

Promoting Diversity and Inclusion in the Legal Profession: The Significance of Giving Voice and Listening to Persons Who Experience Discrimination, Bias, and Harassment

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Date : May 20, 2020

Veronica Root Martinez, [Combating Silence in the Profession](#), 105 *Va. L. Rev.* 805 (2019).

Let's admit it, harassment and bullying are endemic in the practice of law. [Horacio Benardes Neto](#), the President of the [International Bar Association](#) (IBA), made this observation in introducing an IBA report, called [Us Too: Bullying and Sexual Harassment in the Legal Profession](#). Published last year, the report was based on findings from the largest-ever global survey of nearly 7,000 legal professionals in 135 countries. The survey revealed that one in three female respondents and one in fourteen male respondents had been sexually harassed at work. Additionally, one in two female respondents and one in three male respondents reported being bullied at work.

To help the legal professions address the serious problems of sexual harassment and bullying, the IBA report proposes ten recommendations. Recommendation One urges interested parties to "Raise Awareness," while Recommendation Three calls on the legal profession to "Take Ownership" of the problem. These recommendations are one of the reasons that I commend Professor [Veronica Root Martinez](#)'s article, *Combating Silence in the Profession*. In her article, Professor Root Martinez both examines discrimination and exclusion in the legal profession and proposes practical steps for tackling the challenges of discrimination, exclusion, underrepresentation, and bias.

To provide context, the article presents a historical perspective on discrimination and exclusion among lawyers. While we might want to believe that discrimination and exclusion are no longer concerns in lawyers' workplaces, Professor Root Martinez helps the reader understand how discrimination and exclusion continue today. She notes that the disparities start in law school and persist in various workplaces, including large law firms. In addition to examining explicit discrimination, the article discusses implicit discrimination and bias.

This discussion segues into her analysis of how states and the [American Bar Association](#) (ABA) have adopted a new rule related to discriminatory conduct by lawyers. This section reviews the genesis of [Model Rule 8.4\(g\)](#), the ABA's formal anti-discrimination provision. The overview covers positions taken both by the rule's proponents and critics. Critics included those who questioned the need for an anti-discrimination rule and those who challenged the rule's constitutionality.

Professor Root Martinez's analysis of Model Rule 8.4(g) is particularly interesting because it reveals why a proponent of diversity and inclusion in the legal profession might question the rule's content, effects, and impact. To judge the effectiveness of the rule, Professor Root Martinez evaluates whether the rule effectuates the ABA's stated goals and objectives—to promote full and equal participation by all persons and to eliminate bias in the legal system and justice system. Using that measuring stick, she explains how the rule lacks the substance and depth necessary to prompt concrete change within and throughout the profession. To reach this conclusion, she first examines the impact of state analogs of Model Rule 8.4(g), that have been in effect for many years. As she suggests, is it troubling that there is little evidence suggesting that these state rules have had much practical impact when it comes to eliminating discrimination or enhancing diversity.

Professor Root Martinez also notes that most reported disciplinary actions involving state analogs of Rule 8.4(g) involve some additional element of misconduct, beyond discriminatory behavior. This leads Professor Root Martinez to

suggest that enforcement actions should not be limited to prosecutions that involve discriminatory conduct, along with some other type of professional misconduct. Rather, prosecutors should pursue actions when the only misconduct involved is discriminatory behavior.

Drawing on employment and labor law scholarship, Professor Root Martinez points to another inadequacy in Model Rule 8.4(g): the absence of anti-retaliation provisions to protect complainants. Although she recognizes that anti-discrimination provisions would not be a definitive solution to Rule 8.4(g)'s limitations, she suggests that such provisions would be a "modest addition to the ABA effort" and make it more likely for employees to complain. (P. 833.) Creating this protection is very important because evidence suggests that the vast majority of persons in the legal profession do not report discriminatory or harassing conduct.

Recognizing the importance of empowering and supporting victims of discrimination, Professor Root Martinez proposes that the legal profession adopt strategies that: (i) address covert discrimination through the profession, and (ii) encourage individual attorneys to stop remaining silent and instead give voice to their experiences of discrimination, harassment, and bias.

First, she suggests that the organized bar's efforts not be limited to targeting overt discrimination; rather, more should be done to address covert discrimination—the most common type of discriminatory behavior in the legal profession. This covert discrimination takes the form of structural barriers and implicit biases that adversely impact certain demographics.

Second, Professor Root Martinez examines the quandary and difficulties faced by persons on the receiving end of discriminatory conduct. To address the deleterious effects of remaining silent, she generally urges the legal profession to take steps to give voice to its members who have faced harassment, discrimination, and bias. In addition to this general call for action, Professor Root Martinez proposes an online survey as a concrete step that the organized bar can take to give voice to persons who encounter discriminatory conduct. She suggests that such an online survey would be a low-cost tool to encourage lawyers to share their experiences. As described, the survey could gather the information about "attorneys' experiences with or observations of (i) overt discrimination, (ii) overt harassment, (iii) covert discrimination, (iv) policies resulting in structural discrimination, or (v) action or inaction impacted by implicit bias within the practice of law." (P. 846.) Resulting data could then be aggregated, published, and studied by researchers, policymakers, and members of the profession to determine whether there are trends regarding incidents of discrimination, harassment, and bias.

Professor Root Martinez identifies a number of benefits associated with an online survey and other strategies that give lawyers opportunities to share their experiences related to bias, discrimination, and harassment. To evaluate whether such benefits have been realized, decisionmakers may consider the experience in other countries where regulators have taken steps to deal with such conduct, including harassment. For example, in the Australian state of Victoria, sexual harassment by barristers can be addressed through a formal complaint process (seeking an investigation and response) or a confidential report. The confidential reporting process protects the identity of persons who communicate occurrences of sexual harassment experienced or witnessed, while providing them with outlets to express themselves. It also provides data that can be used to better inform the training and awareness needs and initiatives of the bar.

Similarly, a program operated by the [Discrimination and Harassment Counsel](#) (DHC) in the Canadian province of Ontario accepts reports from persons who may wish to anonymously share their experiences and obtain guidance. Once a report is made, the DHC can provide a range of confidential [services](#) to individuals. In addition, the DHC's biannual reports includes anonymized data to enable the [Law Society of Ontario](#) to "[better address systemic issues of discrimination and harassment in the legal professions](#)." The DHC program in Ontario and the [confidential reporting scheme](#) in Victoria point to the value of the organized bar providing confidential channels for persons to share their experiences.

To address the serious problems of discrimination, bias, and harassment in lawyer workplaces, regulators and the

organized bar should take steps to address covert, as well as overt discrimination. A first step is for the organized bar to pursue strategies, such as the online survey that Professor Root Martinez proposes. Such a survey will help us better understand the nature and extent of the problem, while providing a channel for aggrieved persons who otherwise might suffer in silence. By proactively pursuing initiatives to give lawyers a voice, bar leaders and regulators demonstrate they are serious about their pronounced commitment to promoting diversity and inclusion.

Cite as: Susan Fortney, *Promoting Diversity and Inclusion in the Legal Profession: The Significance of Giving Voice and Listening to Persons Who Experience Discrimination, Bias, and Harassment*, JOTWELL (May 20, 2020) (reviewing Veronica Root Martinez, *Combating Silence in the Profession*, 105 **Va. L. Rev.** 805 (2019)), <https://legalpro.jotwell.com/promoting-diversity-and-inclusion-in-the-legal-profession-the-significance-of-giving-voice-and-listening-to-persons-who-experience-discrimination-bias-and-harassment/>.