ILLINOIS STATE BAR ASSOCIATION

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Diversity Matters

The newsletter of the Illinois State Bar Association's Diversity Leadership Council

Editor's Note

BY SANDRA BLAKE

Diversity Matters is back after an extended COVID-related hiatus, and I am both proud and honored to continue as the editor.

Typically published annually by the ISBA Diversity Leadership Council at the time of the ISBA Annual Meeting, *Diversity Matters* is the only ISBA newsletter that is still available in print format. The Diversity Leadership Council is comprised of the ISBA Standing Committees on Disability Law, Racial and Ethnic Minorities and the Law, Sexual Orientation and Gender Identity, Women and the Law, the Human Rights Section and International and Immigration Law Section. Every effort has been made to cover issues of interest to each of the diversity-related constituents. Local, national, and international events during the hiatus have provided plenty of material

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The CROWN Act

BY JANELLE A. DIXON

Much of the world watched in disgust and dismay as a referee, on the sidelines of an ongoing wrestling tournament, sternly and with complete disregard for the student, hacked away at a young student's dreadlocks as a condition precedent for the young man to finish competing in a high school wrestling match. A child was required to choose between his cultural roots and a wrestling competition. Months earlier, a Black BP executive alleged that she was fired from her job after she wore her hair in braids to work. And recently, in Texas, a young male student was threatened with expulsion after he refused to cut his hair. Unfortunately, these are only a few examples in the laundry list of illustrations which demonstrate the ways in which American culture punishes Black Americans who do not conform with its one-sided standard of beauty. Despite the push by companies for diversity in hiring efforts, it remains apparent that many of these spaces want diversity in number, but nothing more. What must be understood, however, is that with diversity in applicants, so too comes diversity in appearance, diversity in attire, and diversity in hairstyles.

While companies are less likely to exhibit the overt discrimination that they did 40 years ago, modern-day racial discrimination is often much more subtle and can, sometimes, be harder to detect. Words like "professional," "neat," and

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in these areas.

Despite ongoing uncertainty regarding the pandemic and large social gatherings, every effort is also being made to get *Diversity Matters* back on track with another issue in June. Contributions are always welcome! ■

The CROWN Act

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"polished" have replaced a company's outright refusal to hire Black men and women and are now used to discriminate against Black women and men who have begun to embrace the natural texture of their hair. A Black woman's textured afro, seen by her as her crowning glory, is seen by many in corporate America as a threat to their image. Similarly, a Black man's decision to allow his hair to naturally grow into dreadlocks makes many see him as allegedly less approachable and more combatant. However, in an attempt to stop these biases about Black hair from creeping into hiring decisions (or lack thereof), state legislators have stepped in to protect their constituents and the future of the young Black boys and girls that these biases are affecting.

California became the first state to ban natural hair discrimination. The CROWN Act, which stands for "**C**reating a **R**espectful and **O**pen **W**orld for **N**atural Hair" was signed into law on July 3, 2019 and prohibits employers, as well as public schools, from banning natural black hairstyles, including braids, cornrows, and dreadlocks. The hairstyles do not alter the natural hair texture, as such, many liken the styles to being synonymous with a "racial trait."

On the heels of California's triumphant ban, across the coast, New York and New Jersey passed their own version of the CROWN Act. To date, 14 states, including Illinois, have passed similar laws, but there are still 36 states left to join this movement. One can only hope that the rest of the country will follow suit and the long history of racial discrimination on the basis of hairstyle will soon be a thing of the past. Our children are watching us, and the discrimination that has been allowed to take place inside the workspace, is seeping into our school systems. The CROWN Act is just the tip of the iceberg, but the advocates on the ground and behind the scenes will not allow it to be the end.

For additional information concerning the CROWN Act and to sign a petition for your state, visit www.thecrownact.com.■

This article was previously published in the Kane County Bar Association's Bar Briefs, *September/October 2020. Information on the states passing CROWN Act legislation has been updated.*

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Diversity Matters

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The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

Building a Diverse Bar Community Together, Not Siloed

BY JAZ PARK

In 2021, I served on the ISBA Steering Committee on Racial Inequality, as chair of the subcommittee Review & Analysis of the Structure of the ISBA and Legal Profession (ISBA and Diversity in the Legal Profession). Committee members included Maryam Arfeen, Kenyatta Beverly, Lea Gutierrez, Anna Lozoya, Dartesia Pitts and Bhavani Raveendran. Below are a few highlights of our work.

Our committee conducted an ISBA diversity assessment, which included a qualitative survey from minority bar leaders, a review of the 2016 Diversity Report and 2019 ISBA Membership Profile Survey and other materials. We made the recommendation for the ISBA to conduct a more comprehensive racial equity audit. Our feedback helped augment President Anna Krolikowska's plans to engage a diversity, equity, and inclusion (DEI) consultant during her term.

On a separate track, we examined two initiatives where the ISBA works extensively with diversity leadership: collaborative programming for the bar community and the judicial selection process. My experience as a co-chair of the Minority Bar CLE Conference ("MBCLE"), a joint CLE conference of mostly racial and ethnic-focused bar organizations, provided the groundwork for the first area. The advisement of MBCLE Co-Chair Jerrod Williams, Melissa Burkholder, and Joyce Williams, as well as my participation in the Judicial Evaluation Committee (JEC) through the Alliance member, Asian American Bar Association (AABA), has facilitated the review of the JEC process. The strong participation of the ISBA members in JEC, including incoming DLC Chair Bianca Brown, all reflect hopeful prospects for engaging in dialog regarding prospects for judicial evaluation process reform.

As a testament on the importance of the ISBA's role in supporting collaborative programming, my years with the MBCLE reflect a first-hand account of the dedication of Jeanne Heaton and the CLE staff. Since 2016, the ISBA Diversity Leadership Council (DLC) leadership has taken an active role on the MBCLE plenary committee, most recently Brian Fliflet and Shannon Shepherd. Not only did ISBA DLC and Standing Committee on Racial and Ethnic Minorities (REM) members attend the 2020 MBCLE in impactful numbers, the ISBA Steering Committee carried on the Defund Police program in its Legislative Reform Committee. While it may not have been apparent to attendees, the work of the ISBA Subcommittee played an integral role in the success of an all-bar event "Breaking Down our Silos," primarily led by AABA, and Sang Yup Lee, to close out Asian American Heritage month. Notably, ISBA Board of Governors, including three future presidents, REM, DLC, Steering Committee, MBCLE members joined the league of affinity bar leaders to generate proposals for future collaboration. This year, we have many synergies that we can look forward to. A central tenet of the MBCLE has been that the collaboration yields further action.■

Jaz Park served as chair of the ISBA Steering Committee on Racial Inequality subcommittee, co-chair of MBCLE, and vice-president of the Korean American Bar Association of Chicago. She is an attorney and lecturer and IIT Chicago-Kent College of Law. She can be contacted at Jaz@JazParkLaw.com

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Employing Individuals With Disabilities: Viewpoints Based on the Experiences of Two Disabled Attorneys

BY BRANDY JOHNSON AND PATTI CHANG

Authors' Note: Brandy Johnson and Patti Chang are both persons with disabilities and are active members of the ISBA. This article is not intended as a legal analysis. Rather it presents the opinion of the authors based on their lived experiences as people with visible disabilities with experience in the legal profession and provides practical information for employers.

Hiring

When navigating the process of securing employment, individuals with disabilities are frequently confronted with concerns that non-disabled applicants never have to contemplate. From the start, many disabled applicants are faced with quandaries that can have a real impact on whether they will receive an interview, much less be seriously considered for the position. Often, disabled applicants must address questions like: Do I indicate that I am disabled on my resume or cover letter? If I disclose my disability, can I still get my foot in the door? If I leave my disability off my resume, will the potential employer react negatively when my disability is disclosed or discovered?

In general, the disability community is of two minds about whether to "disclose" on a resume or in a cover letter. This is especially true for hidden disabilities. Consequently, employers should know that some individuals will not disclose a disability ahead of an interview. In fact, the authors of this article are split on this issue. When job hunting, Chang clearly disclosed while Johnson did not. "After a bad experience with a potential employer that was told of my disability prior to a scheduled interview," Johnson recalls, "I stopped disclosing my quadriplegia. I calculated that, while potential employers might be surprised when I appear at the interview in a wheelchair, I would still get the chance to meet with the employer about the position. I could also use the interview to assuage any concerns about my disability and discuss what I could bring to the table." Chang, on the other hand, took a different path. "I chose to focus on employers who could contemplate hiring a blind person," Chang explained. "In fact, I hoped that some employers might be looking for diversity."

Many people with hidden disabilities elect to go through the hiring process before disclosing their disabilities. While applicants that will need to request accommodations must eventually disclose their disabilities, these individuals can wait until the job offer is in hand before discussing the matter. Others yet may never let their employers know about their disabilities for myriad reasons, including the fear of encountering implicit bias or outright discrimination.

For people like Chang, who is blind, and Johnson, a wheelchair user, disclosure during the hiring process is inevitable. Since potential employers can observe these disabilities, the question becomes: Do I bring up my disability? Potential employers will typically not inquire about a disability during an interview, but disabled applicants may well raise the issue themselves. Although potential employers are not allowed to ask if someone has a disability or how they will do the job, nothing prevents disabled individuals from taking the initiative to talk about those subjects. By raising the subject and addressing it head on for the potential employer, the disabled individual can provide information that may help secure the position. Discussing the positive aspects of employing disabled individuals helps overcome the low expectations of some potential employers. Explaining how the job would get done can allay fears. Disability need not be the elephant in the room.

Johnson always let potential employers know that she would be able to travel and needed minimal accommodations. By explaining what she would need in accommodations, she was able to address any concerns the potential employer may have had about the costs associated with hiring her, if she would need more time off work than a nondisabled employee, and whether she would be able to effectively meet all the requirements of the job.

Likewise, Chang always raised her disability to ensure that employers understood that her lived experience of problem solving and innovating because of her disability brought positive attributes to the table. Once she opened the door, employers felt comfortable asking questions. For example, it is OK to ask about a dog guide if the interviewer is curious. Chang remembers an interviewer once inquiring about how she could find the restroom. Answering the question allowed her to address travel techniques more generally. (By the way, this occurred prior to the ADA's passage and such questions should no longer be asked in an interview. However, the applicant can volunteer the information on his or her own initiative.)

By raising the subject of their disabilities during interviews, both Chang and Johnson created the opportunity to explain to potential employers the benefits of hiring a disabled individual. For example, individuals with disabilities frequently encounter situations that require them to be problem solvers. Living as a disabled individual regularly requires creativity, innovative ideas, the ability to think outside of the box, and results in a unique point of view. These are strengths that would benefit any employer. Further, clients that have suffered

life-changing events and/or their own personal injuries may find individuals with disabilities to be more relatable, empathetic, easier to talk to about the challenges they are currently experiencing, and an overall good resource for information. In some cases, just the optics of an obvious physical disability can prove beneficial to clients. "When trying a personal injury case in front of a jury," Johnson stated, "the plaintiff's attorney must consider multiple factors, including whether the defense attorney's obvious physical disability will have an impact on the jury's assessment of the severity of the plaintiff's injury." Johnson, who specializes in workers' compensation defense, indicated that there have been times where her quadriplegia has served as leverage and/or aided in placing the extent of the plaintiff's injury into perspective. When prosecuting cases for the City of Chicago, Chang found that landlords who complained of their disabilities found suggestions for adaptive techniques rather than a sympathetic ear. "If you own property, you have the same responsibilities as any other owner," seemed more reasonable coming from a disabled individual when disability was the excuse for noncompliance.

Individuals with disabilities make excellent employees and usually do not increase an employer's "cost of doing business" simply because they are disabled. When making hiring decisions, potential employers should try to avoid making assumptions or forming conclusions about an individual's abilities and/or limitations. Employers are also encouraged to be aware of any bias, implicit or explicit, that may cause them to draw conclusions about an individual's abilities and/or limitations. This is true for any applicant, be they disabled, a minority, a parent, or a member of an underrepresented group. Diversity in the workplace has numerous benefits, a fact that should be kept in mind when making hiring decisions. Hiring a qualified disabled applicant should not be viewed as a risky and/or costly business decision. Instead, potential employers should view the opportunity for what it is – the chance to hire a qualified employee with a unique point of view and further diversify its workforce.

Workload and Promotional Process

While hiring a diverse workforce is a great first step, employers need to strive to achieve inclusion. In an inclusive workplace, the employees should receive equal treatment, access and opportunities. Employees should feel able to fully contribute and invested in the firm/organization's success. Employees should be treated the same when decisions are made regarding project/case assignments, mentoring, progress evaluations, constructive criticism, promotional opportunities, pay raises/bonuses, client development, marketing, and termination. Employees that are members of minority and/or underrepresented groups, such as the disabled, should be afforded an equal chance for success. To do so, employers must be aware of bias in its many forms--including explicit, implicit and confirmation bias--and work to eliminate it from the firm's/organization's policies, procedures and practices. It is essential that employers expect the same performance from disabled and nondisabled employees. People with disabilities do things differently, but they can still get the job done.

Employers should not make assumptions regarding the capabilities and/or limitations of disabled employees. While working for the City of Chicago Law Department, Chang noticed early on that her supervisor gave her simpler cases than those assigned to most of her colleagues. When Chang inquired about it, her supervisor explained that he avoided assigning cases with a lot of handwriting because handwriting is hard to convert with Optical Character Recognition (OCR) software. (Blind individuals often access printed material using OCR conversion software.) Chang's supervisor was "being sensitive" to her disability, but he did not consider that she may have had an alternative solution, and his decision inadvertently had a negative impact on her possibility of promotion. Bias encountered by disabled individuals is often based in a misguided attempt to help, or low expectations that are based on good intentions. Good intentions, however, do not negate the resulting harm that the bias causes.

The best way to ensure fairness is to give the same level of opportunity to disabled and nondisabled employees. Rather than making presumptions, rely on your disabled employee to ask for accommodations if any are needed. After all, who knows more about an employee's disability and how to manage it: the employer or the disabled employee?

When it is not possible to offer the same opportunities to disabled and nondisabled employees, employers should consult with the disabled employee to try and find an alternative solution that levels the playing field. Golf outings are a good example. Golf tournaments and golf outings are frequently used for client development and marketing. In addition to networking, such outings give employees the opportunity to become better acquainted with senior partners, equity partners, or an organization's executives/management. Becoming better acquainted with decision makers within a firm/organization can lead to additional work, better case assignments, mentoring, and promotional opportunities. Likewise, the time spent meeting clients and potential clients during golf outings can lead to new business, increased business and promotional opportunities. As popular as golf outings tend to be, not all employees can participate in them. Golf is not an activity that would be accessible for either Johnson or Chang, placing both at a disadvantage when compared to their golfing co-workers.

While it is unrealistic to expect employers to forgo golf outings, they should be encouraged also to look for different options that non-golfers (disabled and nondisabled alike) can use to receive similar marketing and client development opportunities, as well as access to the firm's/organization's partners/decision makers. Arranging other (accessible) activities with clients, attending conventions for marketing opportunities, and enjoying a long lunch or dinner with partners/executives/management are just some possibilities. Solutions are out there,

but employers must recognize the need to look for them and then be willing to follow through. The time and effort will be rewarded, as their employees will feel like they are an important part of the team, and consequently, will be more invested, loyal and satisfied.

There are numerous benefits to having a diverse and inclusive workforce. Not only is such a workforce desirable to many clients in today's society, it also helps to attract talent, provide a variety of different perspectives when tackling problems, increase productivity and improve the quality of the work product. In diversifying a workplace, the value that disabled employees can offer should not be overlooked or marred by misconceptions and erroneous beliefs.■

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A New Rule of Evidence: The Effect of Immigration Status in Illinois Civil Proceedings

BY PATRICK M. KINNALLY

The Illinois General Assembly has enacted 735 ILCS 5/18-2901, a new rule of evidence that applies to civil proceedings. The rule follows similar enactments in Washington and California. See S.Ct. Washington, Evidence Rule 413 (2017) California Evidence Code, 351.3, 351.4 (2018), respectively. This law, which is not a Supreme Court Rule, announces, with some exceptions, that evidence related to a person's immigration status is not admissible in any civil proceeding with certain exceptions. 735 ILCS 5/18-2901. This statute, effective January 1, 2020, states:

> Sec. 8-2901. Admissibility of evidence; immigration status.
>
> (a) Except as provided in subsection (b), evidence related to a person's immigration status is not admissible in any civil proceeding.
>
> (b) Evidence otherwise inadmissible under this Act is admissible if:
>
> (1) it is essential to prove an element of a claim or an affirmative defense;
>
> (2) it is offered to prove an interest or bias of a witness, if it does not cause confusion of the issues or mislead the trier of fact, and the probative value of the evidence outweighs its prejudicial nature; or
>
> (3) a person or his or her attorney voluntarily reveals his or her immigration status to the court.
>
> (c) A party intending to offer evidence relating to a person's immigration status shall file a written motion at least 14 days before a hearing or a trial specifically describing the evidence and stating the purpose for which it is offered. A court, for good cause, may require a different time for filing or permit filing during trial.
>
> Upon receipt of the motion and notice to all parties, the court shall conduct an *in camera* hearing, with counsel present, limited to review of the probative value of the person's immigration status to the case. If the court finds that the evidence relating to a person's immigration status meets the criteria set forth in paragraph (1), (2), or (3) of subsection (b), the court shall make findings of fact and conclusions of law regarding the permitted use of the evidence.
>
> The motion, related papers, and the record of the hearing shall be sealed and remain under seal unless the court orders otherwise.
>
> (d) A person may not, with the intent to deter any person or witness from testifying freely, fully, and truthfully to any matter before trial or in any court or before a grand jury, administrative agency, or any other State or local governmental unit, threaten to or actually disclose, directly or indirectly, a person's or witness's immigration status to any entity or any immigration or law enforcement agency. A person who violates this subsection commits a Class C misdemeanor.
>
> (Source: P.A. 101-550, eff. 1-1-20)

The law does not apply to cases which:

> A person's immigration status is necessary to establish an element of a claim or affirmative defense;
>
> It is offered to prove an interest or bias of a witness, <u>if</u> it does not cause confusion on the issue or mislead the trier of fact; <u>and</u> the probative value of the evidence out weights its prejudicial nature.
>
> A person or his or her attorney voluntarily reveals his or her immigration status to the court.

Clearly, the obligation to use such evidence of a person's immigration status

is on the party seeking to employ it. A prehearing motion is required. See, Illinois Rules of Evidence 104(e). The proffer must describe the nature of the evidence as well as its purpose. It must be filed 14 days before the hearing or trial in which the evidence is sought to be used. The trial court is then to conduct an *in camera* hearing to determine the probative value of the person's immigration status. Apparently, this hearing is to be undertaken so no one other than counsel and the court are aware of it, since the record of the proffer, related papers and the hearing are to "remain under seal" unless the trial court orders otherwise.

Of course, you can disclose your client's immigration status. Historically, my practice has been to do this in *voir dire* and opening statement. Why? Because it creates credibility and trust. For the most part, the immigrant experience is a positive attribution--a story of relocation, assimilation and hard work. These themes create resonance. Jurors, I believe, can identify with them, although this law seems to decry that notion.

The final provision of the rule makes it a criminal misdemeanor for any person with the "intent to deter" any person or witness from testifying before a court, a unit of government or a grand jury to disclose a person's immigration status, including any law enforcement agency. This proviso has a great deal of ambiguity. The fact of what amounts to a person's immigration status is a variable wrinkle which has confounded courts for my life as a lawyer and longer. Although this theory may be well-intentioned, how one gauges a person's "intent to deter" seems an elusive overture.

Another interesting underlying point of this statute is that, arguably, is does not just apply to parties or witnesses, but "persons". This creates a larger tent of inclusion. How that might be enforced is not stated in the statute. Perhaps creative advocates will provide ideas through declaratory judgment actions or similar remedies provided for in our Code of Civil Procedure, Supreme Court Rules, or common law causes of action.

The breadth of the rule casts a wide moat. Although it does not declare applicability to criminal cases, it apparently pertains to grand jury proceedings. Finally, it appears to apply to any law enforcement agency. Does this mean federal law enforcement departments, such as United States Citizenship and Immigration Services? The Kane County State's Attorney or the Attorney General? We will see.

In the Family Court context, how this will play out seems uncertain. An elementary example would be a child support proceeding and whether a person has ability to legally work in the United States. Of course, this cuts both ways. Obviously, the revelation of the fact a person is unauthorized to work denotes an obligor parent cannot pay support for his/her child. No one wants that. Yet, it may be an affirmative defense and could be used as a sword. A custody determination seems even more problematic if one parent is at risk for removal from the United States. I trust our judges to get it right.

In another civil context, such as personal injury, the issue is whether a plaintiff's unauthorized immigration status may be used as evidence to show decreased earning capacity as a measure of damages. *Noe Escamilla v. Shiel Sexton Company*, 73 N.E.3d 663 (S.Ct. Ind. 2017) ("*Escamilla*"). It seems well-settled that states like Illinois and Indiana have the ability to regulate employment of persons within their realms. *Arizona v. United States*, 567 U.S. 387 (2012), *Decanas v. Bica*, 424 U.S. 351 (1976).

Escamilla was injured while working at a construction site. He became permanently disabled. He could no longer work as a construction laborer and filed a complaint for his injuries. He presented evidence to show his lost earning capacity was substantial.

Prior to trial, the defendant filed a motion arguing that Escamilla's immigration status barred him from recovering, since the fact he could be deported at any time meant future lost wages were unlikely. See, *Hoffman Plastics Compounds, Inc. v. NLBR* 535 U.S. 137 (2002) ("*Hoffman*"), which addressed a worker's immigration status in relation to a back pay award under the National Labor Relations Act. The issue there was the interplay between two federal statutes: the Immigration Reform and Control Act and federal labor law. It had nothing to do with the common law of any state, whether constitutional or evidentiary in nature.

Escamilla replied *in limine* that the court should exclude any evidence of his immigration status. The Indiana trial and appellate courts permitted evidence of Escamilla's immigration status and excluded his expert witnesses' testimony as to lost future earning capacity. It found such evidence inadmissible, since Escamilla arguably was not legally permitted to work and the "experts" did not include that condition in their opinions.

One of the provisions relied upon by the Indiana Supreme Court to allow Escamilla to pursue his tort action was the Indiana Constitution's "Open Courts" Clause. In Illinois we have a similar provision in our Bill of Rights. This precept declares, "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law freely, completely and promptly. Illinois Constitution, §12

Like its Indiana counterpart, the Illinois constitution talks about persons. It does not discuss citizenship. It does not explore whether you have a visa, are an immigrant or have some paper issued by a federal official which "authorizes" employment. It does not consider that a person loses a right to a remedy because he or she is a non-citizen. The concept of personhood is much more extensive than a status one might have based on classification by others. In my opinion, it is more far-ranging than its Indiana parallel. Compare them.

The centerpiece of the *Escamilla* litigation was whether the injured plaintiff could introduce into evidence, through expert testimony, that the lost earning capacity he claimed was redress to which he was entitled. The defense, *in limine*, pretrial, made three arguments. First, Escamilla's immigration status, or lack thereof, should prohibit him from recovering for decreased earning capacity. Next, Escamilla's immigration status should be admissible in evidence, since as an unauthorized immigrant he could be deported at any

time. And finally, Escamilla's experts' testimony as to the amount of lost earning capacity was unreliable because it failed to quantify or take into scrutiny the effect of Escamilla's immigration status in reaching their opinions. Escamilla's reply was a request the trial court exclude any mention of his immigration status as unfairly prejudicial and irrelevant. The trial court agreed with the defendant, finding Escamilla's immigration status was relevant to the issue of damages as to lost future income. It struck the expert witness testimony on the issue of decreased or lost earning capacity. The Appellate Court affirmed.

The Indiana Supreme Court reversed, finding the issue was an evidentiary one in consonance with Indiana constitutional provisions. The court found that immigration status is relevant to damages because one's immigration status may affect his deportation and ability to work in the United States over the time he might be employed. A fact finder could determine the probability of his lack of immigration status could lead to deportation and an inability work. Accordingly, it might reduce damages based on such contingencies. So, Escamilla's immigration status was relevant. However, relevant evidence is only a part of the calculus of whether such proof is admissible.

Having said that, like Illinois Rule of Evidence 403, the court looked to whether evidence of immigration status was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

In this regard, the court found having collateral in depth mini-trials on the likelihood of deportation was confusing as well as unduly prejudicial. It found immigration and the changing of immigration status to be commonplace, and that most deportations occurred oftentimes with immigrants with criminal convictions. It found deportations often turned on shifting federal government policies which would prove troublesome for juries to understand, and illegal immigration is a sensitive issue for many. It can evoke in some strong views both for and against. Such perspectives can interfere with reasoned deliberation. These are all objective, not subjective, reasons in assessing the probative value of such evidence.

The court concluded that a plaintiff's unauthorized immigration status is inadmissible unless the preponderance of the evidence shows that the plaintiff will be deported. It found the experts' testimony as to decreased earnings could be introduced. It placed the burden of proof on the proponent of the immigration evidence to show that the probative value of the evidence substantially outweighs its prejudicial effect.

The creation of new evidence laws by our General Assembly is not a new phenomenon. Whether this new fiat survives is unknown. Its intention is a welcome one. Justice Rush's opinion in *Escamilla* is a balanced view. She recognizes at the time Escamilla was hired, whether his immigration status was material apparently was not as important to his Indiana employer as whether he could simply do his job. He was a construction laborer. As such, he had the right to make his case like any person who worked in that trade. He was, like all of us, a person under the law.■

This article was previously published in the Kane County Bar Association's Bar Briefs, September/ October 2020.

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Title VII Prohibits Employment Discrimination Based on Sexual Orientation and Gender Identity

BY LINDSAY A. HATZIS

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination in the workplace on the basis of race, color, religion, sex, or national origin.[1] However, federal appellate courts were split on whether or not sexual orientation or gender identity were encompassed by the prohibition on sex discrimination under Title VII. On June 15, 2020, in a 6-3 opinion, the United States Supreme Court put an end to the controversy by holding that Title VII prohibits discrimination in the workplace based on sexual orientation or gender identity.[2]

In the case of *Bostock v. Clayton County*, the Court had to decide "whether an employer can fire someone simply for being homosexual or transgender."[3] The case involved three separate unlawful

discrimination lawsuits from three different appellate courts. Gerald Bostock was an employee of Clayton County, Georgia, and was fired for "conduct 'unbecoming' of a county employee" shortly after it was learned that he had joined a gay recreational softball league.[4] Donald Zarda worked as a skydiving instructor and was fired several days after disclosing he was gay.[5] Aimee Stephens worked at a funeral home for two years, during which time she presented as a male. After being diagnosed with gender dysphoria, she informed her employer that she was going to live her life as a woman and was fired.[6]

None of the employers in the three cases disputed that they fired the employees because of their sexual orientation or gender identity.[7] Rather, the employers argued that even intentionally discriminating against an employee because of their sexual orientation or gender identity is not protected under Title VII.[8]

The Court ultimately held that "[a]n employer who fires an individual merely for being gay or transgender defies the law."[9]

Prior to this ruling, employment discrimination based on sexual orientation or gender identity was only prohibited based on state law or in jurisdictions where the highest federal appellate court had previously found that these classes were protected under Title VII. As previously mentioned, the circuits were split on whether these classes were encompassed under the "sex" class in Title VII. In 2015, the Equal Employment Opportunity Commission ("EEOC") ruled that discrimination based on sexual orientation is sex discrimination and therefore prohibited by Title VII.[10] The EEOC concluded that sexual orientation is "inherently" a sex-based consideration, and therefore, it can be a basis for a claim of sex discrimination. However, appellate courts were not required to follow the EEOC's guidance.

While the Supreme Court's ruling may not have a significant impact in Illinois, it will in other states and jurisdictions that did not previously recognize sexual orientation or gender identity as a protected class in employment. Illinois already prohibited such employment discrimination.

The Illinois Human Rights Act ("IHRA") prohibits discrimination in the workplace on the basis of various protected classes, including sex.[11] The IHRA was amended to specifically include "sexual orientation" as a protected class, effective January 1, 2006.[12] The IHRA specifically defines sexual orientation to mean the "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth."[13] Thus, sexual orientation and gender identity were already prohibited by Illinois law.

In 2017, the seventh circuit held that discrimination based on sexual orientation is a form of sex discrimination under Title VII.[14] In the case of *Hively v. Ivy Tech Community College*, Hively was openly lesbian and taught part-time at Ivy Tech Community College ("Ivy Tech").[15] Over the course of five years, Hively applied for six full-time positions unsuccessfully, and then her part-time contract was not renewed.[16] Hively filed a discrimination charge with the EEOC, alleging that Ivy Tech had discriminated against her based on her sexual orientation.[17] After being issued a right-to-sue letter from the EEOC, Hively lost in the district court.[18] However, upon appeal to the seventh circuit, the court held that discrimination on the basis of sexual orientation is a "subset" of discrimination on the basis of sex, and therefore prohibited under Title VII.[19]

Thus, while the Supreme Court's ruling in *Bostock* will have a significant impact in other states, Illinois employers were already prohibited from discriminating against employees on the basis of sexual orientation or gender identity.[20] ■

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1. 42 U.S.C.S. § 2000e-2(a).
2. Bostock v. Clayton County, 590 U.S. ____ (2020).
3. *Id.* at ___, slip op. at 2.
4. *Id.* at ___, slip op. at 2-3.
5. *Id.* at ___, slip op. at 3.
6. *Id.*
7. *Id.* at ___, slip op. at 15.
8. *Id.*
9. *Id.* at ___, slip op. at 33.
10. Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015).
11. 775 ILCS 5/1-102(A).
12. P.A. 93-1078, *available at* https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=093-1078.
13. 775 ILCS 5/1-103(O-1).
14. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017).
15. *Id.* at 341.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 343.
20. Since the original publication of this article in September/October 2020, the Second District Appellate Court held in Hobby Lobby Stores v. Sommerville, 2021 IL App (2d) 190362 (Aug. 13, 2021) that an employer violates the Illinois Human Rights Act by denying a transgender woman the use of a woman's bathroom.

Overview of the New Title IX Regulations

BY LINDSAY A. HATZIS

History of Title IX

Title IX of the Education Amendments of 1972 and its implementing regulations prohibit federally funded educational institutions from engaging in sex discrimination in their education programs and activities.[1] Specifically, Title IX provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" with listed exceptions.[2]

While historically thought of as the law that required equity in high school and collegiate athletics, Title IX also applies to admissions, recruitment, housing, counseling, financial assistance, and employment, to name a few areas.

In addition, sexual harassment can be considered sex discrimination in violation of Title IX.[3] The United States Department of Education Office for Civil Rights (OCR), which enforces Title IX, reiterated this in its 2001 Revised Guidance on Sexual Harassment ("2001 Guidance").[4] On April 4, 2011, the OCR published a "Dear Colleague" letter ("2011 Dear Colleague letter") which supplemented the 2001 Guidance and explained how sexual violence is a form of sexual harassment also prohibited by Title IX.[5] In 2014, the OCR provided further guidance related to sexual violence as a form of sex discrimination under Title IX in its "Questions and Answers on Title IX and Sexual Violence" ("2014 Questions and Answers").[6]

However, on September 22, 2017, the OCR published a "Dear Colleague" letter stating it was withdrawing its 2011 Dear Colleague letter and 2014 Questions and Answers, concluding that their guidance "led to the deprivation of rights for many students."[7] The Department of Education stated its intention to engage in the rulemaking process related to Title IX, and in the interim issued new guidance entitled "Q&A on Campus Sexual Misconduct" to be followed in conjunction with the 2001 Guidance.[8]

On November 16, 2019, the Department of Education released its proposed rule and the 60-day public comment period began. After receiving over 100,000 comments, the final rule was released on May 6, 2020 and became effective August 14, 2020.[9] The new regulations primarily focus on sexual harassment as a form of sex discrimination.

Old Regulations

The OCR previously defined sexual harassment as unwelcome conduct based on sex that is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program.[10] Whether or not conduct was sufficiently serious was based on if it was severe, persistent, or pervasive. Acts of sexual violence[11] were included as forms of sexual harassment prohibited by Title IX.

If one of a school's "responsible employees" knew or reasonably should have known of sexual harassment, the school was responsible for responding promptly (meaning to investigate or otherwise determine what occurred), taking effective action to stop the harassment, and preventing the harassment from reoccurring.[12] Failure to do so was a violation of Title IX, regardless of whether the victim wanted to proceed with the school's formal grievance process.[13] A responsible employee included "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility."[14]

In practice, Title IX investigations have taken on two forms: the single or dual investigator model, or a hearing panel. Under the single or dual investigator model, one or two investigators conduct an investigation and then make a recommendation or determination as to whether a Title IX violation occurred. Some schools have the investigators make a recommendation to the Title IX Coordinator[15] or a hearing panel for a final determination of responsibility. Other schools have the investigator make the final determination. There is no actual hearing that occurs as it relates to the facts.

Under the hearing panel approach, an investigator conducts the investigation, but rather than make a recommendation or determination, all of the information they obtained during the investigation is provided to a hearing panel. An actual hearing takes place wherein the complainant and respondent are able to make statements and question each other (often through an advisor), as well as other witnesses. The hearing panel then determines whether there was a Title IX violation.[16]

Of course, which approach a school takes is also dependent on any state laws they must also follow. In postsecondary schools in Illinois, the *Preventing Sexual Violence in Higher Education Act*[17] prohibits the complainant and respondent from directly cross-examining each other, but does allow both to suggest questions to be posed by the investigator or hearing panel resolving the complaint.[18] In addition, the state law prohibits the complainant and respondent from being compelled to testify during a hearing in the presence of each other.[19] Generally, Illinois schools have used some form of the single or dual investigator model.

The old regulations also set forth that the preponderance of evidence standard was required for determinations regarding whether a person violated Title IX.[20]

Although not required, the OCR recommended that schools provide an appeal process related to the outcome of an investigation.[21] If an appeal was allowed, it had to be allowed for both parties.[22]

Schools also were able to informally resolve allegations of sexual harassment, in lieu of a formal investigation.

New Regulations

The new regulations made substantial changes related to sexual harassment as a form a sex discrimination prohibited by Title IX. While an exhaustive list of those changes is beyond the scope of this article, many of the major changes will be discussed below.

For the first time, the regulations provide a definition of sexual harassment, as opposed to the OCR merely providing guidance on the definition. The definition is as follows:

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).[23]

The second part of this definition is narrower than the definition previously given in OCR's guidance. Notably, whereas alleged sexually harassing conduct previously was evaluated from the severe, persistent, *or* pervasive analysis, under the new regulations, conduct must be severe, pervasive, *and* objectively offensive.

Under the new regulations, a school must respond promptly "in a way that is not deliberately indifferent" when it has actual knowledge of sexual harassment in one of its education programs or activities against a person in the United States.[24] There are a couple of things to note about this, specifically the change in notice, jurisdiction, and the deliberate indifference standard. As it relates to notice, under the old regulations, actual or constructive notice by one of the school's responsible employees of sexual harassment was imputed on the school. Under the new regulations, in higher education institutions, knowledge of sexual harassment or allegations of sexual harassment is no longer imputed on the school unless the school's Title IX Coordinator or any school official who has authority to institute corrective measures on behalf of the school has actual knowledge.[25] Within elementary and secondary schools, any employee receiving actual notice of sexual harassment or allegations of sexual harassment is sufficient to put the school on notice. Constructive notice is specifically stated to be insufficient to establish actual knowledge.[26]

Additionally, if the sexual harassment occurred outside of the United States, it is not prohibited under Title IX. For example, if a student was subjected to sexual assault by another student while they were on a study abroad trip, Title IX does not apply. However, a school is able to prohibit such sexual misconduct under other school policies or codes of conduct, even if it is not a violation of Title IX.[27]

The Department of Education also decided to adopt a deliberate indifference standard for evaluating whether or not a school properly handled a sexual harassment allegation. Specifically, if a school's response "is clearly unreasonable in light of the known circumstances" it will be found to have acted with deliberate indifference.[28] This standard was not previously applied.

The new regulations explain how schools must promptly respond when they have actual notice of sexual harassment. The Title IX Coordinator is required to contact the complainant promptly to discuss available supportive measures[29] and the process for filing a formal complaint.[30] While under the old regulations, a school had to investigate any reports of alleged sexual harassment, now only a formal complaint filed by either the complainant or the Title IX Coordinator will initiate the grievance process as set forth in the regulations.

The formal complaint itself must be filed by a complainant (meaning, the individual who is alleged to be the victim) or signed by the Title IX Coordinator. The complainant must be "participating in or attempting to participate in the education program or activity" at the school, otherwise it does not fall under Title IX.[31] Upon receipt of a formal complaint, written notice must be promptly provided to both the complainant and respondent simultaneously and include: the identity of both parties, the conduct alleged to constitute sexual harassment, the date and location of the alleged incident, information regarding the grievance process, a statement that the respondent is presumed not responsible until a determination regarding responsibility is made at the end of the grievance process, that both parties may have an advisor of their choice, that both parties may inspect and review evidence obtained by the school during the formal grievance process, and any provisions the school has that prohibit knowingly making false statements or submitting false information during the grievance process.[32]

Once a formal complaint is received, the school must investigate the allegations within the complaint. Of particular note is that the single investigator model can no longer be utilized, as the new regulations set forth a procedure for live hearings with cross-examination after an investigation has concluded. The burden of proof and the burden of gathering evidence is not on the parties, but rather, the school.[33] In practice, an investigator will conduct interviews with the parties and other witnesses, as well as gather any other available evidence. The investigator must allow both parties the opportunity to present inculpatory and exculpatory evidence, as well as fact and expert witnesses.[34] Upon completion of the investigation, the investigator will create an "investigative report" which includes all evidence gathered. The investigative report must be sent to each party and their advisor so they have an opportunity to review and submit a written response.[35] The investigator will then complete a final investigative report summarizing all relevant evidence and including the parties' written responses, which must be provided to both parties and their advisors.[36] This final investigative report must be provided at least ten days prior to the live hearing.[37]

Formal complaints may be resolved through informal resolution, as set forth

in the new regulations.[38] However, if the matter is not resolved through informal resolution, the matter will proceed to a live hearing with a decision-maker who will ultimately decide if the respondent is responsible for the alleged violation (the live hearing requirement does not apply to K-12 schools).[39] The hearings must be recorded or transcribed.[40] The standard of evidence to determine responsibility may either be a preponderance of evidence or clear and convincing evidence.[41] Illinois law requires a preponderance of evidence standard.[42] Thus, higher education institutions in Illinois must still use this standard.

During the hearing, each party is required to have an advisor who will be permitted to question the other party as well as witnesses.[43] If a party does not have an advisor, the school must provide one free of charge.[44] The parties themselves are prohibited from cross-examining others.[45] Pursuant to the regulations, the questions must be "directly, orally, and in real time."[46] After an advisor has asked a question, the decision-maker decides if it is permissible or will be excluded. Civil and criminal rules of evidence do not apply during these hearings. The regulations only provide that questions must be relevant, as determined by the decision-maker.[47] In addition, there are limitations on the relevance of a complainant's sexual predisposition or prior sexual behavior. Such questions are only allowed if they are offered to prove that someone other than the respondent engaged in the alleged conduct, or, if the questions are related to the respondent, are offered to prove consent.[48] Medical records may not be used or considered unless voluntary, written consent has been obtained from the party and information protected under a "legally recognized privilege" may not be used unless the privilege is waived.[49]

Particularly noteworthy under the regulations is that if a party or witness does not submit themselves to cross-examination, the decision-maker cannot consider any statement that individual previously made before or during the investigation related to the alleged conduct.[50] The decision-maker is also prohibited from drawing any inferences in the determination regarding responsibility from the fact that an individual did not submit to cross-examination, either by not appearing for the hearing or refusing to answer a question.[51]

At the conclusion of the hearing, the decision-maker has an opportunity to prepare a written determination explaining whether or not the respondent is responsible for engaging in the alleged conduct, as well as sanctions.[52] Both parties then have the opportunity to appeal the determination and sanctions.[53]

Conclusion

While several portions of the new regulations appear to conflict with the Illinois *Preventing Sexual Violence in Higher Education Act*, many do not. Thus, Illinois schools receiving federal funding will need to sort through this and ensure they are complying with the new regulations, as well as Illinois law, to the extent it is not in conflict with the regulations. Any one practicing in this particular area should familiarize themselves with these new regulations as well as consider perusing the notice and comments in the unofficial regulations. The OCR has also posted several blogs responding to frequently asked questions that provide some additional guidance.[54] Nevertheless, there are still many unanswered questions about the implementation of these new regulations, as well as the impact they will have on individuals pursing formal complaints now that a formal complaint must be filed and there is a live hearing requirement in higher education.■

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1. 20 U.S.C. § 1681; 34 C.F.R. part 106.
2. 20 U.S.C. § 1681(a).
3. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 649-50 (1999); Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 281 (1998); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992); U.S. Dep't of Educ. Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 F.R. 12034 (1997), *available at* https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf; U.S. Dep't of Educ. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties* (Jan. 19, 2001), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html [hereinafter *2001 Revised Guidance*].
4. *2001 Revised Guidance*, *supra* note 3.
5. U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter* (Apr. 4, 2011) *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html [hereinafter *2011 Dear Colleague Letter*].
6. U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter *2014 Questions and Answers*].
7. U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.
8. U.S. Dep't of Educ. Office for Civil Rights, *Q&A on Campus Sexual Misconduct* (Sept. 2017), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [hereinafter *2017 Q&A*].
9. Unofficial copy of 34 C.F.R. part 106, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf.
10. *2001 Revised Guidance*, *supra* note 3, at 2.
11. OCR defined sexual violence as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent" due to the use of drugs or alcohol or an intellectual or other disability. This included rape, sexual assault, sexual battery, and sexual coercion. *2011 Dear Colleague Letter*, *supra* note 5, at 1-2.
12. *2001 Revised Guidance*, *supra* note 3, at 9-10, 13, 15.
13. *Id.* at 15.
14. *Id.* at 13.
15. The old and new regulations require each recipient of federal funds to designate at least one employee as the Title IX Coordinator, who coordinates the recipient's efforts to comply with Title IX. 34 C.F.R. § 106.8(a).
16. Hearing panels are generally not seen in elementary and secondary schools, but rather, postsecondary schools.
17. 110 ILCS 155/1.
18. 110 ILCS 155/25(10).
19. 110 ILCS 155/25(12).
20. *2011 Dear Colleague Letter*, *supra* note 5, at 10-11.
21. *Id.* at 12.
22. *Id.*
23. 34 C.F.R. § 106.30(a). Sexual assault is defined in accordance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), while dating violence, domestic violence, and stalking are defined in accordance with the Violence Against Women Act ("VAWA").
24. 34 C.F.R. § 106.44(a).
25. 34 C.F.R. § 106.30(a).
26. This notably poses an issue with an employer's obligations under Title VII, but that is beyond the scope of this article.
27. 34 C.F.R. § 106.45(b)(3).
28. 34 C.F.R. § 106.44(a).
29. Supportive measures are "non-disciplinary, non-punitive individualized services" offered for free to the complainant or the respondent regardless of whether a formal complaint is filed. 34 C.F.R. § 106.20(a).
30. 34 C.F.R. § 106.44(a).
31. 34 C.F.R. § 106.30(a). However, nothing prohibits a school from accepting complaints from individuals who are not participating in or attempting to participate in one of its education programs or activities under another school policy or code of conduct.
32. 34 C.F.R. § 106.45(b)(2)(A) and (B).
33. 34 C.F.R. § 106.45(b)(3)(i).
34. 34 C.F.R. § 106.45(b)(3)(ii).
35. 34 C.F.R. § 106.45(b)(3)(vi).
36. 34 C.F.R. § 106.45(b)(3)(vii).

37. *Id*.
38. 34 C.F.R. § 106.45(b)(9). Of note, informal resolutions may *only* be offered if a formal complaint has been filed.
39. While the regulations require the hearing to be live and in the same geographic location, they also allow for either party to request to be located in separate rooms. However, if this occurs, there must be technology in the rooms which enables the decision-maker and parties to simultaneously hear and see the other party and any witnesses while answering questions. The hearing may also be held virtually so long as participants can see and hear each other simultaneously. 34 C.F.R. § 106.45(b)(6).
40. 34 C.F.R. § 106.45(b)(6).
41. 34 C.F.R. § 106.45(b)(3)(vii).
42. 110 ILCS 155/25(5).
43. *Id*.
44. 34 C.F.R. § 106.45(b)(6).
45. *Id*.
46. *Id*.
47. *Id*.
48. *Id*.
49. 34 C.F.R. § 106.45(b)(5)(i); 34 C.F.R. § 106.45(b)(1)(x).
50. 34 C.F.R. § 106.45(b)(6). Since the original publication of this article in September/October 2020, a federal district court in Massachusetts has found this portion of the regulation to be "arbitrary and capricious" and vacated it, nationwide. Victim Rights Law Center et al. v. Cardona, No. 1:20-cv—11104, 2021 WL 3185743 (D. Mass. July 28, 2021). On August 24, 2021, the Department of Education issued a letter stating it would "immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this provision of the provision." U.S. Dep't of Educ. Office for Civil Rights, *Letter to Students, Educators, and other Stakeholders re* Victim Rights Law Center et al. v. Cardona (Aug. 24, 2021), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf.
51. *Id*.
52. 34 C.F.R. § 106.45(b)(7).
53. 34 C.F.R. § 106.45(b)(8).
54. https://www2.ed.gov/about/offices/list/ocr/blog/index.html.

Sex, Gender, and Identity: Using Intentional Language to Foster a More Inclusive Legal Field

BY RYAN R. LEE

All members of the legal profession should strive to make the field as inclusive and affirming as possible. By being well versed in the vernacular surrounding sex and gender, and sexual orientation and gender identity, one can make great strides towards that end. A working knowledge of the imperativeness of proper pronoun use and the importance of gender neutral language can become two invaluable tools in a practitioner's briefcase.

Without a proper primer, the language surrounding the topics of sex and gender can initially be overwhelming. Nuanced descriptors such as "sex," "gender," and "sexual orientation" can easily be conflated and confused. However, with practice, one can become fluent enough that they can exhibit to all those around them that they value inclusion, and wish to respect and value everyone's identity. Put simply, "sex" refers to a person's body; "gender" refers to how a person performs their sex; and "sexual orientation" refers to what kind of people (if any) a person is sexually and/or romantically attracted.

It is not uncommon for a person to conflate those first terms—that is, "sex" with "gender." Legal forms, websites, and government documents with which most attorneys are probably intimately familiar frequently ask for a person's sex, when they are really seeking gender, or vice versa. This is not a correct use of the terms. For example, a form directing someone to "circle your gender: M/F" is dated and problematic (since "male/female" generally denotes sex, not gender, and forcing a binary decision excludes people who do not identify either way). "Sex" simply refers to the body a person has—what is their chromosome arrangement,[1] or do they have a penis or a vagina (or neither, or something else entirely)?[2] "Sex" is sometimes more conveniently referred to as "physical sex" or "body sex."[3] Secondary sex characteristics also are relevant to a person's physical sex, including their voice and body hair.

"Gender," on the other hand, is entirely performative—it is functionally how a person performs their sex.[4] Gender entails the many aspects of how a person presents themselves to the world. For example, how a person sits (do they cross their legs in a more "feminine" way, or keep their legs splayed apart in a more "masculine" way?), how they interact with coworkers (do they wait their turn to speak, or are they prone to interrupt others?), and how much and what kind of makeup or jewelry they wear all are a part of a person's gender, or more accurately, their gender performance. "Male"/"masculine" and "female"/"feminine" are the two most widely used descriptors for gender; however, gender is better conceptualized as a spectrum than a binary. For this reason, depending on where a person falls on that spectrum, a person can identify as agender (meaning the person does not identify with any gender; this is occasionally referred to as "androgyny," though that term is not universally accepted today), genderfluid (meaning the gender a person most identifies with varies, or is never truly defined), or any number of other genders (a common catch-all is "non-binary," which simply means that a person sees their identity as somewhere between "male" or "man" and "female" or "woman"). It is an entirely personal, culturally dictated decision how a person identifies, and how they choose to perform their gender. This can also influence the pronouns a person uses, be that "she/her/hers," "they/them/theirs," or "ze/zir/hir," for example. Any attorney who has registered on the Illinois Attorney Registration and Disciplinary Commission's website will have noticed that now the ARDC offers attorneys three options when defining their gender.[5] "Non-binary" was added in early 2018.[6]

Finally, "sexual orientation" means what kinds of people a person is attracted to—typically sexually and romantically, though not always both. A person can identify as heterosexual (meaning they are attracted to people of the opposite sex/gender), homosexual (meaning they are attracted to people of the same sex/gender as they identify), bisexual (meaning they are

attracted to both sexes/genders), asexual (meaning they are not sexually attracted to anyone), or pansexual (meaning they are attracted to people across the gender spectrum). Like gender, sexuality exists on a spectrum, and can be fluid and flexible.

While the language surrounding sex and gender can be intimidating for people who have the privilege to not frequently need to think about and live the topic, a functional understanding of the concepts can be obtained if a person makes the conscious effort to do so. By becoming comfortable with the nuanced differences amongst "sex," "gender," and "sexual orientation," attorneys can be better versed in facets of the lives of the people they represent and serve. Not only will that make the attorneys better professionals, but it can make the legal field more inclusive for everyone involved.

Intimately tied to sex and gender are a person's pronouns. A person's pronouns are how that person is to be indicated when not using their name. By having a better understanding of pronouns and their importance, people in the legal field can be better-equipped to serve and work with anyone they encounter.

Pronouns describe a person—they do not define a person.[7] They are typically—but not always—related to a person's gender identity. The most common gendered sets of pronouns are "he," "him," and "his" for male-identifying people and "she," "her," and "hers" for female-identifying people. There are many gender-neutral pronouns; the set with which most people have experience is likely "they," "them," and "their(s)," but some people prefer what are sometimes called neo-pronouns—for example, "ze" and "zir" or "ze" and "hir" ("ze" being pronounced like the letter *Z*, and "zir" and "hir" rhyming with "here").[8] Gender-neutral pronouns may be preferred by people who identify as non-binary, or by those who simply prefer gender-neutral language. Additionally, not all non-binary people use gender-neutral pronouns. Finally, some people do not use *any* pronouns—people are to just use the person's name.[9] For example, if Bob doesn't use pronouns, a person describing Bob and Bob's car might say, "Bob is my coworker; Bob collects cars. That Cadillac over there is Bob's. Bob's car is a good reflection of Bob's personality." Some may protest that this is not grammatically efficient, but, as will be discussed shortly, "kindness trumps grammar"[10] when it comes to proper pronoun usage versus semantics.

The pronouns that a person uses is an entirely personal decision; no matter what pronouns a person uses, it is imperative that the pronouns be respected and used, even if it is initially challenging. Two common issues people cite when they encounter unfamiliar pronouns is that it feels strange or uncomfortable using pronouns with which they are not very familiar, and a concern that the relatively common "singular they" is grammatically incorrect. In addressing the first concern, people are often surprised to be reminded that they casually use the singular "they" in their daily lives without giving it a second thought (people have been doing this since the late 1300s, in fact).[11] For example, upon finding a mislaid wallet, one might say, "Oh no, someone lost *their* wallet." Or, upon seeing someone parked illegally, one might comment, "It looks like *they* thought *they* could park *their* car by the hydrant." In both instances, the speaker is unlikely to think the wallet or car are communal objects with multiple owners—thus, the pronouns used are the singular, gender-neutral "they." The second concern, that of the singular "they" being grammatically incorrect, is easily allayed by looking to a few prominent authorities on what is correct. Merriam-Webster has recognized the singular "they" as a non-binary pronoun since 2019;[12] the American Psychological Association, the organization that publishes the widely-used APA Publication Manual, endorses the singular "they" for its inclusivity in the latest edition of their manual.[13] However, even without these authorities (many pronoun sets still are not recognized by Merriam Webster, but that does not make them any less valid),[14] Dr. Betty Birner, professor of linguistics and cognitive science at Northern Illinois University, asserts that "grammar is a social construct" and "kindness trumps grammar"[15]—that is, respecting a person's pronouns and their identity should be paramount over any socially constructed rules.

For people who use pronouns traditionally associated with the gender they were assigned at birth, the importance of respecting a person's pronouns and their identity can be difficult to conceptualize. An easy aid to this is to imagine how it feels to be unintentionally misgendered by someone—for people who identify as males, think how it feels when someone accidentally calls you "miss" or "ma'am." For those who identify as females, think how it feels when someone accidentally calls you "sir" or "bro." Respecting a person's pronouns, especially when the other person identifies in some way outside of the gender binary, makes the interaction more inclusive and welcoming to all.[16] Furthermore, as described by popular musician Sam Smith (who identifies as non-binary), being referred to by proper pronouns can help a person feel "safe, … happy, … [and] completely seen" within the conversation.[17]

While it is paramount to always make the effort to properly use pronouns when interacting with people, it is important to remember, too, that mistakes are inevitable, especially when interacting with someone with whose pronouns one might not be familiar. This is okay, to a point. Should the situation allow, the speaker should quickly correct themselves, apologize, and move on.[18] If that is not possible, it might be best to apologize to the misgendered person later in private.[19] No matter what, the person who made the mistake should correct it in a way that shows the most respect as possible for the recipient of the error. Like anything, the more one practices proper pronoun usage, the easier and more intuitive it becomes.

Having a practical understanding of pronouns is not only beneficial to people looking to be as inclusive as possible to those with whom they work—discussions of pronouns and gender are not uncommon in court opinions, so an attorney well versed in the subject will be better prepared to digest the writings of the court. For example, in *Maday v. Township High School,* the Illinois Appellate Court discusses factors including the interplay of a transgender student's sex and proper pronouns while evaluating the

accommodations that a school district did or did not make for the student.[20] In *People v. Burkes,* the court properly refers to the defendant, who was assigned the male gender at birth but identifies as female, with she/her/hers pronouns.[21] In *Clark v. Gannet Co.,* the Illinois Appellate Court notes that a Supreme Court Rule only uses male pronouns, and recommends that "the pronouns should be reconfigured to refer to both sexes or, better yet, gender-free."[22]

In addition to pronouns, being conscientious of gender-neutral language can help practitioners ensure that their language encompasses everyone they encounter, as well as foster an environment that is openly inclusive to all.

Gender-neutral language is simply language that does not imply inferred gender on the recipient of the language. Becoming adept and comfortable with consistently using it is much like mastering proper pronoun use—that is, it might feel uncomfortable, and even cumbersome, at first, but becomes second nature with deliberate attention and practice. An easy way to start on the path of inclusive language is to excise the generic, casual use of "guys" from one's conversation repertoire. "Guys," of course, refers to people who identify as male, so, "Hey guys!" is akin to greeting a group of people with, "Hey men!" This greeting is fine if all members of the group one is greeting identify as men, but less so if it is made up of (even only potentially) varied genders and gender identities—keeping in mind that the identity non-binary people, transgender people, etc. may not be readily visible to the casual observer. Put simply, indiscriminately calling people "guys" misgenders people who do not identify as "guys," and can easily exclude many members of the group, just like approaching a group and saying "hey ladies" misgenders anyone who does not identify that way.

While it is all too easy to make mistakes and revert to casual, (hopefully inadvertently) exclusionary language, another simple way to become more inclusive is by keeping alternative phrases in mind. Some great greetings that include all members of gender-diverse groups include "hello, everyone," "good morning, folks," and "hi, friends" (if you have a friendly relationship with the group). Alternatively, if greeting a group of members of a certain profession, using the title they worked so hard to obtain is an inclusive option. For example, "Good afternoon, doctors" and "Hello, counselors." The latter, of course, is an option when greeting a group of therapy providers or attorneys, and can be helpful when addressing single attorneys with whom one is not acquainted (for example, a simple "Thank you, counsel" can avoid an awkward exchange such as "Thank you, sir, or, oops, sorry, I mean ma'am"). One final, colloquial example of neutral language for addressing a group is "you all" ("I need you all to quiet down" instead of "I need you guys to quiet down")—granted, say it too fast, and one can quickly expose themselves as a person from the Midwest, but like most turns of phrase, if said confidently, it won't be nearly as awkward or noticeable as one might think.

Another area in which one can show their commitment to inclusive language is through their use of honorifics. A common mistake people make is misusing "miss" and "missus," thus indicating an incorrect marital status for whom they are speaking (the fact that unmarried women are addressed differently than married women is a different problematically gendered issue). To avoid this, one can revert to using a person's title like discussed earlier. Or, if one knows even less about the recipient of their communication, there is a catch-all, non-gendered, non-exclusionary honorific: "Mx."[23] "Mx." is commonly used in written communication when the recipient of the correspondence has a name that does not imply a clear gender or when the recipient is known to be non-binary or otherwise prefer something other than "Mr.," "Ms.," etcetera. Attorneys in Illinois may have noticed that since spring of 2018, "Mx." was an option in the "salutation" drop-down menu when registering with the Attorney Registration & Disciplinary Commission.[24]

An example of how convenient "Mx." can be is when one might be writing to a Chris or a Sean (both names having an unclear gender associated with them). When writing to a Chris Burke or Sean France, rather than gamble with "Dear Mr. Burke"/ "Dear Ms. Burke" or "Hello Mr. France" / "Hello Mrs. France" and risk misgendering and possibly offending the recipient, one could simply write "Dear Mx. Burke" or " Hello Mx. France." This is also practical when corresponding with someone whose name is from a culture with which one is not at all familiar. The "x" in "Mx." can be thought of an amorphous placeholder, serving the same function as any letters following the "M" in "Mr.," "Ms.," "Mrs.," or "Miss." Some non-binary people who do not identify exclusively or consistently as male or female might exclusively use "Mx." as their honorific. Thus, "Mx." includes everyone, and excludes no-one. Pronounced "mix," "Mx." can also be spoken if a person's gender is not evident (though, if the situation allows, it would also be acceptable to politely and privately inquire how a person prefers to be referred [an important distinction to note, however— it would *not* be appropriate to ask "what's your gender?"]).

While some people might find it unusual and challenging to incorporate a new honorific into their repertoire, it is important to remember that "Ms." (that is, the honorific that stands in for "Miss" or "Mrs."), with which most people today are comfortable and familiar, was only fully accepted by publications such as the New York Times as recently as 1986, and even then not without much discussion.[25]

An extension of the topic of using honorifics in the endeavor to be inclusive involves addressing both members of a partnership (usually married couples, but not always). It is no longer best practice to use the address of "Mr. and Mrs. [one partner's full name]." This practice stems from the ways of thinking of marriage that are now problematic—put simply, that manner of address reflects the doctrine of *feme covert*, which meant essentially that once married, the woman ceased to exist as an independent entity from her husband, both legally and socially.[26] For example, after Linda Ness married Paul Porowski, Linda Ness ceased to exist, and was only half of the entity called "Mr. and Mrs. Paul Porowski." Unless one is confident that both members of the couple being addressed are comfortable with "Mr. and Mrs. [one

partner's full name]," their individual names and honorifics should be used (i.e., Mr. Paul Porowski and Mrs. Linda Porowski).

Paying attention to all these facets of language has many benefits. Of course, by speaking inclusively, one can be assured that their speech is not alienating anyone. But just as importantly, and much more subtly, defaulting to gender inclusive language communicates to everyone around that the speaker cares enough to be intentionally kind and aware to everyone, no matter how they identify. Even if someone in the room is not the direct recipient of the communication, gender-neutral language can benefit them immensely. Imagine, for example, an attorney who privately identifies as a member of the non-binary or LGBTQ community who is waiting for their case to be called in court, and overhears the judge using inclusive language and properly referring to an out transgender litigant with the litigant's preferred language—that judicial language alone broadcasts to the attorney awaiting their turn in court that the courtroom is a safe, welcoming, and affirming environment for everyone of all identities.

While it may be challenging initially, if a person commits to being mindful and intentional with their use of pronouns and gender-neutral and inclusive language, they will find that it becomes easier with time. Techniques such as avoiding gendered group designations like "guys" and remembering the usefulness of "Mx." will result in more conversations that are inclusive and welcoming to people of all genders and identities. This, along with an understanding of nuanced differences between sex, gender, and sexual orientation, can lead to the legal field being more inviting and affirming to everyone. ■

This piece is adapted from the following three articles previously published in the Kane County Bar Association Bar Briefs:
Ryan R. Lee, SEX AND GENDER PRIMER, KANE COUNTY BAR BRIEFS, December 2019; Ryan R. Lee, PRONOUNS AND THEIR IMPORTANCE, KANE COUNTY BAR BRIEFS, May 2020 *[Correction rectifying editor's error regarding the imperativeness of proper pronoun use printed in the subsequent June 2020 issue];* and Ryan R. Lee, GENDER NEUTRAL LANGUAGE: HOW AND WHY, KANE COUNTY BAR BRIEFS, September/ October 2020.

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1. "Biologically female" individuals typically have XX chromosomes, while "biologically male" individuals typically have XY chromosomes. Dr. Roseanne F. Zhao, *The Y Chromosome: Beyond Gender Determination*, National Human Genome Research Institute. https://www.genome.gov/27557513/the-y-chromosome-beyond-gender-determination (last visited October 4, 2021).
2. Some individuals are born as "intersex" individuals, meaning their genitalia do not neatly fit into the binary of "penis or vagina." *Id*.
3. Sam Killermann, The Genderbread Person, genderbread.org (last accessed October 1, 2021).
4. Judith Butler, an incredibly influential gender theorist, has suggested that a person's body is essentially a blank slate—that is, a person's body only becomes gendered by means of how the person chooses to perform their own interpretations of "masculinity" and/or "femininity." *See,* Judith Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory" (1988).
5. The IARDC defines non-binary as "any gender that does not typically fit into the gender binary of male or female." Personal Information, Illinois Attorney Registration and Disciplinary Comm'n, https://registation.iardc.org (last accessed October 1, 2021) (click blue question mark near "gender" during registration to access popup with this definition).
6. Email from Mary Grochocinski, Deputy Registrar, Attorney Registration and Disciplinary Comm'n to author (October 31, 2019) (on file with author).
7. Wren Sanders, *What People Get Wrong About They/ Them Pronouns,* Them (October 11, 2019), https://www.them.us/story/coming-out-they-them-pronouns (last visited October 1, 2021).
8. Shige Sakurai, *How,* MyPronouns.Org, https://www.mypronouns.org/how (last visited October 1, 2021).
9. Sakurai, *supra* note viii.
10. Quoting Dr. Betty Birner in NIU Today, *The Importance of Pronouns,* (September 8, 2016), https://www.niutoday.info/2016/09/08/the-importance-of-pronouns/ (last accessed October 1, 2021).
11. *Singular 'They',* Miriam Webster (September 2019), https://www.merriam-webster.com/words-at-play/singular-nonbinary-they (last accessed October 1, 2021).
12. *Id*. See also Jacey Fortin, *When Dictionaries Wade into the Gender (non) Binary,* (September 20, 2019), N.Y. Times, https://www.nytimes.com/2019/09/20/style/they-nonbinary-dictionary-merriam-webster.html (last accessed October 1, 2021).
13. Rule 4.18, *APA Publication Manual*, Am. Psychological Ass'n, Seventh Edition. See also *Singular 'They',* Am. Pschological Ass'n, https://apastyle.apa.org/style-grammar-guidelines/grammar/singular-they (last accessed October 1, 2021).
14. Sanders, *supra* note vii.
15. Birner, *supra* note x.
16. Shige Sakurai, *What and Why*, MyPronouns.Org, https://www.mypronouns.org/what-and-why (last visited October 1, 2021).
17. Benjamin VanHoose, *Sam Smith Says They 'Feel Completely Seen' When Their Pronouns Are Used Correctly by Others,* People (March 4, 2020), https://people.com/music/sam-smith-says-they-feel-completely-seen-when-their-pronouns-are-used-correctly-by-others/ (last accessed October 1, 2021).
18. Shige Sakurai, *Mistakes,* MyPronouns.Org, https://www.mypronouns.org/mistakes (last visited October 1, 2021).
19. *Id*.
20. 2018 IL App (1st) 180294, ¶ 16.
21. 2016 IL App (1st) 152581-U, ¶ 4.
22. 2018 IL App (1st) 172041, ¶ 65.
23. Ie *A Gender-Neutral Honorific*, Merriam-Webster, https://www.merriam-webster.com/words-at-play/mx-gender-neutral-title, (last accessed October 1, 2021).
24. Illinois Attorney Registration and Disciplinary Comm'n, registration.iardc.org/attyreg/registration/atty/indprofile.aspx (last accessed October 1, 2021).
25. Amisha Padnani and Veronica Chambers, *Examining the Meaning of "Mrs.,"* N. Y. Times (updated May 27, 2020), https://www.nytimes.com/2020/05/15/reader-center/examining-the-meaning-of-mrs.html (last accessed October 1, 2021).
26. *Women and the Law,* Harvard Bus. School, https://www.library.hbs.edu/hc/wes/collections/women_law/ (last accessed October 1, 2021).

Standing Committee on Women and the Law Year(s) in Review: 2019-20 & 2020-21

BY CINDY G. BUYS

The Standing Committee on Women in the Law (WATL) had another active and accomplished year under the leadership of Chair Kelly Thames Bennett during 2019-20.

One of the signature achievements of WATL was the approval of the new Carol Bellows Women of Influence Award. The inaugural recipient of this new award was the Honorable Elizabeth Rochford, an associate judge of the Nineteenth Judicial Circuit, Lake County, IL. Judge Rochford was honored for her exceptional work both in the courtroom and in the community.

In October 2019, WATL joined the Women's Bar Association of Illinois (WBAI), Black Women Lawyers' Association of Greater Chicago (BWLA), and the Chicago Bar Association (CBA) Alliance for Women committee, to sponsor a luncheon celebrating the 100th Anniversary of the 19th Amendment giving women the right to vote. The event was held at the Union League Club and featured an inspiring fireside chat with Chief Judge Rebecca R. Pallmeyer and Judge Sharon Johnson Coleman of the United States District Court for the Northern District of Illinois.

The WATL Committee also sponsored two continuing legal education (CLE) programs. The first program was part two of the Girls in Crisis series held in October 2019 at DePaul University. This outstanding program addressed legal issues facing girls in Illinois who are victims of human trafficking, abuse and neglect, or who are in the juvenile justice system.

WATL also held its fourth annual International Women's Day Tea in March 2020 as part of Women's History Month.

In May 2020, WATL co-sponsored a second CLE program titled, "Legal Issues in the Transgender Community" with the Standing Committee on Sexual Orientation and Gender Identity (SOGI) and the National Association of Women Judges District 8. This informative program covered a wide range of issues affecting the transgender community, including access to needed medical care and benefits as well as legal issues in the workplace.

Cindy Buys became the chair of the Standing Committee on Women in the Law in June 2020. That same month, WATL worked with the ISBA Standing Committee on Amicus Curiae participation to secure ISBA support for a lawsuit brought by the Attorneys General of Illinois, Virginia, and Nevada against the Archivist of the United States seeking certification of the Equal Rights Amendment as the 28th Amendment to the U.S. Constitution (*Virginia v. Ferriero*). Unfortunately, that litigation has not been successful thus far. However, with the change in control of Congress and the new Biden Administration, there is hope that the deadline to adopt the ERA will be extended. Continuing with the theme of women's political empowerment, WATL held a virtual celebration of the 100th Anniversary of the 19th Amendment giving women the right to vote.

WATL continued to celebrate the good news of its members, including new babies, new jobs, promotions, awards, and appointments. We continued to lift up female attorneys and other deserving persons by nominating them for more than two dozen ISBA awards during the months of January and February.

WATL also continued its annual tradition of celebrating Women's History Month with its International Women's Day Tea in March 2021. The format was a bit different this year, with a virtual panel discussion featuring female judges talking about the impact of gender, race, sexual harassment, and COVID on the judiciary and the legal profession. The event was incredibly well-attended and the discussion was rich and thought-provoking.

WATL sponsored the third and final part of the "Girls in Crisis" series with a half-day CLE program in April 2021 with a focus on girls in the immigration system and on trauma-informed lawyering. Heartbreakingly, thousands of girls remain in immigration detention, many of whom are victims of trafficking, domestic abuse, and other forms of violence. More immigrant girls are in foster care or otherwise caught up in the juvenile justice system. The program educated the audience about the issues immigrant girls face, as well as how to best work with clients who are victims of trauma. The program also provided important tips to lawyers about how to recognize trauma in themselves and their colleagues and what can be done to address it.

Also in April, the WATL Leadership and Outreach Subcommittee hosted a virtual career and networking panel discussion for students at Southern Illinois University (SIU) School of Law and Loyola University Chicago School of Law. Events like these help to connect aspiring lawyers to the bar and the legal profession.

Throughout the year, the hardworking editors of The Catalyst newsletter put together and published five editions with wide-ranging content of interest to women in the legal profession. WATL also worked on preserving the history of the Committee with the publication of a "Past Chairs" section on its webpage.

In light of national events including the #MeToo Movement and issues of racial justice, WATL members also engaged in difficult conversations about gender and race in the legal profession and in the legal system and took action to address some of those issues. Several members of WATL formed a new organization called FLASH to better address issues of sexual assault and harassment of female lawyers. And WATL members participated in the American Bar

Association's National Day of Conversation on Race and Gender in the legal profession.

Thank you to all the members of the WATL Committee for their assistance in making this Standing Committee such a great success!■

Cindy G. Buys is the 2020-21 chair of the ISBA Standing Committee on Women and the Law. She has been on the faculty of the SIU School of Law since 2001, serving as professor, director of international law programs, and interim dean. She is a two-time Fulbright senior specialist and was a visiting professor at Bangor University in Wales. She can be reached at cbuys@law.siu.edu.

'A Perilous Path: Talking Race, Inequality, and the Law'

BY CINDY G. BUYS

In 2017, New York University School of Law launched the Center on Race, Inequality, and the Law. To commemorate the founding of the Center, its director, Professor Anthony C. Thompson, invited Sherrilyn Ifill, President of the NAACP Legal Defense and Educational Fund, Loretta Lynch, former U.S. Attorney General, and Bryan Stevenson, lawyer and author of *Just Mercy*, to join in a conversation about race one month into the new Trump administration. This book contains an edited version of that conversation which feels incredibly timely.

Ifill, Lynch, and Stevenson all express pride in some accomplishments during the Obama administration, but also a sense that much more remains to be done to improve race relations in the United States. One overarching theme is the importance of sustaining the narrative. It is not possible to declare victory and move on. There has to be continual conversation about important issues involving race.

Lynch suggests that one of the ways to create success is not to focus on the moral issues related to racial discrimination, but instead to talk about the cost of racism to society. When people are not allowed to reach their full potential, we lose the benefit of their contributions to society. Stevenson provides the example of college football in Alabama. He points out that the Alabama constitution still prohibits kids of different races from going to school together. If that were actually enforced, Alabama's beloved football teams could not operate the way they do now. That loss might cause people to reassess the cost of their silence with respect to racial segregation. While Ifill acknowledges that the cost of racism must be part of the conversation, she expresses concern about focusing too much on pragmatics rather than moral rights and wrongs, justice, and the rule of law.

Ifill states that there often have not been good relations between the federal government and groups working to improve race relations. She highlighted the longstanding need for policing reform and prophetically predicted that when the next Ferguson happens, the Trump Administration will respond not by engaging in meaningful conversations with the affected communities, but instead by emphasizing the need for "law and order" and deploying law enforcement officers with military equipment.

Ifill also talks about the need to be careful not to silo issues. There are many commonalities between the civil rights challenges for different marginalized groups. Working together and building coalitions can help effectively address problems. However, it's also important not to lose focus on the unique history of Blacks in this country.

Lynch believes that lawyers have an important role to play in legal reform to address racial discrimination, but passing laws is not enough. You also have to change hearts. Stevenson also emphasized the need to work with community groups who are trying to make a difference, as well as the need to be "smart, tactical, and strategic."

Professor Thompson does an excellent job of turning this incredibly meaningful conversation between these distinguished lawyers into a very readable narrative. What I most appreciated are the concrete suggestions about how to bring about positive change. For example, Stevenson and Ifill both talk about the importance of schools and how they could be transformed into "a locus in the community that provides all the things that children need – counselors, social workers, physical activity, parent learning classes, and meals." All the participants in the conversation remind us of the adage that "all politics are local." We must bring people into the political discourse at the local level. We need caring people to run for city council and work on police reform. Likewise, people who are concerned about racial discrimination need to run for school boards to make sure the curriculum and books used in schools teach the history of Blacks and other marginalized groups accurately and appropriately and that school disciplinary policies are not applied in racially discriminatory ways.

In the end, Stevenson tell us that we have tough work to do and that we will feel overwhelmed at times, but that we must have hope. He states, "Hopelessness is the enemy of justice." These lawyer-leaders leaves us with a message of encouragement that we can and must keep working together for a better world.■

Reflections on the Legacy of Ida Platt and Diversity and Inclusion

BY KHARA COLEMAN

During the mid-February/early March timeframe, the convergence of Black History Month and Women's History Month bring to mind the example of Ms. Ida Platt.[55] I am proud to know that in 1894, Ms. Platt was the first African American woman licensed as an attorney in the state of Illinois. But there remain so many unanswered questions.

What was her life as a practicing attorney really like? What forms of discrimination did Ms. Platt face? After all, *Plessy v Ferguson* was decided only two years later, in 1896.[56] Strict segregation of the races was the way of the times, even here in Chicago, where she practiced. Ms. Platt was apparently the only black female lawyer in the country at the time who was able to sustain a law practice. The others, unable to sustain a law practice or legal employment in the face of discrimination and segregation, turned to teaching or academic professions. Did Ms. Platt have a hard time finding work? Keeping work? Was she dismissed, disrespected, disregarded by the other attorneys, the public, the courts? Was Ms. Platt allowed to argue before the court, as a black woman? To enter the courthouse? Were there lawyers or judges who refused to recognize her or her credentials? Was she harassed or bullied?

And given that Ms. Platt eventually chose to pass as a white woman in her professional life, what were her primary motivations?[57] How did this choice affect her personal life? We are well aware that violence frequently ensued if whites learned that a black person had been passing as white. How difficult was it to keep such a secret, to walk such a risky line? With whom could she discuss the indignities and microaggressions that she experienced on a daily basis? When Ms. Platt joined the Women's Bar Association of Illinois in 1925, did anyone in the organization know or suspect that she was legally a "colored woman," especially given that WBAI's parent organization would not allow black members until 1947?

As an African American attorney and a woman, the micro-aggressions that I deal with are quite stressful enough. I can't imagine that Ms. Platt was able to practice without experiencing any of the discrimination, disrespect, and exclusion that black women experience today. Ms. Platt's path cannot have been clear and easy. After all, no other African American woman was admitted to the Illinois bar until 1920.[58]

Sometimes, "opening the door" to minorities in the legal profession is an entirely illusory act. The "equality and inclusion" of black attorneys was not intended when Ms. Platt was admitted to the bar in 1894. Racial segregation and discrimination were perfectly legal and acceptable. While legal to let "them" in, the custom remained to make it impossible to thrive. This means that while Ms. Platt's admission to the bar in 1894 is a thing to be celebrated, "admission" alone was not "the whole of it" for her, and it is not enough for attorneys of color today.

At the same time, we have been talking for decades about diversity and inclusion in the legal workplace. We commit to, and then recommit to, making sure that racial and ethnic minorities have equal access to training and job opportunities, and are represented on the courts, in law firms, in government, and on boards and commissions. Yet, the statistics have not changed very much.[59] One of the reasons might be because we don't talk as much about the definition of "exclusion," or the affirmative operation of racial and ethnic bias in the daily practice of law. We often focus on recruiting efforts and statistics. After all, our profession isn't so different from the broader society—we don't like to talk about the uglier parts. For example, I have heard Ms. Platt's name for years, without hearing anything at all about the difficulty of being a black, female attorney at the turn of the twentieth century, or acknowledgement of the fact that she was "passing" in the legal profession. No one wants to label any of our failures at diversity and inclusion as the result of bias or discrimination, even of the unintentional kind.

As a profession, despite numerous laws, bylaws, commitments, and initiatives, we've often failed to be truly inclusive and respectful of diversity. And if we cannot talk about bias in our law firms and workplaces, we cannot be expected to openly address bias in operation of the law. We struggle to admit what we are doing, and what we have done.

In 2021, I think that part our "The Challenge" is to use this moment to engage in honest conversations about race, racism, and discrimination as they affect our profession. I don't just want to see racial and ethnic minorities represented fairly across the profession. I want to see them—us—*thrive*. We will not truly thrive unless the types of bias with which impede progress are both acknowledged and addressed.

In memory of Ms. Ida Platt, the first African American woman to practice law in the state of Illinois, and the only African American woman licensed to practice in this state between 1894 and 1920, we must continue to fight for real inclusion and the elimination of racial discrimination and bias in our profession. I know the conversations that we must have will be difficult. Racist assumptions and bias frequently manifest in our daily habits, decisions, and impulses. All of the attitudes, biases, and mechanisms which impede success must be a part of the conversation. I hope and pray that that our profession will not shy away the difficult conversations before us.■

1. https://scholarship.kentlaw.iit.edu/womeninlaw/3/.
2. *See* abstract of Gwen Jordan, "A Woman of Strange, Unfathomable Presence": Ida Platt's Lived Experience of Race, Gender, and Law, 1863-1939, 42 Harvard Journal of Law & Gender 219 (Winter, 2019) , available at https://racism.org/articles/law-and-justice/practice-of-law/2925-a-woman-of-strange-unfathomable.
3. 163 U.S. 537 (1896).
4. Violette Neatley Anderson is sometimes called the first black woman to establish a law practice in Illinois. https://arthurashe.ucla.edu/2016/01/29/no-shrinking-violet-the-accomplishments-of-violette-neatley-anderson/. Historically, she was the second. It is not clear whether she was aware of Ida Platt's practice, but Ms. Platt was practicing in Illinois in 1920, and it appears that many black Chicagoans would have been aware that Ms. Platt was a "colored" woman, as her family had been known to black Chicago for decades.
5. https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf.

Diversity Leadership Award

The Diversity Leadership Award recognizes long-standing, continuing and exceptional commitment by an individual or an organization to the critical importance of diversity within the Illinois legal community, its judiciary and within the Illinois State Bar Association.

Congratulations to the 2020 winner, Eirene Nakamura Salvi, and the 2021 winner, Patti Gregory- Chang.

Eirene Nakamura Salvi

By Marcie Mangan

Eirene Nakamura Salvi is a co-chair and founding member of the Chicago Committee of the Japanese American Bar Association. The group provides a special forum for members of the legal profession with interests and ties to the Japanese American community to discuss issues, network, and serve the community. Salvi is also a member of the auxiliary board of Lawyers Lend-A-Hand to Youth, an organization that channels the legal community's resources to promote mentoring and tutoring programs in disadvantaged Chicago communities. She is also a member of the Asian American Bar Association of Chicago. In addition, Salvi works with a group that promotes greater inclusion of studies on the internment of Japanese-Americans during World War II in school textbooks and national recognition and preservation of the stories of its survivors. Additionally, she serves on the Diversity & Inclusion Committee of the Illinois Trial Lawyers Association, which aims to develop strategies and programs to increase minority membership and participation in leadership roles and joint programs with other minority bar associations.

During law school, Salvi assisted a professor in writing an amicus curiae brief on behalf of the families of victims of terrorism against the Islamic State of Iran as a state sponsor of terrorism. She also worked as an extern at the National Immigrant Justice Center, where she filed a successful application for humanitarian parole for a victim of gross human rights violations in the Central Democratic Republic of Congo. She characterizes that victory as one of the greatest moments of her life, and one that strongly influenced her to focus her legal career on helping victims of wrongs.

During her time at Notre Dame Law School, she also served as vice president of the Asian Law Students Association and was active in the Black Law Students Association and Hispanic student groups.

A native of Japan, Salvi moved to California with her family when she was a young child. She speaks four languages—English, Japanese, Spanish, and French—and enjoys travel, particularly to her own Japanese homeland and to her mother's homeland, Mexico.

Patti Gregory-Chang

By Patti Gregory-Chang and Jewel N. Klein

Patti Gregory-Chang identifies as blind and works diligently to help a very under-represented population gain an equal seat at the table. She is currently the second vice president of the National Federation of the Blind of Illinois and serves as director of outreach for the National Federation of the Blind national organization.

According to her nominator, Gregory-Chang has taught the ISBA that communication with its members must include those who are blind or who have low vision. For well over a decade, she has worked within the bar association to increase web accessibility. As a long-term member of both the Administrative Law Section Council and the Disability Law Committee, Gregory-Chang helps to bring disability to the diversity discussion. Despite significant barriers to participation of people with disabilities in the ISBA, she works to encourage people with disabilities to participate.

Gregory-Chang has worked on innumerable education programs for the ISBA and for the National Federation of the Blind. When working to develop CLE, she has helped the ISBA to find people with disabilities to present and attend CLE events. She nominates people with disabilities for awards to increase their visibility in the profession. Most importantly, she presses members of the legal profession to understand the capacity of people with disabilities and to move away from the custodial attitude which emphasizes that attorneys are there to "help."

Her nominator wrote, "She's tireless, outspoken, and a true champion. It's my honor to know her."■

It's a Sign of the Times

BY SANDRA BLAKE

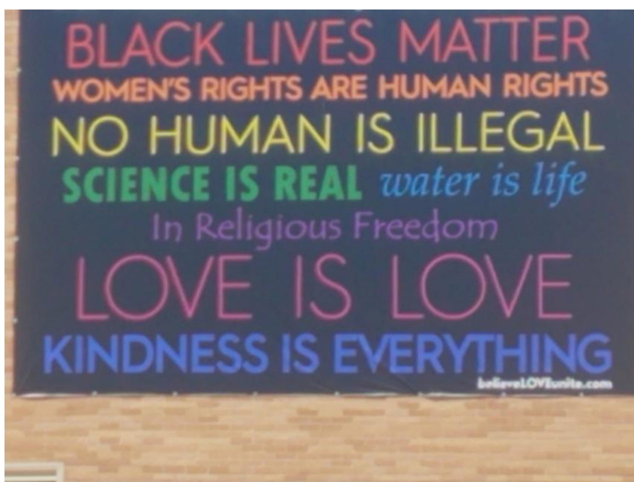
Perhaps it's because of the isolation of the pandemic, but over the past year or two, I've seen many signs of changing attitudes in society. These signs, both literal and figurative, seem to indicate a move toward more acceptance and inclusion. While we have so much further to go, the following provide some encouraging beginnings.

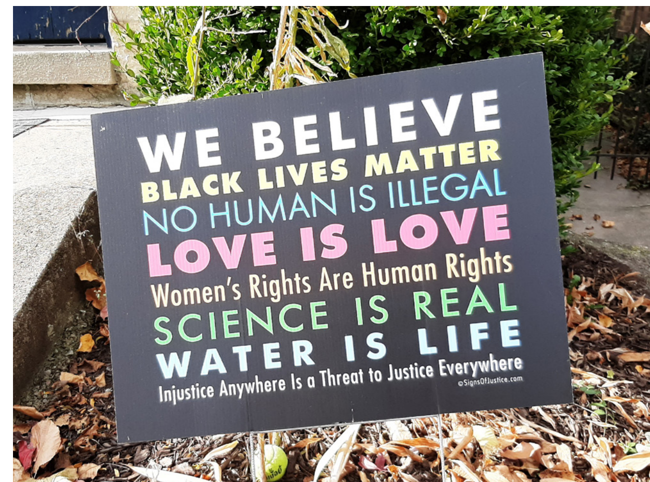
In *Star Wars: The Rise of Skywalker*, released in December 2019, two female Resistance fighters shared a kiss during a celebratory scene, a first for the Star Wars franchise. Hallmark movies are also featuring same-sex and interracial couples.

Barbie dolls are no longer just blonde-haired and blue-eyed. According to the product description, "Barbie doll celebrates diversity with unique fashion dolls that encourage real-world storytelling and open-ended dreams. With a wide variety of skin tones, eye colors, hair colors and textures, body types and fashions, the Barbie Fashionistas dolls are designed to reflect the world girls see around them today, offering them infinite ways to play out stories and express their style. This doll inspires new play possibilities with a manual wheelchair that has rolling wheels and a working brake. A ramp is included so Barbie doll can easily get in and out of the Barbie Dreamhouse (sold separately, subject to availability)."

Back in 2015, *Diversity Matters* reported on efforts to pass the Lactation Accommodation in Airports Act. At that time, ISBA member Emily Masalski was a new mother who was serving as ISBA delegate to the ABA House of Delegates. Masalski encouraged State Senator Kimberly Lightford to introduce the legislation after Masalski encountered adverse conditions in airports during flights for bar activities. That act became law. Today, many public places, including courthouses, have lactation rooms for nursing mothers.

In the military, outright bans and "Don't Ask, Don't Tell" (DADT) the official United States policy on military service by gay men, bisexuals, and lesbians, instituted during the Clinton Administration, are no more. In fact, September 20, 2021, marked the 10th anniversary of the repeal of DADT. Recently, a veteran's memorial was erected near Halsted and Addison in Chicago, recognizing gay, lesbian, bisexual and transgender members of the U.S. armed forces. Thanks to Jennifer Wu for the photos of the memorial. ■





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