Signposts In The Road:

The Lawyer's Ethical Obligation to Promote Diversity In the Legal Profession

David L. Douglass

Managing Partner, Sheppard Mullin Richter & Hampton LLP

Amber C. Thomson

Associate, Sheppard Mullin Richter & Hampton LLP

Eliazar Chacha

Attorney, Sheppard Mullin Richter & Hampton LLP

Has the time come for the ABA to amend its model rules to codify a lawyer's ethical obligation to promote equality and diversity in the profession?

I. INTRODUCTION

The legal profession has long espoused increasing diversity in the profession,[1] but making the case for taking affirmative steps to promote diversity has proven to be an enduring challenge.[2] A moral case has been made: "It's the right thing to do."[3] A business case has been made: "Our clients and

1. In 2009, then-ABA President H. Thomas Wells, Jr., launched a comprehensive initiative to assess the "State of Diversity in the Legal Profession." The ABA conducted a qualitative survey, held four regional hearings with testimony from representatives of all sectors of the profession, held an invitational summit in June of that year with more than two-hundred participants, and conducted a summit follow-up program at that year's ABA Annual Meeting. A team of legal scholars prepared summary reports of each stage from this year-long process. They found that Caucasians constituted about seventy percent of the working population over the age of sixteen, and they represented eighty-nine percent of all lawyers and ninety percent of all judges. This led the Chair of the Presidential Commission on Diversity, Ellen F. Rosenblum, to conclude, "In the 21st century, the legal profession faces no greater challenge than the imperative to advance diversity throughout our ranks." ABA Presidential Diversity Initiative Comm. on Diversity, *Diversity in the Legal Profession: The Next Steps, Report and Recommendations* (2009–2010), https://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf [hereinafter ABA Diversity].

2. Six years prior to the ABA's comprehensive initiative to assess the "State of Diversity in the Legal Profession," then-ABA President-Elect Dennis W. Archer acknowledged, "While there has been improvement in the numbers of [diverse] lawyers since the 1990s, they remain woefully underrepresented in the legal profession. Clearly, we have failed to promote diversity throughout our profession." Dennis W. Archer, *The Value of Diversity: What the Legal Profession Must Do To Stay Ahead of the Curve*, 12 Wash. U. J. L. & Pol'y 25, 27 (2003), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1307&context=law_journal_law_policy. Yet, not much changed in those six years nor from 2009 to 2018.

3. ABA Diversity, *supra* note 1, at 4 ("It is incumbent upon each one of us to do something that will make a real difference.")

customers demand it."[4] There have even been arguments based upon political,[5] leadership,[6] and demographic considerations.[7]

The business case for diversity has been especially successful in encouraging efforts to advance diversity in large law firms.[8] The business case is compelling because it bypasses differences of opinion about the value of promoting diversity, i.e., whether it is the right thing to do, by refocusing on the shared business imperative of meeting client demand.[9] To the question, "Why should we promote diversity in our organization?", the answer is, "Because our clients and customers want it and, if we don't meet that demand, our competitors will."[10]

There is, however, another consensus value that holds the same transformative power for advancing diversity in the profession as the business case for diversity. It is the ethical case for diversity. The historical role of lawyers in this nation demonstrates lawyers have a clear and compelling ethical duty to promote diversity in the legal profession.[11] It is time for codified rules of ethics to acknowledge this duty. The ABA should lead this change by amending its Model Rules of Professional Responsibility (Model Rules) to acknowledge that duty. Specifically, we propose the ABA amend its Model Rules by inserting a new rule 8.5 as follows:

> As a learned member of society with an ethical obligation to promote the ideal of equality for all members of society, every lawyer has a professional duty to undertake affirmative steps to remedy *de facto* and *de jure* discrimination, eliminate bias, and promote equality, diversity and inclusion in the legal profession. Every lawyer should aspire to devote at least 20 hours per year to efforts to eliminating bias and promoting equality, diversity, and inclusion in the legal profession. Examples of such efforts include but are not limited to: adopting measures to promote the identification,

4. ABA Diversity, *supra* note 1, at 5 ("Business entities are rapidly responding to the needs of global customers, suppliers, and competitors by creating workforces from many different backgrounds, perspectives, skill sets, and tastes. Ever more frequently, clients expect and sometimes demand lawyers who are culturally and linguistically proficient.")

5. ABA Diversity, *supra* note 1, at 5 ("Lawyers and judges have a unique responsibility for sustaining a political system with broad participation by all its citizens. A diverse bar and bench create greater trust in the mechanisms of government and the rule of law.')

6. ABA Diversity, *supra* note 1, at 5 ("Individuals with law degrees often possess the communication and interpersonal skills and the social networks to rise into civic leadership positions, both in and out of politics.")

7. ABA Diversity, *supra* note 1, at 5 ("Our country is becoming diverse along many dimensions and we expect that the profile of LGBT lawyers and lawyers with disabilities will increase more rapidly. With respect to the nation's racial/ethnic populations, the Census Bureau projects that by 2042 the United States will be a 'majority minority' country.")

8. Archer, *supra* note 2, at 27 ("In the 1980's, after learning about what social scientists and demographers termed the 'browning of America,' corporations began embracing cultural diversity. When they heard that people of color would constitute a majority of the U.S. population by 2056, corporations developed vendor and employee affirmative action programs and changed the content of their advertising.")

9. Archer, *supra* note 2, at 27 ("Corporations knew that their bottom-line would be affected if they did not reach out to the changing consumer demographic.")

10. This sentiment is best epitomized by the fact that, in 1999, the Chief legal Officers of nearly five-hundred major corporations signed a document entitled "Diversity in The Workplace – A Statement of Principle," which was intended to be a mandate for law firms to make immediate and sustained improvement in the area of diversity in the legal profession. In essence, signatories pledged to end or limit their relationships with law firms whose track records reflected a lack of meaningful interest in diversity. In 2004, then-Executive Vice President, General Counsel, and Chief Compliance and Risk Management Officer of General Mills Roderick "Rick" Palmore wrote "A Call to Action – Diversity in the Legal Profession" to serve as a renewed commitment to the 1999 mandate after noticing in the five years since "Diversity In The Workplace — A Statement of Principle" that "all objective assessments show that the collective efforts and gains of law firms in diversity have reached a disappointing plateau." Rick Palmore, *A Call to Action – Diversity in the Legal Profession* (2004), https://www.lcldnet.org/resources/2004-call-to-action/.

11. Archer, *supra* note 2, at 28-29 ("Our profession requires diversity because lawyers not only speak for the legal rights of citizens, but also for the Constitution, the judicial system, and the rule of law—the regulations and problem-solving mechanisms that make our heterogeneous democracy possible. As representatives of the third branch of government, we are responsible for ensuring the checks and balances that our founding fathers deemed necessary for a just society.")

> hiring, and advancement of diverse lawyers and legal professionals; attending CLE and non-CLE programs concerning issues of discrimination, explicit and implicit bias, and diversity; and active participation in and financial support of organizations and associations dedicated to remedying bias and promoting equality, diversity and inclusion in the profession.

Why would such a change matter? Because recognizing a lawyer's ethical obligation requires and empowers lawyers to act even in the absence of a business case. It bridges the gap between the moral case for diversity and the business case for diversity. It says that, as lawyers, we have the obligation and the agency to pursue liberty and justice for all, within and outside our commercial practices. It compels us to use our skills, voice and station independent of our clients' interests. Requiring lawyers to act to promote diversity in the profession has the potential to be as impactful as making *pro bono* legal services an ethical responsibility. Codifying the long-established ethical obligation to promote equality gives us jurisdiction to address existing inequality.

II. THE FOUNDATIONS OF LEGAL ETHICS

In this day and age, the importance of ongoing formal education in legal ethics is undeniable.[12] Accordingly, most states with mandatory Continuing Legal Education (CLE) rules require ongoing education on legal ethics.[13] Yet, lawyers attending CLE courses ordinarily cannot be assumed to have a common base of knowledge about the subject.[14] In this vein, to understand the case for an ethical obligation to promote diversity in the legal profession, it is necessary to first understand what ethics are and, importantly, how they differ from morals.

> [Ethics and morals] are often used interchangeably. Among lawyers and other regulated professionals, "ethics" is often taken to mean the positive rules governing conduct by those professionals by virtue of their profession being state-regulated. "Morals," on the other hand, cover what a lawyer should do, all things considered, or how the lawyer should live, including norms of conduct that relate to the relationship between a person and a deity.[15]

> Thus, while both terms relate to "right" and "wrong" conduct, morals are subjectively held beliefs or a belief system. Ethics, by contrast, are externally imposed, binding and enforceable rules that govern conduct to achieve a shared belief as to what is right.

> When it comes to diversity and lawyers' duties, the distinction between ethics and morals is critical. The Reverend Dr. Martin Luther King was a Baptist minister who attained national recognition during the mid-1950's as a symbolic leader of the civil rights movement in the United States. In one of his most memorable sermons entitled "On Being a Good Neighbor," Dr. King famously said, "Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless."[16] As Dr. King recognized, an ethical call to action operates as an imperative in a way that a moral call does not.

12. Martin P. Moltz, *Viewpoint: Debate Over MCLE Continues: Mandatory CLE-A Better Idea Now than Ever Before*, 11 CBA REC. 44 (1997) ("When one objectively analyzes the number and variety of [disciplinary] findings yearly against individual practitioners, it becomes exceedingly clear that a yearly 'refresher' seminar on ethics is highly desirable. No matter our area or areas of practice, we all need to be acutely aware of the pitfalls prevalent in those areas of the profession.").

13. Jack W. Lawson, *Mandatory Continuing Legal Education and the Indiana Practicing Attorney*, 40 Val. U. L. Rev. 401, 403 (2006).

14. Bruce A. Green, *Teaching Lawyers Ethics*, 51 St. Louis U. L. J. 1091, 1097 (2007).

15. Dennis J. Tuchler, *Teaching Legal Profession: Ethics Under the Model Rules*, 51 St. Louis U. L. J. 1161 (2007).

16. Martin Luther King Jr., Strength to Love 29 (1963).

The concept of law as a system of rules (ethics) that regulate and constrain the affairs of individuals emerged from, and is inextricably linked to, the concept of Justice (morality).

The concept of law as a system of rules (ethics) that regulate and constrain the affairs of individuals emerged from, and is inextricably linked to, the concept of Justice (morality). Marcus Tullius Cicero was a Roman statesman, lawyer, scholar, and writer who is famous for his writings that attempted to uphold republican principles in the final civil wars that destroyed the Roman Republic. In one of these time-tested writings, entitled "De Legibus," Cicero said:

> It is agreed, of course, that laws were invented for the safety of citizens, the preservation of States, and the tranquility and happiness of human life, and that those who first put statutes of this kind in force convinced their people that it was their intention to write down and put into effect such rules as, once accepted and adopted, would make possible for them an honourable and happy life; and when such rules were drawn up and put in force, it is clear that men called them "laws." From this point of view, it can be readily understood that those who formulated wicked and unjust statutes for nations, thereby breaking their promises and agreements put into effect anything but "laws." It may thus be clear that in the very definition of the term "law" there inheres the idea and principle of choosing what is just and true.[17]

We must then ask ourselves, "And what is our conception of the 'just and true?'" For Americans, it is defined in our founding documents: the Declaration of Independence, the Constitution and the Bill of Rights. The Preamble to the Constitution, for example, proclaims:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The elevation of the rule of law finds its ultimate expression in Thomas Paine's "Common Sense."[18] Thomas Paine was an English-born American political activist, philosopher, political theorist, revolutionary, and one of the Founding Fathers of the United States. Paine wrote "Common Sense" in 1775 and 1776 to advocate independence from Great Britain and to encourage common people in the Colonies to fight for egalitarian government. In support of these efforts, Paine exclaimed:

> But where, says some, is the King of America? I'll tell you. Friend, he reigns above,

17. Sara Robbins, Law: A Treasury of Art and Literature 52 (1990).

18. Thomas Paine, *The Writings of Thomas Paine*, 99 (1776), http://calhum.org/files/uploads/program_related/TD-Thomas-Paine-Common-Sense.pdf.

It fell to the legal profession to make real the rights conferred in our founding documents.

> and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, *that so far we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.* But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony, be demolished, and scattered among the people whose right it is.[19]

If, as Paine writes, in America law is king, then lawyers by virtue of training and social status, are its knights:

> The original account of the American Lawyer's role was that of America's governing class. The core of this approach was that lawyers—in contrast to business people—are above self-interest, and accordingly, are uniquely able to discern and pursue the common good. As America's governing class, lawyers were obligated to manage society in the interest of promoting the rule of law."[20]

It is important to remember that at the time of the Nation's founding, the idea of a representative government based on the consent of the governed was, with a few insignificant exceptions, virtually unprecedented.[21] Thus, it fell to the legal profession to make real the rights conferred in our founding documents. Lawyers and the judiciary debated and ultimately defined and enforced these rights. *Marbury v. Madison*,[22] which established the doctrine of Judicial Review, legitimized and endorsed the legal profession's right and obligation to enforce our social contract. The Supreme Court has continued to perform this mission over the entire course of our Nation's existence, through cases such as *Gideon v. Wainright*[23] (Sixth Amendment right to counsel), *Brown v. Board of Education*[24] (declaring separate but equal unconstitutional), *Roe v. Wade*[25] (woman's right to privacy) and, most recently, *Obergefell v. Hodges*[26] (equal protection for same-sex marriage). In each of these cases, the Supreme Court enforced fundamental protections enshrined in the Constitution, sometimes even before widespread public acceptance.[27]

19. See id. (emphasis added).

20. Russell Pearce, *The Lawyer and Public Service*, 9 AM. U.J. Gender Soc. PoL'y & L. 171 (2001) [hereinafter Pearce, *The Lawyer and Public Service*]. This concept is echoed in Alexis De Tocqueville's description of lawyers as the American aristocracy. *See id.* at 172 (citing Alexis De Tocqueville, *Democracy in America*, 266-270 (1969)). De Tocqueville's writings reflected the republican understanding of lawyers as "providing the enlightened political leadership that protected 'life, liberty, and property…." *Id*.

21. *See, e.g.*, Joseph Ellis, *Founding Brothers: The Revolutionary Generation* 6 (2000).

22. Marbury v. Madison, 5 U.S. 137 (1803).

23. Gideon v. Wainwright, 372 U.S. 335 (1963).

24. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

25. Roe v. Wade, 410 U.S. 113 (1973).

26. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

27. To be clear, at the time of the Nation's founding, the realization of our founding ideals was not preordained. Public acceptance of the legal profession's authority to translate our founding and constitutional principles into a binding set

III. THE EMERGENCE OF CODIFIED ETHICAL DUTIES.

While the first role of lawyers in society was selfless pursuit of the common good,[28] the second role became advocacy on behalf of individual clients.[29] It was in this phase, as discussed below, that Rules of Professional Responsibility emerged to regulate the inherent tension between the interests of society and the interests of individuals.

The emergence of codified ethical rules followed the emergence of lawyers representing private clients. Because lawyers were previously considered an exalted class obligated to serve the social good, the notion of representing private citizens for pecuniary gain was frowned upon. As private, commercial practice on behalf of clients became more common, there arose a corresponding need for rules to regulate the competing interests and obligations of the lawyer *viz-a-viz* his client, opposing counsel, the court, and the public.

The history of codified legal ethics standards dates back to 1836 when David Hoffman, considered the grandfather of American legal ethics,[30] first published "Fifty Resolutions in Regard to Professional Deportment."[31] Hoffman's Resolutions proposed to balance the tension between lawyer as servant for the common good and lawyer as private advocate. In doing so, however, Hoffman's rules illustrate the tensions inherent in the then prevailing view that a lawyer's duty to the common good transcended his duty to his client.

Hoffman's Rule 15, for example, provided guidance as to how a lawyer should balance his duty to public service and his duty to a client accused of murder:

> When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavors to arrest or to impede the course of justice, by special resorts to ingenuity, to the artifices of eloquence, to appeals to the morbid and fleeting sympathies of weak juries, or of temporizing courts, to my own personal weight of character–nor finally, to any of the overweening influences I may possess from popular manners, eminent talents, exalted learning, etc. Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honorable profession; and, indeed, to no intervention beyond securing to them a fair and dispassionate investigation of the facts of their cause, and the due application of the law. *All that goes beyond this, either in manner or substance, is unprofessional, and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy*

of external rules was necessary but by no means assured. Through public consent to legally binding judicial pronouncements, the general framework established in the Constitution was transformed into an externally imposed set of rules that guide and constrain the citizenry's behavior. Although casually the Supreme Court is often described as establishing the law of the land, the reality is the Court's pronouncements carry no more force than the other two branches of government and the lower courts accord them. That the Court's pronouncements are overwhelmingly obeyed even when politically unpopular, demonstrates the force of normative pronouncements, such as ethical precepts.

28. *See* Pearce, *The Lawyer and Public Service*, at 171 ("The original account of the American lawyer's role was that of America's governing class. The core of this approach was that lawyers-in contrast to business people-are above self-interest, and accordingly, they are uniquely able to discern and pursue the common good.") (citing Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professionalism Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1241 (1995)).

29. *See id.* at 172. However, this does not mean that governing class lawyers were not zealous advocates for their clients. Rather, their zealous advocacy occurred within the bounds of governing class obligations. *Id.* (citing Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo. J. Legal Ethics 241 (1992)).

30. Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture on Legal Ethics: Lawyer Professionalism as Moral Argument*, 26 Gonz. L. Rev. 393, 396 n.9 (1991).

31. David Hoffman, *Fifty Resolutions in Regard to Professional Deportment* (1836), https://lonang.com/commentaries/curriculum/professional-deportment/ (last visited Sept. 6, 2018).

and selfish motive which sets a higher value on professional display and success than on truth and justice, and the substantial interests of the community.[32]

In other words, if the lawyer adjudged the accused to have committed a murder or other heinous offense, by legal or *moral* standards, his duty to the rule of law precluded him from using the full range of his knowledge, skill or reputation to obtain his client's acquittal. But, ethical standards evolve with society.[33] Today, the pendulum has swung fully in the opposite direction; the notion that a lawyer might give his criminal client a less than zealous defense due to his belief in his client's guilt would be considered unethical.

The ABA adopted Canons of Professional Ethics in 1908.[34] These were subsequently revised to become the ABA Model Code of Professional Responsibility, which were further revised in 1983 to became the Model Rules of Professional Conduct.[35] The ABA Rules, in their various incarnations, are an authoritative source of ethical obligations for the legal profession, as are their state counterparts.[36]

Neither the Model Rules nor individual state rules are a comprehensive compendium of a lawyer's ethical obligations, however. Rather they provide, with a few exceptions, rules of decision for lawyers representing individual clients. Codified rules emerged as the profession wrestled with the tension between lawyers as individuals who put serving the public good above self-interest and the emergence of lawyers representing clients for remuneration.[37] Viewed from the vantage point of the legal profession's obligation to advance the common good, rules of professional responsibility are revealed to be rules for allocating duties within that overall responsibility. Lawyers, whether prosecutor or defense attorney, advocate zealously (within the bounds of the Rules); judges decide impartially (subject to Rules of Judicial Conduct); and, collectively, the profession fulfills its duty to society.

The prominent legal ethicist Thomas Haffernce observed, "Somewhere between Hoffman's day (he died in 1854) and our own, professionalism stopped meaning that lawyers are responsible for justice."[38] This epitaph, however understandable, reflects the error of focusing narrowly on ethics as rules adopted to govern the private practice and disregarding the broader, preexisting yet equally binding ethical responsibility to serve the public good. Codified rules of professional conduct have not displaced pre-existing ethical obligations. Rather, they focus narrowly on representing individual clients in commercial practice. It is the undue focus on codified Rules to the exclusion of common law legal ethics that leads to frustration with, and arguably even disdain for, the profession and for lawyers. For example, another legal ethicist argued, "[T]he adversary system is justified only by the very weakest of reasons, namely, that it is not demonstrably worse than other systems."[39] This cynical view fails to recognize the allocative character of the adversary system by which the interests of society and the individual are simultaneously advanced and balanced. The lawyer representing

32. *See id.* (emphasis added).

33. The next milestone in the development of codified ethical rules occurred in 1854 when a series of lectures given by Judge George Sharswood, Chief Justice of the Pennsylvania Supreme court, were combined and published as Professional Ethics. These works in turn became the basis for the first formal code of ethics for lawyers adopted in the United States, the Alabama Code of Ethics, in 1887. *See* ABA, *Model Rules of Professional Conduct: Preface*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface.html (last visited Spt. 6, 2018) [hereinafter ABA, *Model Rules*].

34. *See id.*

35. *See id.*

36. *See id.* Puerto Rico is the only U.S. jurisdiction besides California to not adopt the ABA Model Rules. See ABA, Jurisdictions That Have Adopted the ABA Model Rules of Professional Conduct (previously the Model Code of Professional Responsibility), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Sept. 6, 2018).

37. *See* Pearce, *The Lawyer and Public Service*, at 174 ("At times, however, the governing class lawyer's higher duty to the law resulted in conflict with cause lawyers and activists.").

38. Shaffer, *supra* note 30, at 402-403.

39. David Luban, Lawyers And Justice: An Ethical Study xxiii (1988).

Thus, considered in their historical context, codified ethical rules are revealed to be neither the source nor the limit of the profession's ethical obligations.

an individual client is not obligated to balance his client's interests against the numerous competing interests she has been retained to fight because she is not alone in the fight. She acts in community with the profession, which collectively bears the burden of ensuring that each interest has an equally zealous advocate. But of course, if the profession does not zealously discharge its duty to ensure that all voices are represented, then it fails to honor its heritage or perform its role in society and as importantly, it will deserve the disdain society casts upon it.

Thus, considered in their historical context, codified ethical rules are revealed to be neither the source nor the limit of the profession's ethical obligations. Rather, they serve to regulate the roles and responsibilities of individual lawyers representing competing interests so that the profession as a whole can achieve its mission of advancing and defending our nation's founding compact. As New York's Rules of Professional Conduct explicitly acknowledge, "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."[40]

IV. CODIFIED RULES EVOLVE TO REFLECT COMMON LAW ETHICAL RESPONSIBILITIES

Pearce argues, if the legal profession's first role in society was to serve the public good and the second was commercial, private practice, then recognition of pro bono lawyers represents the third phase of lawyers' role in society.[41] The Canons originally made no mention of pro bono service. Their successor Model Code of Professional Responsibility, however, encouraged lawyers to donate their services on behalf of those unable to pay:

> Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession.[42]

40. New York Rules of Professional Conduct: Preamble, at ¶ 8.

41. *See* Pearce, *The Lawyer and Public Service*, at 175 ("The third approach of lawyers to public service is unpaid pro bono services, often referred to by the short hand 'pro bono.' It refers to lawyers who or no fee donate a limited amount of their work to public service.").

42. Model Code of Professional Conduct: EC2-25, https://www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM (foot-

The Model Code of Conduct was replaced by the Model Rules of Professional Conduct (the "Model Rules") in 1983.[43] Model Rule 6.1, Voluntary Pro Bono Publico Services provided:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.[44]

Rule 6.1 was amended in 1993 to recognize a lawyers' ethical duty to provide *pro bono* services and to include an aspirational call to render 50 hours annually of *pro bono* legal services:

> Rule 6.1 (Voluntary Pro Bono Publico Service): Every lawyer has a professional responsibility to provide legal services to those unable to pay. *A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.* In fulfilling this responsibility, the lawyer should: provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; (2) delivery of legal services at a substantially reduced fee to persons of limited means; or (3) participation in activities for improving the law, the legal system or the legal profession.
>
> In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.[45]

Thus, since 1908 the ABA's rules of professional responsibility have evolved from no recognition of a professional obligation to provide pro bono legal services, to general encouragement, to an established professional responsibility and a 50-hour aspirational standard.[46] In recognizing that a lawyers' ethical obligations extend beyond the commercial practice of law, the ABA and state rules of professional conduct are evolving toward closing the gap between common law and codified rules of ethics.

---

notes omitted) (last visited Sept. 6, 2018).

43. *See* ABA, *Model Rules* ("In 1977, the American Bar Association created the Commission on Evaluation of Professional Standards to undertake a comprehensive rethinking of the ethical premises and problems of the legal profession. Upon evaluating the Model Code and determining that amendment of the Code would not achieve a comprehensive statement of the law governing the legal profession, the Commission commenced a six-year study and drafting process that produced the Model Rules of Professional Conduct. The Model Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983. At the time this edition went to press, all but eight of the jurisdictions had adopted new professional standards based on these Model Rules.").

44. *See* ABA CPR Policy Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct Rule 6.1: Voluntary Pro Bono Service*, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_1.authcheckdam.pdf.

45. Model Rule 6.1 (emphasis added).

46. Although aspirational, the fifty-hour standard has affected the profession. Numerous law firms have adopted the goal of having each lawyer perform fifty-hours of *pro bono* services.

Numerous "signposts in the road"[47] indicate the time has come for bar associations to recognize and require an ethical duty to promote diversity in the profession.

V. THE ETHICAL CASE FOR DIVERSITY: IT'S TIME

In the case of diversity and equality, if serving the public good was the first stage of ethical responsibility, serving clients the second, and *pro bono* the third, then promoting the ideal of equality is the fourth. Numerous "signposts in the road"[47] indicate the time has come for bar associations to recognize and require an ethical duty to promote diversity in the profession and in society at large, in discharge of the profession's common law ethical duty to advance and protect our Nation's founding values.

Signpost 1: State Bar Efforts to Attack Discrimination and Promote Diversity

State bar associations for years have developed their own initiatives, rules and strategies for dealing with sensitive issues that affect their members. Prior to 2016, when the ABA declared discriminatory conduct to be professional misconduct, 24 jurisdictions had adopted some form of anti-bias, anti-prejudice and/or anti-harassment mandates in the black letter of their rules of conduct. Another 15 had adopted an official Comment in their Rules to address bias, discrimination, and prejudicial behavior by lawyers.[48]

Of the 24 states that have established anti-discrimination rules on their books, there exists a wide variation in the language adopted. For example, California has incorporated a duty to refrain from discriminating "on the basis of race, national origin, sex, sexual orientation, religion, age or disability in hiring, promoting, discharging or otherwise determining the condition of employment."[49] Indiana's ethics rules also have dispensed with a *mens rea* element to the prohibition on discriminatory conduct. Indiana Rule of Court 8.4(g) explicitly states it is misconduct for a lawyer to "engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic

47. In *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N.Y. 369 (1927), Chief Judge Cardozo outlined the standards of promissory estoppel, a doctrine that, at that time, had yet to be fully developed in New York. In his opinion, Cardozo acknowledged that, "[w]hether [promissory estoppel] has made its way in this state to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not attempt to say." *Id.* Still, by supporting his opinion using earlier and similar jurisprudence as "signposts in the road," Cardozo laid the foundation for introducing the doctrine of promissory estoppel into New York courts. Likewise, our argument, that the time has come for bar associations to recognize and require an ethical duty to promote diversity in the profession and in society at large, will be supported using earlier and similar "signposts in the road."

48. A chart outlining the jurisdictional adoption of Model Rule 8.4(g) is attached as Appendix B.

49. California Rules of Professional Conduct, Rule 2-400.

The missing element, however, continues to be the link between these established diversity initiatives and a professional obligation to promote and support diversity and inclusion in the legal profession.

status, or similar factors."[50] Colorado[51] and Missouri[52] have similar rules addressing bias and omitting the *mens rea* requirement.[53]

Although state bars have taken important steps toward remediating discrimination in the industry, none have taken the additional step of issuing a clear mandate regarding the lawyer's affirmative obligation to enforce and advance equality. Many are actively tackling discrimination and disparity issues: establishing diversity committees, drafting strategic plans, and conducting benchmarking studies. The missing element, however, continues to be the link between these established diversity initiatives and a professional obligation to promote and support diversity and inclusion in the legal profession. Without this link, these rules do not have the force necessary to drive real change in the profession.

Signpost 2: International Efforts to Combat Discrimination and Promote Diversity.

The topic of diversity in the legal profession is not limited to the United States. Other countries have recognized the impact discrimination and harassment can have on lawyers, clients, and the profession. Two countries in particular – Canada and the UK – have drafted Codes of Conduct that explicitly recognize lawyers have heightened social and professional responsibilities which derive from their privileged status.

In Canada, the Ontario Rules of Professional Conduct outlines lawyers' special responsibility to address discrimination, by setting out the special role of the profession to recognize and protect the dignity of individuals and the diversity in the community. Specifically, the Rule states:

> A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.[54]

50. Indiana Rules of Court, Rules of Professional Conduct, Rule 8.4(g).
51. Colorado Rules of Professional Conduct, Rule 8.4(g).
52. Missouri Rules of Professional Conduct, Rule 4-8.4(g).
53. As of March 2018, however, there are approximately twenty-one states that have no language in their Rules addressing discrimination, although three of those states are studying Rule 8.4(g). As of 2018, none of the fifty states have adopted rules contemplating the ethical obligations of attorneys to promote diversity in the workplace and beyond.

54. Law Society of Ontario, Rules of Professional Conduct, Rule 6.3.1-1.

The Commentary to the Rule explains that Ontario's Law Society "acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination."[55] The Rule is interpreted according to the provisions of Ontario's Human Rights Code, which includes as discrimination conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Rule places additional responsibilities on the lawyer to take reasonable steps to prevent or stop discrimination by third parties subject to the lawyer's control or direction.

The UK Code of Conduct includes a chapter on equality and diversity, which is meant to encourage equality of opportunity and respect for diversity. It mandates that "Everyone needs to contribute to compliance with these requirements, for example by treating each other, and clients, fairly and with respect, by embedding such values in the workplace and by challenging inappropriate behaviour and processes."[56] Taking it one step further than Canada's Rule, the UK Code of Conduct outlines specific outcomes lawyers must achieve in order to comply with the Chapter. These include: (1) an approach to recruiting and employment that encourages equality of opportunity and respect for diversity; (2) monitoring and reporting workforce diversity data; and (3) refraining from discriminating, victimizing or harassing anyone (in the course of professional dealings).[57] The Code goes on to identify for lawyers ways in which they can determine whether they have complied with the Code. These include having a written equality and diversity policy and providing employees and managers with training and information about complying with the equality and diversity requirements. Lawyers with management responsibilities are required to take "all reasonable steps to encourage equality of opportunity and respect for diversity" in the workplace.

Perhaps most notable in these provisions is the clear connection drawn between lawyers' moral and ethical obligations and their duty to promote diversity in the profession. Lawyers are held accountable for their conduct and the conduct of those who are under their control. In the UK, lawyers' obligations are outlined in the black letter of the Code (not merely in the Commentary).

Signpost 3: Corporate Defense of our Founding Ideals

Corporate America is becoming increasingly vocal and engaged in promoting equality and inclusion. In a number of major Supreme Court cases, such as *Trump v. Hawaii*[58] (U.S. travel restrictions); *Obergefell v. Hodges*[59] (equal protection for same-sex marriage); *Fisher v. University of Texas*[60] (affirmative action in university application processes); and *Gloucester County School Board v. Gavin Grimm (G.G.)*[61] (transgender student issues), major corporations have submitted amicus briefs in support of the underrepresented and underserved. In *Obergefell,* for example, 379 companies, ranging from Amazon to Starbucks, filed an amicus brief in which they argued that their businesses benefit from diversity and inclusion.[62]

Recently, Brad Smith, President and Chief Legal Officer of Microsoft, forcefully expressed Microsoft's commitment to supporting legislation giving formal legal status to the Dreamers, undocu-

55. *Id.*
56. Solicitor's Regulation Authority Code of Conduct, Chapter 2.
57. *Id.*
58. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).
59. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
60. Fisher v. Univ. of Tex., 570 U.S. 297 (2013).
61. Gloucester Cnty. Sch. Bd. v. G.G., 136 S. Ct. 2442 (2016).
62. *See Obergefell v. Hodges*, SCOTUSblog, http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/ (last visited Sept. 6, 2018).

mented individuals illegally brought to America as minors and who have lived most of their lives here. Smith issued an official statement on behalf of Microsoft, "As an employer, we appreciate that Dreamers add to the competitiveness and economic success of our company and the entire nation's business community. In short, urgent DACA legislation is both an economic imperative and a humanitarian necessity."[63] Other corporations, such as Apple[64] and IBM,[65] issued similar statements.

Similarly, in 2017, in the wake of comments by President Trump in response to the violent actions of white supremacists at a rally at the University of Virginia, three CEO's condemned the President's statements and resigned from his American Manufacturing Council.[66] Ken Frazier, an attorney and CEO of Merck, said, "America's leaders must honor our fundamental values by rejecting expression of hatred, bigotry and group supremacy, which run counter to the American ideal that all people are created equal."[67]

Corporate America is not just speaking out, it is also devoting renewed efforts to drive change. In 2016, Diversity Lab, an incubator for innovative ideas and solutions that boost diversity and inclusion in law, joined with Bloomberg Law and the Stanford Law School to convene the Women in Law Hackathon.[68] The Hackathon's goal was to generate innovative and new solutions to the lack of diversity in the legal profession.[69] One of the solutions developed during the Hackathon was the Mansfield Rule.[70] Named after Arabella Mansfield, the first woman admitted to the practice of law in the United States, the Mansfield Rule measures whether law firms have affirmatively considered women, LGBTQ+, and minority lawyers – at least 30% of the candidate pool – for promotions, senior level hiring, and significant leadership roles in the firm, including:

- Equity Partner Promotions
- Lateral Partner and Mid/Senior Level Associate Searches
- Practice Group & Office Head Leadership
- Executive Committee and/or Board of Directors
- Partner Promotions/Nominations Committee
- Compensation Committee
- Chairperson and/or Managing Partner

---

63. Brad Smith, *Urgent DACA Legislation is Both an Economic Imperative and Humanitarian Necessity*, Microsoft on the Issues (Sept. 5, 2017), https://blogs.microsoft.com/on-the-issues/2017/09/05/urgent-daca-legislation-economic-imperative-humanitarian-necessity/.

64. Catherine Clifford, *Apple CEO Tim Cook 'deeply offended' by 'DACA situation'*, CNBC (April 6, 2018, 12:19 PM), https://www.cnbc.com/2018/04/06/as-an-american-apple-ceo-tim-cook-is-offended-by-daca-repeal.html.

65. Ali Breland, *IBM Pushing for DACA Legislation by the End of the Year*, The Hill, (Oct. 09, 2017, 12:59 PM), http://thehill.com/policy/technology/354549-ibm-is-pushing-for-daca-legislation-by-the-end-of-the-year.

66. Michael Erman, *Three CEOs resign from Trump council over Charlottesville*, Reuters, (Aug. 14, 2017, 8:54 AM), https://www.reuters.com/article/us-virginia-protests-merck/three-ceos-resign-from-trump-council-over-charlottesville-idUSKCN1AU1FM.

67. Lucinda Shen, *Business Leaders Are Not Happy With President Trump's Charlottesville Response*, Fortune (Aug. 14, 2017), http://fortune.com/2017/08/14/ken-frazier-trump-charlottesville-response/.

68. *2016 Women in Law Hackathon*, DiversityLab, http://www.diversitylab.com/hackathons/ (last visited Sept. 6, 2018).

69. *See id.*

70. *See id.*

For example, if a law firm's management has identified a short list of five candidates for an opening on the executive committee, under the Mansfield Rule guidelines two of the candidates would need to be women and/or attorneys of color.[71] Firms that consider women and attorneys of color for 70% or more of their existing leadership committees/roles that exist at the firm and are open during the review period qualify to become Mansfield Certified.[72] Mansfield Certified firms will be offered the opportunity to send their recently promoted diverse partners to a two-day Client Forum to be hosted in late 2018 to build relationships with and learn from influential in-house counsel. More than 40 firms agreed to adopt the first iteration of the Rule and many more have signed on to the 2.0 iteration. 70 legal departments have signed on to support this effort by attending the Client Forum.[73]

Signpost 4: The ABA Recognizes the Need to Actively Combat Discrimination and Promote Diversity in the Legal Profession

Formed in 1878, the ABA Constitution proclaims:

> The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote through the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public.[74]

Consistent with this mission, the ABA has adopted four goals. Goal III is the elimination of bias and enhance diversity (discussed *infra*). Goal IV is to advance the rule of law which, as discussed above, includes five objectives that derive from the profession's historical obligations to promote the public interest:

> 1. Increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world.
>
> 2. Hold governments accountable under law.
>
> 3. Work for just laws, including human rights, and a fair legal process.
>
> 4. Assure meaningful access to justice for all persons.
>
> 5. Preserve the independence of the legal profession and the judiciary.[75]

Thus, the ABA's mission has always been to advance the American legal profession's established role as guardian of the Nation's founding principles and ideals. Yet, in its formation, the ABA did

---

71. *See id.*

72. DiversityLab, *Mansfield Rule 2.0: 65 Law Firms Pilot Mansfield Rule 2.0 to Boost Diversity in Leadership Ranks*, http://www.diversitylab.com/pilot-projects/mansfield-rule/ (last visited Sept. 6, 2018).

73. *See id.*

74. *ABA Constitution and Bylaws: Rules of Procedure House of Delegates 2015-2016*, https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/aba_constitution_and_bylaws_2015.authcheckdam.pdf.

75. *ABA Mission and Goals* (June 11, 2018), https://www.americanbar.org/about_the_aba/aba-mission-goals.html.

not live up to its professed ideals. Membership was initially reserved exclusively to white men.[76] The first woman member was not admitted until 1918.[77] Membership was not opened to non-whites until 1943.[78] And yet, the first African-American was not admitted to the ABA until 1950.[79]

ABA rules did not address discrimination for more than a century after the ABA's founding. In 1988, the ABA adopted Comment 2 to Rule 8.4(d), which provided that discriminatory conduct in the course of representing a client violates Rule 8.4(d), conduct prejudicial to the administration of justice. Comments, however, are mere guidance, not rules, and thus unenforceable.

It would take almost another 30 years before the ABA squarely addressed the problem of discrimination, and the lack of diversity, in the profession. In 2016, the ABA amended Rule 8.4 to directly prohibit lawyers from harassing or discriminating against certain classes of persons while engaged in the practice of law.[80] The ABA did so by adding a new paragraph (g),[81] so that Misconduct was defined to include discriminatory conduct:

> It is professional misconduct for a lawyer to:
>
> …
>
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The amendment, although a welcome step forward, was nevertheless more measured than several of the state model rules. The new rule, for example, contains a *mens rea* element. It prohibits only discriminatory conduct engaged in knowingly (including constructive knowledge).[82] California, Indiana and New York, for example, have eliminated the *mens rea* element. California's rule also extends to discriminatory employment practices.

In recent years, however, science has revealed that all of us—regardless of race, creed, ethnicity, gender identification or sexual orientation—harbor and act on implicit biases against disfavored

---

76. *ABA Timeline*, http://abaleaders.org/timeline/index.html (last visited Sept. 6, 2018).

77. New York Women's Bar Ass'n, *Major Milestones in the History of Women Attorneys and Judges in the United States*, https://web.archive.org/web/20140916055711/http://www.nywba.org/history2.shtml (last visited Sept. 6, 2018).

78. *ABA Mission and Goals*, *supra* note 76.

79. *See id.*

80. Samson Habte, *ABA Ethics Committee Floats Draft Anti-Bias Rule*, Bloomberg (July 29, 2015), https://www.bna.com/aba-ethics-committee-n17179934053/.

81. Peter Geraghty, *ABA adopts new anti-discrimination Rule 8.4(g)* ABA, (Sept 2016), https://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html.

82. The inclusion of a *mens rea* element was a conscious decision of the ABA House of Delegates. "[T]he Ethics Committee was concerned that a model rule that did not include a *mens rea* would in effect impose a strict liability standard on the profession. The Ethics Committee was not convinced that this was necessary, or that prohibiting 'knowing" conduct would not adequately prevent the conduct this Rule is intended to address." ABA Standing Comm. on Ethics and Professional Responsibility Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative (June 16, 2015), https://lalegalethics.org/wp-content/uploads/2015-07-16-ABA-Proposed-Amendment-to-Rule-8.4-re-Harassment.pdf?x16384.

groups in society.[83] The ABA has recognized the problem of implicit bias and has urged action to remedy it.[84] Importantly, because implicit bias is subconscious, it is imperceptible. Consequently, Rule 8.4(g)'s focus on *knowing* discrimination fails to address the fact that we all unconsciously discriminate. In that light, linking the professional obligation to a *mens rea* element is a bit of a red herring. All lawyers unconsciously discriminate. Moreover, the science of implicit bias reveals that we are incapable of willing ourselves to non-discrimination. The best we can do is take remedial steps. However, that is Rule 8.4(g)'s second limitation; it imposes no remedial obligation, either for intentional or unintentional discrimination.

In conjunction with amending Rule 8.4, the ABA House of Delegates also passed Resolution 113, "Promoting Diversity in the Legal Profession."[85] The Resolution urged providers of legal services to "expand and create opportunities at all levels of responsibility for diverse attorneys" and urged clients "to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase … to diverse attorneys."[86]

The ABA followed this resolution with a letter to the chief legal officers of the Fortune 1000 companies seeking their commitment to supporting Resolution 113 and taking additional affirmative steps to increase diversity among the ranks of their outside counsel.[87] Responding to this call for action, 80 general counsel from Fortune 1000 companies signed the "GC Pledge," committing to support Resolution 113 and encourage their outside law firms complete a Model Diversity Survey regarding diversity in the legal profession.[88] The companies also agreed to use the results of the Model Diversity Surveys as a factor in determining which firms they would retain or terminate.[89]

The Resolution was a resounding call for action directed not only at the legal community, but also toward consumers of legal services. The ABA enlisted the help of in-house counsel in promoting the Resolution because it understood that there is a "well-established business case for diversity and inclusion" and that clients, the profession and society are best served by organizations that are diverse and inclusive at every level. In fact, the Report issued by the ABA's Diversity & Inclusion 360 Commission concluded that:

> The economic success of diverse attorneys would attract others into the profession, thereby building the pipeline; upend the implicit bias that stifles opportunities now; and result in the full and unhindered participation of diverse attorneys in the profession, thereby making the profession more representative of the populations it serves.[90]

---

83. *See, e.g.*, David L. Douglass, *The Scientific Basis For The Ethical Obligation To Require Action To Eliminate Bias And Promote Diversity In The Legal Profession*, IILP Review 2017: The State of Diversity and Inclusion in the Legal Profession 66 (2017), http://theiilp.com/resources/Pictures/IILP_2016_Final_LowRes.pdf.

84. *Id.; see also* Paulette Brown, *Inclusion ≠ Exclusion: Understanding implicit bias is key to ensuring an inclusive profession* (Jan. 2016), http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring.

85. ABA, *113: Adopted*, https://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/113.html (last visited Sept. 6, 2018).

86. *See id.*

87. Letter from Susan Alexander et al. (Sept. 7, 2016), https://www.americanbar.org/content/dam/aba/administrative/diversity-portal/general-counsel-implementation-aba-resolution-113.authcheckdam.pdf.

88. *Id.*

89. *See* ABA Diversity & Inclusion 360 Commission, *ABA Model Diversity Survey*, https://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission/diversity-survey.html (last visited Sept. 6, 2018).

90. ABA Diversity and Inclusion 360 Commission Report to the House of Delegates, *Report: Resolution 113*, at 2 (Sept. 7, 2016), https://www.americanbar.org/content/dam/aba/administrative/diversity-portal/general-counsel-implementation-aba-resolution-113.authcheckdam.pdf.

While the resolution was a constructive effort to advance diversity in the profession, it cannot escape notice that the ABA was calling for in-house law departments to take efforts the ABA itself was not committing to undertake. Further, it is ironic that the ABA, a legal association, was making a business case for diversity rather than a legal case for diversity. Viewed in the larger context of international legal associations, state associations and corporate advocacy, the ABA's recent actions appear belated and timid.

VI. THE TIME HAS COME FOR THE ABA TO AMEND ITS MODEL RULES TO CODIFY A LAWYER'S ETHICAL OBLIGATION TO PROMOTE EQUALITY AND DIVERSITY IN THE PROFESSION.

The ABA's recent initiatives to promote diversity in the legal profession are admirable. The data however, reveals that more must be done. The National Association for Law Placement's ("NALP") 2017 Report on Diversity revealed that the representation of women associates has seen a net decrease, and the percentage of Black/African-American associates declined every year from 2010 to 2015, although there were small increases in 2016 and 2017.[91] James Leipold, NALP's Executive Director poignantly reflected that:

> Minority women and Black/African-American men and women continue to be the least well represented in law firms, at every level, and law firms must double down to make more dramatic headway among these groups most of all. And, while the relatively high levels of diversity among the summer associate classes is always encouraging, the fact that representation falls off so dramatically for associates, and then again for partners, underscores that retention and promotion remain the primary challenges that law firms face with respect to diversity.[92]

Beyond merely remediating discrimination, however, the Model Rules should be amended to impose an affirmative obligation to promote equality, diversity and inclusion in the profession in recognition of a lawyers' duty to fulfill his or her obligation to enforce and advance the founding principles of equality for all. Indeed, this is the mandate expressed in Model Rules' Preamble:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.
>
> *Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.*[93]

91. National Association for Law Placement (NALP), 2017 Report on Diversity in U.S. Law Firms, https://www.nalp.org/uploads/2017NALPReportonDiversityinUSLawFirms.pdf.

92. National Association for Law Placement (NALP), 2016 Report on Diversity in U.S. Law Firms 3, https://www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf.

93. ABA Model Rules of Professional Conduct, Preamble (emphasis added).

Through these words the Preamble evokes the concept of "lawyer as champion of the public good" that first characterized the role of lawyers in society. History and science lead us to conclude that the ABA should further amend Model Rule 8.4 to acknowledge a lawyer's professional obligation to act affirmatively to promote equality and diversity in the profession. This could be accomplished by moving current Rule 8.5, Disciplinary Authority, to a new Rule 8.6 and drafting a new Rule 8.5 as follows:

> As a learned member of society with an ethical obligation to promote the ideal of equality for all members of society, every lawyer has a professional duty to undertake affirmative steps to remedy *de facto* and *de jure* discrimination, eliminate bias, and promote equality, diversity and inclusion in the legal profession. Every lawyer should aspire to devote at least 20 hours per year to efforts to eliminating bias and promoting equality, diversity and inclusion in the legal profession. Examples of such efforts include but are not limited to: adopting measures to promote the identification, hiring, and advancement of diverse lawyers and legal professionals; attending CLE and non-CLE programs concerning issues of discrimination, explicit and implicit bias, and diversity; and active participation in and financial support of organizations and associations dedicated to remedying bias and promoting equality, diversity, and inclusion in the profession.

Amending the Model Rules in this fashion would elevate the ABA to a position of leadership in the cause of promoting equality, diversity and inclusion in the legal profession. The aspirational 20-hour commitment, like the aspirational 50-hour pro bono commitment, has the potential to mobilize law firms and legal departments to leverage current efforts to eradicating the persistent lack of diversity that plagues the legal profession in a common cause to realize the ideal of equality in our profession and in our society. The ABA should take this evolutionary and necessary step not only in recognition of the legal profession's historic role as guardian of our founding values but out of self-preservation. In a society and profession that is becoming increasingly diverse, failure to do so will cause the ABA to cede its role as leader of the profession and risk relegating it to an anachronistic irrelevancy. Alternatively, as the Nation's premier legal association, the ABA is uniquely positioned to speak as the voice of the legal profession. It can serve as a unifying and galvanizing voice for the numerous organizations that are currently addressing the imperative to promote diversity and inclusion in the profession. The time has come.