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# Who Do We Want to Be? A Candid Look at “Diversity, Equity, Inclusion & Belonging” Within the Legal Profession

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*Signature Resolution*

In the wake of the U.S. Supreme Court’s June 29, 2023 decision in *Students for Fair Admissions, Inc. v President and Fellows of Harvard College*, academics, professionals, and businesspeople across the country have been reevaluating diversity, equity, inclusion, and belonging (DEIB) efforts in the workplace, including in the nation’s law firms.

Opponents lost no time pursuing action against such programs. On July 13, 2023, thirteen state attorneys general sent a letter to every Fortune 100 CEO asserting that “the Supreme Court stated definitively that racial discrimination under the guise of affirmative action must end.” A member of Congress addressed a July 17, 2023 letter to employment attorneys at dozens of the nation’s largest law firms threatening Congressional oversight “to scrutinize the proliferation of race-based employment practices.”

Lawsuits were filed in August against Perkins Coie and Morrison & Foerster challenging their DEI internship programs. Both firms were recipients of diversity honors within the profession, but at least one of the firms appears to be trying to address the charges. The implications of this action could signal a worrisome shift in the legal industry.

## A Simple Question

Despite these legal challenges, as legal professionals we must ask ourselves one simple question: Who do we want to be?

We can argue about the value of affirmative action programs in higher education and in the workplace until we're blue in the face, but I submit to you, my fellow barristers, that—independent of our personal opinions on this issue—we collectively have an ethical obligation to ensure that our profession represents the clients and the broader society we serve.

What do we want our profession to represent? Do we want it to reflect and align with the growing diversity of our society, or do we want a profession and community of lawyers that only exist for the chosen few?

How we answer this question as individuals, as legal professionals, and as members of the broader community will dictate our continued and future DEIB and other efforts to level the playing field and to be examples to the rest of the world of what can and should be done. We have come a long way as a profession. Now—despite the changing tides—is not the time to go back.

So, let's discuss specifics.

## An Overview

To provide context to our discussion, I want to first review how affirmative action and DEIB programs and initiatives came about. Although this article is not about affirmative action per se, I believe providing this historical context will help us understand how DEIB programs emerged and how they have evolved over the years.

### *Affirmative Action*

Affirmative action, intended to overcome the effects of past practices, policies, or barriers to equal employment opportunity, was conceived in 1961 in President Kennedy's Executive Order 10925, which instructed federal contractors to take "affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin." In 1965, President Johnson's Executive Order 11246 required government contractors and subcontractors to take affirmative action to expand job opportunities for "minorities." It was amended in 1967 to include women.

The U.S. Supreme Court in *Regents of the University of California v. Bakke* (438 U.S. 912 (1978)) upheld the use of race as one factor in choosing among qualified applicants for admission. A year later, the Court ruled in *United Steelworkers v. Weber*

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(444 U.S. 889 (1979)) that race-conscious affirmative action efforts designed to eliminate a conspicuous racial imbalance in an employer's workforce resulting from past discrimination were permissible as long as they were temporary and did not violate the rights of white employees. Other decisions upheld the constitutionality of affirmative action as long as it was narrowly tailored to accomplish a compelling government interest—i.e., remedying discrimination. (See *Johnson v. Transportation Agency, Santa Clara County, California* (480 U.S. 616 (1987)); *Adarand Constructors, Inc. v. Peña* (513 U.S. 1012 (1994)).)

The affirmative action fabric changed in 1996, when California voters chose to dismantle the state's mandate. Proposition 209, the first electoral test of affirmative action policies in North America, passed by a narrow margin. The law abolished all public-sector affirmative action programs in employment, education and contracting and permitted gender discrimination "reasonably necessary" to the "normal operation" of public education, employment and contracting.

In June 2020, the California State Legislature passed Assembly Constitutional Amendment No. 5 (ACA-5) to put a qualified measure on the ballot, which was presented as Proposition 16, to reverse Proposition 209. Proposition 16, however, was rejected by voters in the November 2020 election, meaning that Proposition 209 remains in the California Constitution. Although it has been the subject of many lawsuits since its passage, the law has withstood legal scrutiny over the years.

Following the 1998 effective date of the Proposition 209 ban, UC Berkeley, campus-wide, saw a 61% drop in admissions of African American, Latino/a and Native American students; UCLA experienced a 36% decline across undergraduate and graduate programs.

Voters in eight other states—Washington, Florida, Michigan, Nebraska, Arizona, New Hampshire, Oklahoma, and Idaho—followed California's lead in abolishing affirmative action (Washington repealed its ban in 2022). In 1998, Congress rejected an attempt to eliminate the use of affirmative action in higher education admissions programs funded through the Higher Education Act.

As recently as 2016, in *Fisher v. University of Texas* (136 S. Ct. 2198, 579 US 365, 195 L. Ed. 2d 511), the Supreme Court held that diversity was a "compelling governmental interest" and that schools were permitted to consider race as a contributing factor for admissions in higher education.

Now that the Court has firmly ruled against affirmative action in higher education, the burning questions are whether and how this ruling will impact efforts to increase representation of underrepresented groups not only in higher education but also in the

workplace. Many commentators have predicted that corporate efforts to recruit and retain employees of color and other disadvantaged workers could now be sidetracked, slowed down, or outright shut down. It is my personal hope that this will not be the case.

### ***Diversity, Equity, Inclusion + Belonging***

With the rise of affirmative action in the 1960s, organizations and institutions began taking serious steps to level the playing field in the workplace. The first diversity, equity and inclusion programs coincided with the enactment of the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act of 1967. These laws prompted companies to start diversity training programs to help employees adjust to working in more integrated offices. DEI programs have grown to include efforts to increase gender, sexual orientation, religion, national origin, and other representation in the workplace.

The early 2010s saw an increased emphasis on accountability to ensure that diverse groups were represented at all economic and social levels, but the focus on accountability went into overdrive with the events of 2020. The national Black Lives Matter movement and the protests resulting from George Floyd's death in Minneapolis in May 2020 caused many companies—large and small—to invest more dollars and resources into their DEI programs. Between 2020 and 2022, 80% of dedicated executive and managerial-level DEI roles were established within organizations to build programs that would have a meaningful impact on the workplace, although recent statistics show that many of those roles have been and/or are slated to be eliminated.

At their core, strategic DEI programs—now with the added B for “Belonging”—are not only designed to increase the number of “diverse” individuals in the workplace but also are intended to boost team dynamics, productivity, and innovation, providing all team members with equal opportunities to feel included, valued and heard.

These terms tend to be loosely used, but what are we really talking about when we talk about “DEIB” in the workplace?

- “Diversity” refers to the demographics of the workplace, including ethnicity, gender, sexual orientation, age, military/veteran status, location, nationality, disability status, skills, and other factors.
- “Equity” refers to providing employees fair and equal access, opportunities, and advancements, regardless of their background. It may require companies to break down employees’ barriers to success, such as ensuring accessibility for disabled workers. A law firm, company, or organization whose employee

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numbers reflect “diversity” may not have created an environment that truly levels the playing field for such employees. Beyond numbers, employers must ask: “Has the organization taken steps to ensure that all employees can compete equally and be successful in the work environment?”

- “Inclusion” has to do with how employees interact, and it calls for everyone on the team to be treated fairly and respectfully, despite differences. Are day-to-day work programs and activities designed in a way that makes everyone feel included, and not just a select few?
- “Belonging” looks at the employee experience of feeling accepted in the workplace. Belonging to a team implies that an employee is needed and wanted. They feel that their contributions have value.

## Current Statistics in the Legal Field

Long before the Supreme Court’s recent affirmative action decision, the legal profession was responding to the underrepresentation of minorities in its ranks. It began doing some serious self-analysis, looking at its history and examining demographics. Along with much of corporate America, law firms undertook the serious business of addressing disparities within their ranks by embracing DEI programs.

Since 1989, the California Rules of Professional Conduct (CRPC) have included prohibitions against discriminatory behavior in the practice of law (See former CRPC 2-400). For at least three decades, California attorneys have been required to complete elimination of bias training, which requires “at least one hour dealing with the recognition and elimination of bias in the legal profession and society by reason of, but not limited to, sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation.”

Some leading legal publications joined the mission by adding a DEI category to their annual achievement awards, recognizing firms and practitioners who walked the walk in terms of hiring, mentoring, and challenging a broad spectrum of lawyers. For example, Bloomberg Law this year announced its “Diversity, Equity, & Inclusion Framework,” a listing of law firms “that meet or exceed a rising standard for diversity, equity, and inclusion in their firm.”

In 2020, the NALP Foundation studied law firms across the country to track the effects of the COVID-19 pandemic and the George Floyd protests. *Professional Development in a Pandemic: The Impact of COVID-19, Civil Unrest and Economic Crisis* includes these findings:

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- 88% of firms reported having department, staff, or other personnel responsible for developing and implementing DEI initiatives;
- 70% of firms reported that their DEI team's scope and responsibilities had increased after March 2020;
- 69% of firms reported an increase in their DEI team's visibility/clout among firm leadership.

How well has all of this worked? Not as well as hoped. [According to the American Bar Association](#), there were more than 1.3 million lawyers nationwide in 2022. The percentage who are people of color— Hispanic, African-American, Asian, Native American, and mixed race—grew less than three percentage points in the decade from 2010 to 2020, from 11.4% of all lawyers in 2010 to 14.1% of all lawyers in 2020. In 2020, 86% of all lawyers were non-Hispanic whites, while 60% of all U.S. residents were non-Hispanic whites in 2019. Five percent of all lawyers were Black against a U.S. population that was 13.4% Black. Similarly, 5% of lawyers were Hispanic even though Hispanics made up 18.5% of the U.S. population.

In its [First Annual Report Card on the Diversity of California's Legal Profession](#), the California State Bar found that despite higher numbers of women and minorities in the profession and in leadership roles, significant gaps remain.

- People of color comprise 60% of California's population; 70% of active licensed attorneys are white.
- Seven percent of attorneys are Latino; the state has a 36% Latino population.
- The percentage of newly licensed attorneys who are Black increased in the three decades between 1990 and 2021 from 3% to 5%.
- Five percent of attorneys report having a disability; 20% of Californians are disabled.
- People of color represent nearly one-third of attorneys in California law firms but comprise a mere 23% of partners.
- White men are 44% of attorneys in law firms but 56% of partners.
- Women of color are 15% of law firm attorneys but just 8% of partners.

Significantly, among attorneys in California law firms, “Women, people of color, LGBTQIA+ and people with disabilities consistently report lower levels of satisfaction with workplace experiences than white men.” As a profession, do we have a duty to address these concerns? I believe we do.

## **The Educational Pipeline**

So, if we want to ensure diversity in the legal field and profession, it all starts with the educational pipeline—not just in our law schools, but in our K-12 education system and our communities as a whole.

That gap will play out long after students complete their education. In a July 5, 2023 statement on the heels of the U.S. Supreme Court’s affirmative action decision, the Diversity in the Profession Section of the Los Angeles County Bar Association decried its negative impact on underrepresented groups in higher education: “Affirmative action in college admissions drives diversity by expanding opportunities to historically marginalized groups and helps ensure that college student bodies and the professions they enter reflect the rich diversity of our society.”

Limiting educational opportunities, the statement said, would have far-reaching implications, including hampering “efforts to diversify the educational pipeline leading to the legal profession.”

Without the intentionality imbued by affirmative action upon law schools, our legal profession has the potential of becoming monolithic—is that what we really want? Already schools are looking at other ways to attract and retain underrepresented students, including reaching out to lower-income communities, dispensing with standardized testing, and giving greater weight to application essays and extracurricular activities.

## **Why Does It Matter?**

In its 2022 diversity report card, the California State Bar put it succinctly: “Having a diverse legal profession positively impacts the administration of justice, ensures fairness, and promotes the rule of law. The mandate to promote a diverse and inclusive legal profession is central to the State Bar’s mission of public protection.”

The “mission of public protection” is central to the legal profession and sets it apart from most other professions. Many commentators are predicting a scaling back or dismantling of corporate DEI programs as a result of the Supreme Court’s decision, but that should not happen in the practice of law. As lawyers, we have a unique duty and responsibility to see that justice is done.

True justice can only be achieved when we legal professionals—lawyers, judges, neutrals, academics, and others in our profession—look beyond ourselves. When we exchange ideas, connect with, and develop meaningful relationships with people from different backgrounds and experiences, our views become wider, helping us see and appreciate how others see and view the world. The same thing happens when we work



on cases together. We bring to our clients a more inclusive world view that recognizes and responds to their issues.

The law—and the practice of law—should reflect the society in which we live. As we represent clients through their legal matters, it is critical that they see a diversity of backgrounds across the entire system, not just in law firms but among judges, mediators and arbitrators, prosecutors, and public defenders, and in supportive professions such as expert witnesses and jury consultants. If we want to best serve our clients and the legal industry, we must be able to relate to them from a broader set of perspectives and with deeper understanding, even those representing corporations and business organizations. The people and individuals *within* those organizations also deserve to work with lawyers and other legal professionals who understand and are sensitive to their diverse employee, vendor, consumer, and customer bases.

More importantly, for many underrepresented communities, lawyers of color are the first—and sometimes only—professionals to provide legal services. These attorneys can be lighthouses for their communities. When they return to mentor and give back, they serve as both role models and critical support systems for others. But when there are fewer lighthouses, underserved communities remain in the dark. True diversity across the legal profession allows the system to work by shining a 360-degree spotlight on the process. Everyone—lawyers, legal professionals, and disadvantaged communities—benefits.

## **Strategies That Work**

So, how do we continue to foster and create diversity in the legal field? Just as DEI has evolved to include a larger palette of colors and to add the all-important “B” of belonging, so too must the law evolve to recognize the contributions of traditionally marginalized and underrepresented communities within our ranks. In law schools, law firms and legal organizations, big and small, there can be no tolerance of separation, differentiation, and ostracism.

A policy statement celebrating diversity is not enough. As attorneys and leaders within our law firms and legal organizations, we must continue to take active steps and to develop strategies not only to recruit diverse attorneys and other legal professionals but also to ensure their success after hire.

How do we get there? The good news is that DEIB is not rocket science. Law firms, companies and organizations have spent years creating programs that make a difference. Although we still have a long way to go, there are good blueprints for expanding and diversifying the legal workplace.



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Successful law firm DEIB initiatives have included the following:

- **Leadership.** Any successful program or initiative starts with leadership from the top. When those at the top lead, others will follow.
- **Accountability & Measurable Goals.** SMART Goals are the key—specific, measurable, realistic, and timebound. Goals based on metrics, benchmarks and milestones can help firms track and align their DEIB initiatives with the firm’s goals. If an organization merely gives lip service to DEIB but doesn’t set measurable standards that are reviewed and re-evaluated on a regular basis, DEIB is meaningless. Goals must not only be clear, but they also must be clearly communicated throughout the firm or organization.
- **Recruiting.** Recruiting is, of course, critical. Firms should seek out law school students who will bring not just a knowledge and skill set but also interesting insights and experiences to the job. They can also do outreach to law students and attorneys of color and from other marginalized groups through targeted bar association and law student groups, job boards and word of mouth.
- **Mentorship/Sponsorship.** Mentorship and sponsorship are critical in every profession but especially so in the legal world. A lawyer’s success depends as much on relationships and other intangibles as it does on writing briefs and conducting discovery. The profession must look beyond simply honing skills and truly create environments that are welcoming to people of different backgrounds. Inclusion and belonging won’t happen unless everyone in the organization is part of the DEIB process. All members of the firm should be invested in the growth and retention of its attorneys.
- **Affinity Groups.** These groups provide opportunities for women, lawyers of color, LGBTQIA+, and other groups to network, mentor and provide support to one another both inside the firm and in the larger community.
- **Project Assignments.** Teams are selected for different types of clients and work based on the unique perspectives, experiences, and skills of individual attorneys.
- **DEIB Committee.** A dedicated committee includes representatives from every level of the organization, including partners, associates, paralegals, staff, and anyone else who wants to participate, and all have equal say in decisions. The group meets regularly and coordinates programming, communications, and initiatives for the firm.

- **Education & Training.** Regular training is provided for all attorneys on DEIB policies and practices. Such training helps to build strong working relationships between team members, promotes models for success of underrepresented attorneys, and provides attorneys with tools to better support their minority clients.

These are just a few of the ideas, programs and initiatives that have been used by many law firms and organizations and are working. However, every firm's DEIB strategy must be uniquely crafted and designed to meet that firm's individual goals and objectives.





## Conclusion

Despite the Supreme Court's rejection of affirmative action programs in higher education, and the most recent attacks on private law firms and workplaces, most accounts suggest that our nation's leading law schools understand the importance of supporting a diverse and inclusive student body. They will continue their efforts to recruit, train and graduate a broad cross-section of future lawyers.

Law firms and other legal organizations must also continue the work of fostering a profession that reflects the world around us. This means adopting policies and implementing practices that further diversity, equity, inclusiveness and belonging among lawyers, legal professionals and the clients who rely on us for full and equal access to the justice system. Justice should be blind, but the legal profession cannot be blind to the importance of ensuring our profession leads the way in ensuring equality and equity for all.

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