Justice System
- Bias: The Enemy of Persuasion
- Bring Diversity and Equity in Environmental Planning
- Cultural Competency in Domestic Violence Cases
- Delights, Diversions, and Discriminations: The Bias and Business of Show Business
- Elimination of Bias in Jury Selection: Wheeler/Batson/Lenix in the Courtroom
- Religion Issues Affecting Family Law Strategy
- Does Gender Matter in Antitrust Law? Tips from Experienced Practitioners in Private Practice, Government and In-house Roles on How to Survive and Thrive in Your Antitrust Practice
- Ten Common Mistakes in Mediation and How to Avoid Them

In addition, California lawyers can access CLE programs sponsored by State Bar of California-approved MCLE providers through online vendors like Versatape,⁴ which offers elimination of bias programs such as:

- Elimination of Bias: Transgender Rights
- Challenges Faced by Minorities and Women in the Legal Profession
- How to Recognize Cross Cultural Issues in Litigation, Negotiation and Mediation
- Understanding and Mitigating Bias (including a professional responsibility segment)

Minnesota:

The Minnesota State Bar Association offers a wide variety of D&I/Elimination of Bias CLE courses through their website,⁵ including the following programs on-demand or through teleconference and webcast:

⁴ <http://www.versatape.com/>.

⁵ <http://www.mnbar.org/cle-events/on-demand-cle/on-demand-elimination-of-bias-cles>.

- Impact of Technology on Diversity and Inclusion in the Legal Profession
- Fisher v. University of Texas at Austin (a conversation about the value of diversity in education and legal practice as well as the challenges and contributions of black attorneys and law students in Minnesota, in response to questions raised by Chief Justice Roberts)
- Helping Your Client Legally Change Gender
- The Mall of America Protest Cases, Black Lives Matter, and the Minnesota Legal System
- Understanding Ogbergefell v. Hodges: The decision and its effects on related areas of law
- Clients from Other Cultures: Traps & Tips
- Transgender People Interacting with the Legal and Healthcare Industries— Personal and Practical Insights

In addition, the Minnesota state court system offered a program in May 2012, “Ramsey County Mental Health Court: Working with the Mentally Ill Defendant”.⁶

Multistate:

Multistate CLE providers offer a range of programs as well. For example, the Practising Law Institute⁷ lists upcoming online programs that qualify for elimination of bias credit in California and/or Minnesota, as well as for ethics or other CLE credit in multiple other states, including New York:

- PLI’s California MCLE Marathon 2016: Current Developments in Legal Ethics – Competence Issues—Elimination of Bias (approved in California for 4 credits in ethics, 1 credit in elimination of bias, and 1 credit in competence issues; approved in New York for 7 credits in ethics)
- How to Become a Culturally Competent Attorney (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in ethics)
- Representing Transgender Clients: Practical Skills and Cultural Competency (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 1 ethics credit and 6.5 credits in professional practice)
- Working with Immigrants: The Intersection of Basic Immigration, Housing and Domestic Violence Issues in California (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 7 credits in professional practice)

⁶ Available at http://www.mncourts.gov/Documents/2/Public/Criminal/RCMHC_CLE_Flyer_5-23-12.pdf.

⁷ <http://www.pli.edu/>.

- Diversity & Inclusion in Law Practice 2016 (approved in California and Minnesota for 2.25 elimination of bias credits and 1 general credit; approved in New York for 2.5 ethics credits and 1.5 credits in professional practice)
- Providing Respectful and Culturally Competent Services to LGBT Clients (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in professional practice)

Likewise, LawLine⁸ offers multiple programs that qualify for elimination of bias credit in states that have that requirement and for ethics or other types of CLE credit in other states, including New York. Course offerings include:

- Steps to Eliminate Bias in the Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Implicit Bias: The Bias You Didn't Know You Have... But You Do (approved in Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Leveling the Playing Field: Elimination of Bias in the Legal Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)

Similarly, LexVid⁹ offers courses that qualify for elimination of bias credit in California and/or Minnesota and are approved for credit in multiple other states, including New York, such as:

- Respect in the Workplace—The Legal Landscape of Harassment, Bias & Discrimination in the Workplace, Part II (approved in California for 1.75 elimination of bias credits; approved in New York for 2.0 credits {unspecified; presumably professional practice});
- Unconscious Bias and the Legal Profession (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)
- Bias and LGBT Issues in the Legal Workplace (approved in California for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- The Elimination of Bias in the Practice of Law (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)

⁸ <https://www.lawline.com/>.

⁹ <http://www.lexvid.com/>.

* * *

I hope this information is useful for your purposes. Please let me know if I can be of any further assistance. Thank you again for your attention to this important proposal.

Respectfully,

A handwritten signature in black ink, appearing to read "John S. Kiernan", with a horizontal line extending to the right from the end of the signature.

John S. Kiernan

Encl.

cc: Elise Geltzer, Esq., Counsel, NYS Continuing Legal Education Board (w/encl.)
Office of Court Administration
25 Beaver Street
New York, NY 10004

Appendix B:

Sample D&I CLE Programs from
New York and Around the Country

Appendix B

Sample Programs from New York and Around the Country

New York:

Despite not having a mandatory diversity and inclusion and/or elimination of bias CLE requirement, the New York State Bar Association has presented the following programs that would qualify for D&I credit:

- Justice, Race and Police Force
- Going Beyond Ferguson and Garner
- Constance Baker Motley Symposium: The Impact of Implicit Bias on Lawyers and the Legal Profession
- Representing LGBT Clients after Obergefell
- Human Trafficking in New York State: Legal Issues and Advocating for the Victim
- Contemporary Civil Rights in Relation to the 50th Anniversary of the Civil Rights Act
- The Path to Marriage Equality & Beyond: Representing LGBT Clients in a Post-DOMA World
- Representing the Transgender Client through the Arc of Life

The New York City Bar Association has presented the following programs that would also qualify for D&I credit:

- The Explicit Impact of Implicit Bias: Unpacking and Interrupting Implicit Bias to Create More Diverse and Inclusive Legal Workplaces
- Diversity and Inclusion Conference: a General Counsel and Managing Partners Forum

Other CLE providers have also presented D&I programs.

California:

California is one of two states that currently have a D&I CLE requirement. California Bar's website (<http://mcle.calbar.ca.gov/MCLE/OnlineCLE.aspx>) lists 34 online programs that qualify for elimination of bias credit and which are offered in a variety of formats, including on demand, CLEtoGo (podcasts), self-study articles (review an article and answer 20 questions at the end—counts as 1 hour of credit) and webcasts.

Some programs focus on elimination of bias within the profession:

- Bias in the Legal Profession
- Discrimination and Bias: Strategies for Preventing and Responding in the Intellectual Property Bar
- Guess Who's Coming to Court
- Recognizing and Addressing Implicit Gender Bias in the Arena of the Solo & Small Firm
- Avoiding Cultural Missteps

Other programs focus on diversity and inclusion and the elimination of bias across a broad range of practice areas, relevant to both large firm and solo practitioners, including criminal justice, environmental law, family law and litigation:

- Addressing the Needs of Persons with Disabilities in the Criminal Justice System
- Bias: The Enemy of Persuasion
- Bring Diversity and Equity in Environmental Planning
- Cultural Competency in Domestic Violence Cases
- Delights, Diversions, and Discriminations: The Bias and Business of Show Business
- Elimination of Bias in Jury Selection: Wheeler/Batson/Lenix in the Courtroom
- Religion Issues Affecting Family Law Strategy
- Does Gender Matter in Antitrust Law? Tips from Experienced Practitioners in Private Practice, Government and In-house Roles on How to Survive and Thrive in Your Antitrust Practice
- Ten Common Mistakes in Mediation and How to Avoid Them

In addition, California lawyers can access CLE programs sponsored by State Bar of California-approved MCLE providers through online vendors like Versatape (www.versatape.com), which offers elimination of bias programs, such as:

- Elimination of Bias: Transgender Rights
- Challenges Faced by Minorities and Women in the Legal Profession
- How to Recognize Cross Cultural Issues in Litigation, Negotiation and Mediation
- Understanding and Mitigating Bias (including a professional responsibility segment)

Minnesota:

Minnesota is the second state with a mandatory D&I CLE requirement. The Minnesota State Bar Association offers a wide variety of D&I/Elimination of Bias CLE courses through their website (<http://www.mnbar.org/cle-events/on-demand-cle/on-demand-elimination-of-bias-cles>), including the following programs on-demand or through teleconference and webcast:

- Impact of Technology on Diversity and Inclusion in the Legal Profession
- *Fisher v. University of Texas at Austin* (a conversation about the value of diversity in education and legal practice as well as the challenges and contributions of black attorneys and law students in Minnesota, in response to questions raised by Chief Justice Roberts)
- Helping Your Client Legally Change Gender
- The Mall of America Protest Cases, Black Lives Matter, and the Minnesota Legal System
- Understanding *Ogbergefell v. Hodges*: The decision and its effects on related areas of law
- Clients from Other Cultures: Traps & Tips
- Transgender People Interacting with the Legal and Healthcare Industries—Personal and Practical Insights

In addition, the Minnesota state court system offered a program in May 2012, “Ramsey County Mental Health Court: Working with the Mentally Ill Defendant” at http://www.mncourts.gov/Documents/2/Public/Criminal/RCMHC_CLE_Flyer_5-23-12.pdf.

Multistate:

There are a range of programs offered through multistate CLE providers as well. By way of example, the Practising Law Institute (<https://pli.edu/>) lists upcoming online programs that qualify for elimination of bias credit in California and/or Minnesota, as well as for ethics or other CLE credit in multiple other states, including New York. For example:

- PLI’s California MCLE Marathon 2016: Current Developments in Legal Ethics – Competence Issues—Elimination of Bias (approved in California for 4 credits in ethics, 1 credit in elimination of bias, and 1 credit in competence issues; approved in New York for 7 credits in ethics)
- How to Become a Culturally Competent Attorney (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in ethics)
- Representing Transgender Clients: Practical Skills and Cultural Competency (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 1 ethics credit and 6.5 credits in professional practice)
- Working with Immigrants: The Intersection of Basic Immigration, Housing and Domestic Violence Issues in California (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 7 credits in professional practice)
- Diversity & Inclusion in Law Practice 2016 (approved in California and Minnesota for 2.25 elimination of bias credits and 1 general credit; approved in New York for 2.5 ethics credits and 1.5 credits in professional practice)
- Providing Respectful and Culturally Competent Services to LGBT Clients (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in professional practice)

Likewise, LawLine (www.lawline.com) offers multiple programs that qualify for elimination of bias credit in states that have that requirement and for ethics or other types of CLE credit in other states, including New York. Course offerings include:

- Steps to Eliminate Bias in the Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Implicit Bias: The Bias You Didn’t Know You Have... But You Do (approved in Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Leveling the Playing Field: Elimination of Bias in the Legal Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)

Similarly, LexVid (www.lexvid.com) offers courses that qualify for elimination of bias credit in California and/or Minnesota and are also approved for credit in multiple other states, including New York, such as:

- Respect in the Workplace—The Legal Landscape of Harassment, Bias & Discrimination in the Workplace, Part II (approved in California for 1.75 elimination of bias credits; approved in New York for 2.0 credits {unspecified; presumably professional practice});
- Unconscious Bias and the Legal Profession (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)
- Bias and LGBT Issues in the Legal Workplace (approved in California for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- The Elimination of Bias in the Practice of Law (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)

Finally, the ABA (<http://www.americanbar.org/aba.html>) also offers online D&I/elimination of bias CLEs, including:

- Canaries in the Coalmine: Succeeding as Female Counsel in Male-Dominated Industries
- Transgender Issues in the Legal Profession and its Impact on Diversity and Inclusion.



MEMORANDUM

December 14, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed New York Continuing Legal Education Requirement for Diversity, Inclusion, and the Elimination of Bias

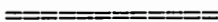
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The Continuing Legal Education Board of the Unified Court System is seeking public comment on a proposed amendment of the rule addressing mandatory continuing legal education (CLE) for attorneys in the State of New York (22 NYCRR §1500) that would impose a one-credit requirement in CLE for experienced attorneys (admitted to the New York Bar for more than two years) addressing the subject of diversity, inclusion, and the elimination of bias (Exh. A). This credit would be included within, and would not add to, the current requirement of 24 credit hours of accredited CLE in each attorney biennial reporting cycle (see, 22 NYCRR §1500.22[a]).

As reported in a memorandum provided by representatives of various bar associations (Exh. B) and correspondence from the New York City Bar Association (Exhs. C and D), the proposal builds upon the recommendations of the American Bar Association set forth in ABA Resolution 107 (February 2016; Exh. E), and is designed to increase diversity and inclusion and to promote equality of opportunity in the legal profession.

Currently, only California and Minnesota have adopted stand-alone diversity and inclusion CLE requirements. Proponents of the amendment note that New York adoption of this requirement would have a substantial impact on the legal profession's awareness of issues of bias and inclusion – both in New York State and in the nation at large (Exh. B, p. 2).

Any amendment of Part 1500 would require the approval of the Departments of the New York State Supreme Court, Appellate Division.



Persons wishing to comment on the proposed rules should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than February 15, 2017.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System, the Continuing Legal Education Board, the Departments of the Appellate Division, or the Office of Court Administration.

EXHIBIT A

Proposed Amendment of 22 NYCRR §1500.22
Issued for Public Comment on December 15, 2016

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Subpart C. Mandatory Continuing Legal Education for Attorneys Other Than Newly Admitted Attorneys

* * *

§1500.22. Minimum Requirements.

(a) Credit Hours. Each attorney shall complete a minimum of 24 credit hours of accredited continuing legal education each biennial reporting cycle in ethics and professionalism, skills, law practice management, ~~or~~ areas of professional practice or diversity, inclusion, and the elimination of bias, at least four (4) credit hours of which shall be in ethics and professionalism and at least one (1) credit hour of which shall be in diversity, inclusion, and the elimination of bias. Ethics and professionalism, skills, law practice management, ~~and~~ areas of professional practice and diversity, inclusion, and the elimination of bias are defined in §1500.2.* The ethics and professionalism components or the diversity, inclusion, and the elimination of bias component may be intertwined with other courses.

*Section 1500.2 will be revised to include a definition of diversity, inclusion and the elimination of bias.

EXHIBIT B

July 21, 2016

Hon. Janet DiFiore
Chief Judge of the State of New York
New York State Unified Court System
Office of Court Administration, Rm. 852
25 Beaver Street
New York, NY 10004

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

Dear Chief Judge DiFiore:

The undersigned bar associations respectfully urge the licensing and regulatory authorities governing attorney admission in New York State to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession and programs regarding the elimination of bias (“D&I CLE”).

This issue was an agenda item at the American Bar Association (ABA)’s mid-year meeting this past February as Resolution 107, which was approved unanimously and without opposition by the ABA House of Delegates.¹ The resolution expands upon a 2004 House of Delegates resolution—Resolution 110—which amended the language of the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education to provide that regulatory systems require lawyers—either through a separate credit or through existing ethics and professionalism credits—to complete programs related to racial and ethnic diversity and the elimination of bias in the profession. Resolution 107 **expands the definition** of diversity and inclusion to include all persons regardless of race, ethnicity, gender, sexual orientation, gender identity or disabilities; and it also encourages all licensing and regulatory authorities that currently require mandatory continuing legal education (MCLE) to include, **as a separate required credit**, D&I CLE. The resolution does not specify the number of hours of D&I CLE required or call for an increase in the total number of MCLE credits required per cycle.

¹ 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.

Of the 45 states that currently have mandatory continuing legal education, only two—California and Minnesota—have adopted stand-alone D&I CLE requirements. Thus, the resolution, if implemented nationally, would have a wide-ranging impact on attorneys licensed to practice law in the United States. Despite efforts by many New York City law firms to increase their engagement and investment in diversity progress and retention, the attrition rate of minority attorneys at those and other New York law firms remains disproportionately high. We must do more to reverse this trend.

Instituting D&I CLE as a separate required credit for attorneys licensed to practice in New York would be a significant step toward addressing this pervasive, but often unspoken, problem within our profession. We believe this change would be straightforward and easily understood by attorneys. Similar to the stand-alone ethics requirement under our current continuing legal education system, all lawyers renewing their New York State registration would certify that they had completed, as part of their required 20 hours of non-ethics credits, the required number of credit hours in D&I CLE during the immediately preceding biennial reporting cycle.

Moreover, we need not limit diversity and inclusion to the ABA's suggested definition. Rather, we suggest that the Board adopt the broader definition set forth in New York's Human Rights Law, which prohibits discrimination on the basis of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status or marital status (Executive Law § 296). Since New York has defined its protected classes under state law, any New York CLE program that educates lawyers on diversity, inclusion and the elimination of bias should follow suit.

The legal profession is grounded on principles of equality, access to justice and the rule of law. It therefore behooves us—as legal practitioners who advocate for these principles in the courtroom—to learn to recognize discrimination within our own organizations and law firms and to work toward eliminating bias in all aspects of the profession, including in our workplaces, in the courthouses and vis-à-vis our clients. CLE programs are an important tool to raise awareness of both explicit and implicit bias within the profession and to educate and empower those who can effect change, particularly law firm leaders. And, like the ABA, we believe that D&I

programs are appropriate for MCLE certification because their “primary objective [is] to increase the professional legal competency of the attorney in ethics and professionalism, skills, practice management and/or areas of professional practice.” See 22 NYCRR 1500.4(b)(2).

We stand ready to assist in whatever way will help the Board to implement this important addition to our state’s CLE requirements. Thank you for your consideration.

Respectfully,

Amistad Long Island Black Bar Association
Cherice Vanderhall, *President*

Association of Black Women Attorneys
Kaylin Whittingham, *President*

Association of Law Firm Diversity Professionals
Carlos Dávila-Caballero, *President*

Dominican Bar Association
Queenie Paniagua, *President*
Vianny Pichardo, *Director & President-Elect*

Hispanic National Bar Association
Robert Maldonado, *National President*

Jewish Lawyers Guild
Bruce Raskin, *Board Chair*
Shoshana Bookson, *President*

LGBT Bar Association of Greater New York (LeGaL)
Meredith R. Miller, *President*

Long Island Hispanic Bar Association
Frank Torres, *President*

Metropolitan Black Bar Association
Taa Grays, *President*

Muslim Bar Association of New York
Atif Rehman, *President*

Puerto Rican Bar Association
Betty Lugo, *President*

New York City Bar Association
John S. Kiernan, *President*

South Asian Bar Association of New York
Rippi Gill, *President*

Cc: Hon. Betty Weinberg Ellerin, Chair, NYS Continuing Legal Education Board
Elise Geltzer, Esq., Counsel, NYS Continuing Legal Education Board

Contact: Maria Cilenti, Senior Policy Counsel, New York City Bar Association
mcilenti@nycbar.org or 212-382-6655

EXHIBIT C



NEW YORK
CITY BAR

JOHN S. KIERNAN
PRESIDENT
Phone: (212) 382-6700
Fax: (212) 768-8116
jkiernan@nycbar.org

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.

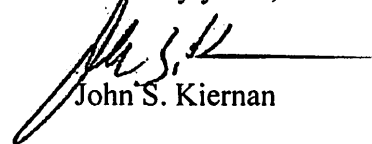
¹⁷ Id. at 486.

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,



John S. Kiernan

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

EXHIBIT D



NEW YORK
CITY BAR

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October 17, 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: Proposal that New York adopt a separate CLE requirement for diversity, inclusion and the elimination of bias (“D&I CLE”) as per ABA Resolution 107

Dear Justice Ellerin:

Thank you for your continued consideration of the proposal to modify New York’s existing CLE requirements (without increasing the total required hours) by adopting a separate CLE requirement for diversity, inclusion and the elimination of bias. I am writing in response to your request for information about programs that already are being offered for CLE credit either under the D&I category or, in those states that do not currently recognize a D&I category, under some other category for accreditation.

To respond to your request, we surveyed CLE program offerings that we believe providers would consider accrediting for a D&I CLE requirement in New York, as well as courses that already are accredited in California and Minnesota, the two states that have long required attorneys to fulfill separate D&I CLE requirements. We also reviewed multistate online D&I CLE offerings because they provide a good overview of the types of courses that will be accessible to lawyers regardless of the location or size of their practices.

Based on our survey of existing offerings, it appears that D&I CLE courses fall into one or more of the following categories: (i) how lawyers perceive and interact with each other as employers, colleagues and partners; (ii) how lawyers perceive and interact with those they come in contact with during the course of practicing law, such as court personnel, witnesses, jurors, judges, opposing counsel, etc.; (iii) ways lawyers can better understand and represent their clients who face barriers, biases and discrimination; (iv) non-discrimination, non-harassment and competent representation as part of a lawyer’s ethical obligations; (v) discrimination and bias in the broader legal and societal context and the role of lawyers in addressing them; and (vi) the law and legal issues as they relate to diverse groups and protected classes.

This letter provides an overview of CLE courses we believe may be relevant to your consideration of this proposal. We understand that definitional and apportionment issues among the accreditation categories – i.e., ethics and professionalism, skills, areas of professional practice, law practice management, and diversity, inclusion and the elimination of bias - may still need to be discussed and ironed out. We are happy to continue participating in those discussions if you think that would be helpful.

New York City Bar Association:

In 2016, the New York City Bar Association hosted two diversity and inclusion programs as to which we awarded CLE credit. In light of the City Bar’s position as a New York State accredited CLE provider, the City Bar’s programs are presumptively accredited after being reviewed by our CLE Department for compliance with the CLE Board’s regulations. Because of the special nature of these programs, however, we engaged in a dialogue with the CLE Board staff to ensure “pre-approval” and to maintain our own best practices for program review.

On April 22, 2016, we hosted Dr. Arin N. Reeves as she presented, “The Explicit Impact of Implicit Bias: Unpacking and Interrupting Implicit Bias to Create More Diverse and Inclusive Legal Workplaces,” for which attendees received 2.0 credits of law practice management. The program materials are attached. Dr. Reeves is in great demand for this type of programming and we hope to engage her for similar programming in the future. Her program was extremely well received and well reviewed.

On May 24, 2016, we hosted a full-day Diversity and Inclusion Conference, sponsored by our Enhance Diversity in the Profession Committee. We had originally advocated for accreditation of three separate segments: (i) “Intersectionality”; (ii) “From Bystanders to Upstanders: Activating Allies and Advocates for Inclusion”; and (iii) a General Counsel and Managing Partners Forum. We received approval for only the third segment because, in the view of the CLE Board, the first two were not sufficiently related to the legal profession or the practice of law, and did not have the required legal “wrapper”. Therefore, for the third segment, attendees received 1.5 credits in ethics. The program materials are attached.

In addition, the City Bar frequently hosts programs that cover anti-discrimination laws, civil rights and legal issues pertaining to diverse groups and protected classes. These programs currently are typically accredited for professional practice credits.

We anticipate that, should New York adopt this proposal, our CLE Department would consider each program on its individual merits and decide whether to award skills, professional practice, ethics, law practice management or D&I credit, or some combination. CLE providers make these assessments in the ordinary course of business and we do not anticipate a different approach to assessing D&I CLE programming for potential accreditation.

New York State Bar Association:

A sampling of recent and upcoming offerings of the State Bar that appear to fall into one of the above-mentioned six categories include:

- Representing LGBT Clients After Obergefell
- Human Trafficking in NYS: Legal Issues and Advocating for the Victim
- Representing the Transgender Client Through the Arc of Life
- The Path to Marriage Equality & Beyond: Representing LGBT Clients in a Post-DOMA World
- Justice, Race and Police Force
- Contemporary Civil Rights in Relation to the 50th Anniversary of the Civil Rights Act
- The Impact of Implicit Bias on Lawyers and the Legal Profession

Timed agendas and outlines for these programs are attached.¹

American Bar Association:

The ABA² offers online D&I/elimination of bias CLEs, including, “Canaries in the Coalmine: Succeeding as Female Counsel in Male-Dominated Industries,” and recently hosted a webinar entitled, “Transgender Issues in the Legal Profession and its Impact on Diversity and Inclusion.” Furthermore, as part of Resolution 107, the ABA has pledged to assist in the development and creation of D&I CLE. Thus, we can anticipate additional relevant programming and materials to be offered through the ABA in the future. For instance, on October 6, 2016, the ABA held a program entitled “Implicit Bias: How to Recognize and Address It – and New Model Rule 8.4(g),” which awarded attendees 1.0 credit in the “elimination of bias” category.

California:

The State Bar of California website³ lists 34 online programs that qualify for elimination of bias credit and are offered in a variety of formats, including on demand, CLEtoGo (podcasts), self-study articles (review an article and answer 20 questions at the end—counts as 1 hour of credit) and webcasts.

Some programs focus on elimination of bias within the profession:

- Bias in the Legal Profession
- Discrimination and Bias: Strategies for Preventing and Responding in the Intellectual Property Bar
- Guess Who’s Coming to Court

¹ Questions regarding State Bar programming can be directed to H. Douglas Guevara, Senior Director, Continuing Legal Education, 518-487-5580 or dguevara@nysba.org.

² <http://www.americanbar.org/aba.html>.

³ <http://mcle.calbar.ca.gov/MCLE/OnlineCLE.aspx>.

- Recognizing and Addressing Implicit Gender Bias in the Arena of the Solo & Small Firm
- Avoiding Cultural Missteps

Other programs focus on elimination of bias across a broad range of practice areas, relevant to both large firm and solo practitioners, including criminal justice, environmental law, family law and litigation:

- Addressing the Needs of Persons with Disabilities in the Criminal Justice System
- Bias: The Enemy of Persuasion
- Bring Diversity and Equity in Environmental Planning
- Cultural Competency in Domestic Violence Cases
- Delights, Diversions, and Discriminations: The Bias and Business of Show Business
- Elimination of Bias in Jury Selection: Wheeler/Batson/Lenix in the Courtroom
- Religion Issues Affecting Family Law Strategy
- Does Gender Matter in Antitrust Law? Tips from Experienced Practitioners in Private Practice, Government and In-house Roles on How to Survive and Thrive in Your Antitrust Practice
- Ten Common Mistakes in Mediation and How to Avoid Them

In addition, California lawyers can access CLE programs sponsored by State Bar of California-approved MCLE providers through online vendors like Versatape,⁴ which offers elimination of bias programs such as:

- Elimination of Bias: Transgender Rights
- Challenges Faced by Minorities and Women in the Legal Profession
- How to Recognize Cross Cultural Issues in Litigation, Negotiation and Mediation
- Understanding and Mitigating Bias (including a professional responsibility segment)

Minnesota:

The Minnesota State Bar Association offers a wide variety of D&I/Elimination of Bias CLE courses through their website,⁵ including the following programs on-demand or through teleconference and webcast:

⁴ <http://www.versatape.com/>.

⁵ <http://www.mnbar.org/cle-events/on-demand-cle/on-demand-elimination-of-bias-cles>.

- Impact of Technology on Diversity and Inclusion in the Legal Profession
- Fisher v. University of Texas at Austin (a conversation about the value of diversity in education and legal practice as well as the challenges and contributions of black attorneys and law students in Minnesota, in response to questions raised by Chief Justice Roberts)
- Helping Your Client Legally Change Gender
- The Mall of America Protest Cases, Black Lives Matter, and the Minnesota Legal System
- Understanding Ogbergefell v. Hodges: The decision and its effects on related areas of law
- Clients from Other Cultures: Traps & Tips
- Transgender People Interacting with the Legal and Healthcare Industries—Personal and Practical Insights

In addition, the Minnesota state court system offered a program in May 2012, “Ramsey County Mental Health Court: Working with the Mentally Ill Defendant”.⁶

Multistate:

Multistate CLE providers offer a range of programs as well. For example, the Practising Law Institute⁷ lists upcoming online programs that qualify for elimination of bias credit in California and/or Minnesota, as well as for ethics or other CLE credit in multiple other states, including New York:

- PLI’s California MCLE Marathon 2016: Current Developments in Legal Ethics – Competence Issues—Elimination of Bias (approved in California for 4 credits in ethics, 1 credit in elimination of bias, and 1 credit in competence issues; approved in New York for 7 credits in ethics)
- How to Become a Culturally Competent Attorney (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in ethics)
- Representing Transgender Clients: Practical Skills and Cultural Competency (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 1 ethics credit and 6.5 credits in professional practice)
- Working with Immigrants: The Intersection of Basic Immigration, Housing and Domestic Violence Issues in California (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 7 credits in professional practice)

⁶ Available at http://www.mncourts.gov/Documents/2/Public/Criminal/RCMHC_CLE_Flyer_5-23-12.pdf.

⁷ <http://www.pli.edu/>.

- Diversity & Inclusion in Law Practice 2016 (approved in California and Minnesota for 2.25 elimination of bias credits and 1 general credit; approved in New York for 2.5 ethics credits and 1.5 credits in professional practice)
- Providing Respectful and Culturally Competent Services to LGBT Clients (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in professional practice)

Likewise, LawLine⁸ offers multiple programs that qualify for elimination of bias credit in states that have that requirement and for ethics or other types of CLE credit in other states, including New York. Course offerings include:

- Steps to Eliminate Bias in the Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Implicit Bias: The Bias You Didn't Know You Have... But You Do (approved in Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Leveling the Playing Field: Elimination of Bias in the Legal Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)

Similarly, LexVid⁹ offers courses that qualify for elimination of bias credit in California and/or Minnesota and are approved for credit in multiple other states, including New York, such as:

- Respect in the Workplace—The Legal Landscape of Harassment, Bias & Discrimination in the Workplace, Part II (approved in California for 1.75 elimination of bias credits; approved in New York for 2.0 credits {unspecified; presumably professional practice});
- Unconscious Bias and the Legal Profession (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)
- Bias and LGBT Issues in the Legal Workplace (approved in California for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- The Elimination of Bias in the Practice of Law (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)

⁸ <https://www.lawline.com/>.

⁹ <http://www.lexvid.com/>.

* * *

I hope this information is useful for your purposes. Please let me know if I can be of any further assistance. Thank you again for your attention to this important proposal.

Respectfully,



John S. Kiernan

Encl.

cc: Elise Geltzer, Esq., Counsel, NYS Continuing Legal Education Board (w/encl.)
Office of Court Administration
25 Beaver Street
New York, NY 10004

EXHIBIT E

ADOPTED

RESOLUTION

1 RESOLVED, That the American Bar Association encourages all state, territorial, and
2 tribal courts, bar associations and other licensing and regulatory authorities, that have
3 mandatory or minimum continuing legal education requirements (MCLE) to modify their
4 rules to:

- 5
- 6 1. include as a separate credit programs regarding diversity and inclusion in the legal
7 profession of all persons regardless of race, ethnicity, gender, sexual orientation,
8 gender identity, or disabilities, and programs regarding the elimination of bias
9 (“D&I CLE”); and
 - 10
 - 11 2. require a designated minimum number of hours for this separate credit without
12 increasing the total number of required MCLE hours and without changing the
13 criteria for MCLE credit.

14 FURTHER RESOLVED, That the American Bar Association, through its Goal III and
15 other entities, assist in the development and creation of diversity and inclusion continuing
16 legal education programs to ensure attorneys can meet their MCLE requirements.

AMERICAN BAR ASSOCIATION
Diversity and Inclusion 360 Commission
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association encourages all state, territorial, and
2 tribal courts, bar associations and other licensing and regulatory authorities, that have
3 mandatory or minimum continuing legal education requirements (MCLE) to modify their
4 rules to:
5
6 1. include as a separate credit programs regarding diversity and inclusion in the
7 legal profession of all persons regardless of race, ethnicity, gender, sexual
8 orientation, gender identity, or disabilities, and programs regarding the
9 elimination of bias (“D&I CLE”); and
10
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12 increasing the total number of required MCLE hours and without changing the
13 criteria for MCLE credit.
- 14 FURTHER RESOLVED, That the American Bar Association, through its Goal III and
15 other entities, assist in the development and creation of diversity and inclusion continuing
16 legal education programs to ensure attorneys can meet their MCLE requirements.
17

REPORT

I. Introduction

The ABA Diversity & Inclusion 360 Commission (the “Commission”) was created in August 2015 to formulate methods, policy, standards and practices to best advance diversity and inclusion over the next ten years. The Commission was charged with reviewing and analyzing diversity and inclusion in the legal profession, the judicial system, and the American Bar Association. Moreover, the Commission was charged with recommending specific action items to move the needle on diversity and inclusion in an impactful way. The Commission has examined diversity and inclusion related continuing legal education because of its potential to significantly impact the profession, the judicial system and the rule of law.

In 2004, the House of Delegates approved Resolution 110 amending the language of the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education. The amended language provided that regulatory systems require lawyers, either through a separate credit or through existing ethics and professionalism credits, complete as part of their mandatory continuing legal education those programs related to racial and ethnic diversity and the elimination of bias in the profession. The resolution being sponsored by the Diversity & Inclusion 360 Commission builds and expands on that prior recognition of the importance and need for programs regarding diversity and inclusion in the legal profession and further expands the definition of diversity and inclusion consistent with current ABA Goal III to include all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities. The Commission believes that while the 2004 resolution was a good start to address the need for diversity and inclusion programs, more can be and should be done to advance diversity and inclusion in a meaningful and productive manner.

The resolution encourages all state, territorial and tribal courts, bar associations and other licensing and regulatory authorities that *currently* require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Although several states currently allow MCLE credits for D&I CLE, only California and Minnesota have adopted stand-alone D&I CLE requirements.

The resolution does not specify the number of hours for D&I CLE, or increase the total number of MCLE hours required. Rather, the resolution encourages the adoption of a separate credit within those MCLE requirements to ensure that all attorneys receive education regarding the elimination of bias, and diversity and inclusion.

II. Current Status of MCLE and Diversity and Inclusion CLE

Forty five states currently have mandatory continuing legal education. Therefore, the proposed resolution has the potential to impact the vast majority of attorneys in the United States. As referenced above, California and Minnesota have already adopted stand-alone D&I MCLE requirements. Their requirements are as follows:

California: California requires one (1) hour of “Recognition and Elimination of Bias in the Legal Profession and Society” as a component of its three-year MCLE requirements. <http://mcle.calbar.ca.gov/Attorneys/Requirements.aspx>.

Minnesota: Minnesota requires two (2) hours related to “Elimination of Bias” as a component of its three-year MCLE requirements. https://www.mbcle.state.mn.us/mbcle/pages/general_info.asp.

Additional states allow programs on elimination of bias to qualify for ethics and/or professionalism credits, but do not create separate D&I CLE requirements. Those states include Hawaii, Kansas, Illinois, Maine, Nebraska, Oregon, Washington, and West Virginia.

The Commission considered the merits of both approaches – those that create a separate D&I CLE category, and those that provide ethics credits for D&I CLE. Ultimately, the Commission concluded that the California and Minnesota models best advance the goal of diversity and inclusion by ensuring *all* attorneys actually receive D&I CLE.

Recognizing the wide array of existing MCLE requirements, the Commission declined to specify a precise number of required hours. Rather, each jurisdiction should determine the appropriate number of required hours within their current MCLE requirements

III. The Availability of D&I Inclusion CLE

The resolution calls upon the ABA, through its Goal III and other entities, to assist in the development and creation of D&I CLE. This is to ensure that all attorneys can satisfy their new D&I CLE requirement. Although we are confident that CLE providers will ultimately develop programming in response to the new D&I CLE requirement (similar to the prevalence of ethics and professionalism CLE classes), the Commission wants to ensure that *all* attorneys have access to D&I CLE, and that a potential lack of availability of D&I CLE does not deter any jurisdiction from adopting a D&I CLE requirement.

IV. Conclusion

The resolution encourages each jurisdiction that currently has MCLE to designate a minimum number of credit hours for D&I CLE. In order to ensure that all state and territorial bar associations’ attorneys can meet those requirements, the resolution calls upon the American Bar Association, through its Goal III and other entities, to assist in the development and creation of D&I CLE. The resolution is consistent with the ABA’s

longstanding commitment to diversity and inclusion in the legal profession as evidenced in Resolution 110 approved by the House of Delegates in 2004. It is also consistent with multiple states that have recognized the need for D&I CLE. As such, we respectfully request that House of Delegates adopt the resolution.

Respectfully submitted,

Diversity and Inclusion 360 Commission

GENERAL INFORMATION FORM

Submitting Entity: Diversity & Inclusion 360 Commission

Submitted By:

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1. Summary of Resolution(s). The resolution encourages all state, territorial, and tribal courts, bar associations and other licensing and regulatory authorities that currently require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Although several states currently allow MCLE credits for D&I CLE, only California and Minnesota have adopted stand-alone D&I CLE requirements.
2. Approval by Submitting Entity. The Diversity and Inclusion 360 Commission approved this Resolution at its fall meeting on October 6, 2015.
3. Has this or a similar resolution been submitted to the House or Board previously? In 2004, the House approved Resolution 110 amending the language in the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education. The amended language provided that regulatory systems require lawyers, either through a separate credit or through existing ethics and professionalism credits, complete as part of their mandatory continuing legal education those programs related to racial and ethnic diversity and elimination of bias in the profession.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This resolution builds and expands on Resolution 110. Additionally, Goal III of our Association seeks increased awareness of diversity and inclusion, and the elimination of bias. This resolution addresses the intent of Goal III.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a
6. Status of Legislation. (If applicable) n/a

- 7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
- 8. Cost to the Association. (Both direct and indirect costs) None anticipated
- 9. Disclosure of Interest. (If applicable) n/a
- 10. Referrals. We have or will refer to all committees, sections, and divisions, particularly the Standing Committee on CLE, Litigation Section, TIPS, Business Law, Young Lawyers Division, and the entities within the Diversity Center, and NCBP.
- 11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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- 12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution encourages all state, territorial, and tribal courts, bar associations and other licensing and regulatory authorities who require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate credit, programs regarding diversity and inclusion in the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Further, this resolution while requiring a designated minimum number of hours for a separate credit, will not increase the total number of required MCLE hours or in any way change or alter the criteria for MCLE credit.

2. Summary of the Issue that the Resolution Addresses

This Resolution addresses the need to provide stand-alone Diversity and Inclusion CLE requirements for all attorneys who practice in MCLE states. The Resolution also advances Diversity and Inclusion by assisting in the development and creation of diversity and inclusion continuing legal education programs to ensure all attorneys can meet their MCLE requirements. The Resolution is in accordance with Goal III of the American Bar Association, which is to eliminate bias and enhance diversity in the profession.

3. Please Explain How the Proposed Policy Position will address the issue

This Resolution will increase the legal profession’s understanding and awareness of issues relating to diversity and inclusion, and the elimination of bias, by ensuring that all attorneys who are obligated to comply with MCLE requirements receive education related to diversity and inclusion, and the elimination of bias.

4. Summary of Minority Views

No minority views or opposition to this Resolution have been identified.