Breaking Through Bias and Barriers: Exploring Access to Justice in the Legal Profession

Friday, September 7, 2018
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3 Access to Justice Introductory credits
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Breaking Through Bias and Barriers: Exploring Access to Justice in the Legal Profession

Part of the Oregon State Bar’s mission is to increase access to justice by advancing equality in the justice system and removing barriers to that system. This one-of-a-kind presentation looks at topics such as:

◆ Access to justice and the right to counsel
  — The issue of economic status
◆ The intersection with ORCP 8.4(a)(7)
◆ Breaking through the bias barrier
  — Strategies to increase diversity in the practice of law

Come for the substance; leave with inspiration.

(One 15-minute break will be taken.)

11:45 Adjourn

FACULTY

Stuart Teicher, East Brunswick, NJ. Mr. Teicher is a professional legal educator who focuses on ethics law and writing instruction. A practicing attorney for over two decades, his career is now dedicated to helping fellow attorneys survive the practice of law and thrive in the profession through his entertaining and educational CLE presentations. A New Jersey Supreme Court appointee to the New Jersey District Ethics Committee, Stuart investigates and prosecutes grievances filed against attorneys. He is an adjunct professor of law at Georgetown Law, teaching professional responsibility, and an adjunct professor at Rutgers University in New Brunswick, teaching undergraduate writing courses. Mr. Teicher is the author of Navigating the Legal Ethics of Social Media and Technology, published by Thomson Reuters.
1. Access to Justice

There is a reason that Access to Justice (which I might call A2J in this paper) has become a priority in the law. Don’t get me wrong, it’s always been a valued concept, but it’s only recently that it’s become a priority— and it’s a long time coming.

First what is the concept. The Oregon MCLE rules give a great definition. MCLE Rule 5.14(c) explains that lawyers need to “identify and eliminate from the legal profession and from the practice of law barriers to access to justice arising from biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation.” The key word there is “barriers.”

Access to Justice is all about removing barriers. It’s about assisting others in gaining the ability to find justice, to use the court system, and to realize the benefit of the laws which protect them in this country. For far too long there have been barriers of many kinds that have been erected which foreclose people’s ability to exercise and protect their rights. Sometimes those barriers are economic, thus the need for Legal Services to help the poor. Other time it’s access to knowledge— such as a pro se litigant who is unable to find out information about how the court system works. There could be language barriers, or education barriers, or physical barriers that affect a person with disabilities. And sometimes the barriers converge. Consider,
for example, the person who is economically disadvantaged and therefore can’t afford the education which would provide them the understanding of the technology they need to utilize to protect their legal rights. Often times the A2J issues disproportionately affect marginalized individuals, which is the reason for what one might call the protected classes in the Oregon rule above. Sometimes, A2J issues can manifest themselves in surprising ways. Take the issue of drug dealers, for example.

There have been several cases in this country in which alleged drug dealers end up being “disadvantaged” and access to justice issues are implicated. Consider the situation where a person is arrested for selling drugs. The forfeiture laws will require that all of their funds are confiscated. And yes, it’s usually all of their funds because it’s likely that every dollar they ever made was done so through illegal means. Thus, all of their assets are subject to forfeiture. In that case, they won’t have money to pay for a lawyer. In fact, defense attorneys are aware of that concern and they frequently petition the court to confirm that the lawyer will actually receive their fee and that the court won’t seek reimbursement from those defense lawyers if it’s later revealed that the monies they are paid were subject to forfeiture. Many times, however, those requests are denied. Thus, the dry dealer is too rich to qualify for a public defender, but they can’t get private representation because no lawyer is willing to take the case for fear of not getting paid. Alas…an interesting access to justice issue for someone who is uniquely disadvantaged.

The A2J ideal isn’t just theoretical, it’s actually reflected in the rules. To illustrate what I mean, consider that there are many lawyers who would not even think to take those drug dealers’ cases. Not because the lawyer is unqualified, but because they find the defendants themselves repugnant. If that were the case, then Rule 1.16 might give the lawyer some cover. Subsection (b) states that, “…a lawyer may withdraw from representing a client if: (4) a client
insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” But here is where we see a conflict with another rule, Rule 1.2.

For the most part, Rule 1.2 explains the allocation of decision making responsibility between lawyer and client. Subsection (a) states that, "a lawyer shall abide by a client’s decisions concerning the objectives of representation and…consult with the client as to the means by which they are to be pursued.” Thus, the rule explains who gets to call the shots in the lawyer/client relationship. Within that rule, however there is a section that addresses A2J. Subsection (b) states, “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”¹ The commentary in Ohio clearly establishes the A2J connection.

[5] A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social, or moral views or activities. Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client’s views or activities.

Now...about the conflict between Rules 1.16 and 1.2 and the A2J implications. Rule 1.16 states that lawyers can refuse to take on a client if they find their matter repugnant. But Rule 1.2(b) stands for the principle that a client should not be denied representation because their cause is controversial or the subject of popular disapproval. So which is it? The answer...is both. The rules rightly give lawyers the opportunity to refuse to take on clients who offend their conscience, but it also gives us the opportunity to advocate for clients who we feel obligated to assist. The rules encourage lawyers to take steps to prompt A2J, but basically provide an escape valve in 1.16. Our job is to navigate the between the two...and the thrust of the A2J

¹Permit me to make one note about the rules: I’d like to reference the ABA Model Rules of Professional Conduct because most states’ rules are a derivative of that code. However, copyright restrictions prevent me from doing so. As a result, the within rules are actually the Delaware Rules of Professional Conduct which are the same as the ABA code, but not subject to the same copyright restrictions.
education explains that it’s more important to use our powers to remove barriers, than to protect our individual sensibilities.

2. Rule 4.3: Dealing with Unrepresented Person

One of the interesting things about promoting Access to Justice, is that there could be a rise in pro se litigants. Dealing with pro se litigants creates an ethical issue of its own and it’s worth explaining the rules in that regard. Let’s do so with a hypothetical, and at the end we’ll tie it in with the access to justice ideal as well. I was recently in Nashville, Tennessee and it inspired me to write the following hypo:

a. The Rule:

Rule 4.3. Dealing with unrepresented person.
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

b. The Hypo:

Let’s say you go back in time to 1974...let’s say that today’s ethics rules apply- we can suspend the time and space continuum for the purposes of a hypothetical, right? The Grade Ole Opry is moving out of the Ryman Auditorium to its new place across town. Now, you represent the Opry- is that a corporation? I don’t know- let’s say it is. Opry, Inc. Now the cleaning staff at the old Ryman consisted of one little old man named Cletis. Cletis says that the Opry owes him a balance of $5,000 for cleaning services. Well, the Opry has a problem- they can’t get any cleaning staff for their new place because no one will work until Cletis is taken care of. It’s a solidarity thing because Cletis, a lifelong custodian, is an institution in Nashville. Your client the Opry (remember, a corporation) wants this handled. Cletis is representing himself because he said, “Dag burn it,” (is the a real term?), “I don’t need a fancy lawyer.” You go to meet with Cletis to see if you can work something out.

At your meeting you lay out a payment plan for Cletis. You propose to pay him out in even monthly installments over the next year. Cletis rubs his chin and then his head and says to you, “Hmm, I don’t know about that. Seems like a long time. What do you think, is that fair? What do you think I should do?” You respond, “Listen, I’ve got no dog in this fight. If you’re asking me, it sounds like a fair deal.”
c. The Analysis:

Hopefully you can see the obvious issues in this hypo. Let’s track some of the language from Rule 4.3 in our discussion here. First, Cletis is “not experienced in dealing with legal matters” because the guy was a maintenance worker his entire life. Additionally, he “might assume that” you are “disinterested” even if he knows that you represent the Opry.” That’s an important point- it doesn’t matter if he knows you have a client. Depending on the circumstances there might still be some confusion. That’s why the commentary to Rule 4.3 states, “[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.”

What about that statement where you say that you’ve got no dog in the fight? It makes it seem as if you are disinterested and that’s specifically forbidden by the rule, which states at the very beginning, “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.”

Finally, when you tell him that you think it sounds look a fair deal, you’re getting very close to giving him legal advice. That also violates the rule which states that you can’t give advice to an unrepresented person unless that advice is to secure counsel. Of course, the prohibition against giving advice is only applicable, “if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.” Rule 4.3. In this hypo that doesn’t appear to be an issue at all since your client and Cletis are clearly on opposite sides of the issue.

Personally, I don’t really like the way this section was drafted. I think our obligations are a little easier to understand if you flipped the order of this section and rewrote it like this:

If the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. THEN
The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.

2 Those last words com right to to the commentary to Rule 4.3.
d. The duty to resolve confusion

Let’s change the facts a little. What if you haven’t said anything that makes it seem as if you’re disinterested, but Cletis has sniffed a little too much ammonia from his mop bucket over the years, if you know what I’m saying. As a result, he still seems confused. “Cletis, you say, “I’m not your lawyer.”

“Okay,” he responds. “So what you’re saying is that you’re protecting my interest”

“No, Cletis, I’m saying the exact opposite.”

Cletis now seems like he gets it, “Okay, so the way I hear it, you’re on my side, right?”

Yeesh.

There’s obviously confusion, right? And Rule 4.3 says you need to do something about that. It says that when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, you’ve got to make reasonable efforts to correct the misunderstanding. What exactly is a “reasonable effort?” Well, that involves the two most often used words in the disciplinary system. “It depends.” Clearly it means that you need to have a conversation with the other person and Comment [1] to Rule 4.3 tells us a little bit about what you should say. That comment says, “In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.”

What I like about this example, however, is that it illustrates the practical difficulties in this scenario. Sometimes you could make what seem like super-reasonable efforts to correct the misunderstanding, but you’re still not successful in doing so. In that case you really only have one option. Stop speaking with the person. Oh, and make sure you go back to your office and memorialize your conversation. You’re going to want to make a record of the attempts you made to comply with the rule and the fact that you walk away from the situation when compliance appeared to be impossible,

e. The Connection to A2J

Lawyers generally want to make the best of competitive advantages. And that’s fine in a situation where you’re facing an adversary of equal training and qualification. But here, the playing field is not level. The other party is someone who does not have the same training as a
licensed attorney. Now, to a certain extent the other party has to live with that disadvantage. If they choose not to get a lawyer, then they can’t complain. What about those situations where they can’t afford a lawyer? That’s when our notions of the importance of access to justice conflict with our desire to zealously advocate for our client. There seems to be something inequitable about that.

That access to justice question is admittedly a difficult issue, but one thing that is abundantly clear — there is never a situation where it’s okay for a lawyer to take advantage of a pro se litigant’s misunderstanding or confusion. That’s what Rule 4.3 is trying to prevent. That’s why the rule requires lawyers to correct misunderstandings. Oh, and the connection to “bad decisions”? Far too often lawyers know there will be misunderstandings, and they prey on them.

Sometimes lawyers knows that they are up against a pro se litigant and use the education disparity to foster confusion. In those cases the misunderstanding itself becomes the competitive advantage for the lawyer. Then it’s a conscious decision to prey upon the weaknesses of a pro se litigant in a manner that crosses the line. But some lawyers will do anything it takes in order to win for the client, even if their actions break the rules. That’s just a bad decision.

By the way, I’m sure you’ve heard me rail on and on in other programs about how jurisdictions are rethinking whether the word zealous should be in our ethics code all together? Well, the type of behavior I described in the previous paragraph is a good example of why they’re rethinking the concept. At some point “zealous advocacy” crosses over and becomes “prohibited conduct.” A good example of that is when a lawyer creates and takes advantage of a misunderstanding on the part of their pro se opposition.
3. Misconduct and Discrimination.

Our ethics rules establish the boundaries of appropriate lawyer behavior. The outside limit of those boundaries is set forth I'm my second favorite ethics rule. Yes, I have favorite ethics rules. And if this is my “second” favorite, then that means that I have more than one favorite ethics rule. I am further aware that the aforementioned facts are pathetic. Regardless, Rule 8.4 is my second favorite ethics rule. I call this rule, “the Stupid Rule.”

I don’t think there’s anything stupid about the text of Rule 8.4. In fact, its content is very important. I call it the Stupid Rule because if you don’t know that the things in Rule 8.4 are wrong…. you’re stupid. I mean, think about it. The title of the rule is “Misconduct.” Need I say more? Incidentally, if you find yourself facing an ethics grievance and the authorities claim that you violated Rule 8.4, don’t refer to that rule as the Stupid Rule to the tribunal. They won’t find it nearly as cute as I do.

Let’s talk about the details of Rule 8.4. First, however, permit me to make one note about the rules: I’d like to reference the ABA Model Rules of Professional Conduct because most states’ rules are a derivative of that code. However, copyright restrictions prevent me from doing so. As a result, the within rules are actually the Delaware Rules of Professional Conduct which are the same as the ABA code, but not subject to the same copyright restrictions. Also, the purpose of these materials are not to be a document that you could follow along with during the program. Instead, I hope that they’ll serve as a supplemental resource that will be valuable to you after hearing the program.
a. The Text of the Rule

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
(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.

b. Assisting in a Violation

I find the first section of Rule 8.4(a) funny. Well, I’m not sure that you can say there’s humor in the attorney ethics rules, but that first section is a certainly a little amusing. That’s because it says:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

What’s funny is that you know this code was written by lawyers because who else would feel that need to include a clause in a disciplinary code that says, you can’t violate this disciplinary code. Doesn’t that go without saying? Apparently not. Despite what I consider a superfluous opening clause to Rule 8.4, this section is actually seen pretty often in the disciplinary world…but that’s because of the second part of the subsection
c. Criminal Behavior:

Rule 8.4(b) is a deceiving section. I call it deceiving because there are several really important angles to the rule, even though it seems sort of short and straightforward. You need to read through each word carefully and consider the broad implications to see what I mean.

Here’s the section:

It is professional misconduct for a lawyer to: (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

This section, more than any other illustrates the underlying concern of the ethics rules: a lawyer’s behavior.

While it’s usually important to understand exactly what an ethics rule says, in the case of 8.4(b) it’s equally important to understand what it does not say. This subsection does not say that a lawyer needs to be “convicted” of a crime. It doesn’t say that a lawyer much be indicted, charged, or even arrested. All it says is that a lawyer needs to have committed a criminal act. The reason it’s worded like that is because the ethics world isn’t concerned with what happens in the criminal justice system. The disciplinary system exists in an alternative universe from the criminal system. While there might be some crossover, the systems are distinct.

The disciplinary system has its own tribunals, standards, and concerns. And one of the fundamental concerns is to regulate behavior. The disciplinary system only cares about how a lawyer behaved. We don’t care if the prosecution was able to prove its case beyond a reasonable doubt, or whether a district attorney decided not to bring charges for some reason. We care about whether a lawyer committed a criminal act. Thus, a lawyer could be liable for an independent ethics violation regardless of what happens to them criminally. We see a similar sentiment in another ethics rule— the rule that defines “fraud.”
Rule 1.0(d) states:

"Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

It’s critical to read the commentary to this section as well:

Rule 1.0 Comment [5] Fraud. -- When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Thus, you can see that the disciplinary world doesn’t care about “damages.” In civil court, damages would be an indispensable element of the case. However, in the ethics world it’s irrelevant. That’s because just like in the case of 8.4(d), the ethics world operates in a parallel universe. We don’t care about whether someone was harmed. We don’t care if a lawyer was lucky enough to avoid causing someone damages— the question is, ‘how did the lawyer behave?’

But a lawyer isn’t going to have an ethics violation for any criminal act. The rule has some limitations. The obvious critical question is when does a crime qualify as one that reflects adversely, and violates the rule? The answer to that invokes the two most widely used words in all of attorney ethics. “It depends.” When is the threshold crossed? It depends.

What’s clear is that different states have different opinions about when that threshold is crossed. And the way they evaluate a particular crime can be tricky. Take, for example, a case from my home state, In Re Howard, 143 N.J. 526 (1996). In that case the court held that the crime of vehicular homicide did not qualify as a crime that reflects adversely on a lawyer’s honesty, etc. However, while the idea that a lawyer might kill another with a car wouldn’t

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3 This case was retrieved from New Jersey Attorney Ethics, 2017 Edition, by Kevin H. Michels at page 1042-1043.
necessarily impact on a lawyer’s fitness to be a lawyer, that attorney’s state of mind while committing the crime might be relevant. The court stated that,

recklessness did, however, result in the death of another human being and that recklessness brings substantial disrepute to the bar generally. We believe that the discipline imposed should reflect the seriousness of the societal norms transgressed. See Rule 1:20-13(b)(2) (stating that ‘serous crimes’ ordinarily call for the automatic temporary suspension of the offending attorney). 143 NJ at 533; Michels at 1042.

Thus the fact that the lawyer acted in wonton disregard of the consequence of their actions caused an otherwise non-ethically-actionable crime to become one that is worthy of discipline. The moral of the story? Look carefully at all angles of the crime at hand— not just the definition of the offense, but also the state of mind of the offender.

Sure, the Howard case is only applicable in New Jersey, but the concept could easily be adopted in another jurisdiction. It also makes me think of how this concept, if adopted in your jurisdiction, could be applied in some other offenses that are more characteristic of life in the 21st Century. Consider what might happen if a lawyer killed another person while texting and driving. The crime might be similar to vehicular homicide, the state of mind would be reckless, but consider the quantum of discipline. Specifically, the measure of discipline might be harsh. If the jurisdiction making the determination agrees with the NJ court in Howard, then they will consider “the seriousness of the societal norms transgressed” when deciding on the discipline to be imposed. 143 N.J. at 533. Given the public concern about texting while driving these days, the court might consider that such an offense is a large transgression of current societal norms. Something to think about…as societal norms change, the disciplinary system’s reaction to various offenses could change as well
d. Deceptive Behavior

I have a saying. Call it a maxim, call it an eternal truth, call it what you will. Here it is: If you do something repulsive, they're gonna find a way to get you. “They,” of course is are the disciplinary authorities. And I really believe it— if you do something horrible, the disciplinary authorities are going to find a way to file a grievance against you. Now don't get me wrong— I’m not saying that this is a bad thing. Quite the contrary, if you do something awful, then you deserve to get got. But how will they “get” you? Don't they need a rule? That's where 8.4(c) and (d) come in. First, take a look at 8.4(c).

It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Notice, first, that the behavior proscribed by the rule does not have to be a crime. That's a critical distinction between subsections (b) and (c). It seems to be that the goal of this section was to capture bad conduct that fell short of criminal behavior, but was nonetheless deemed worthy of punishment.

Also notice that there is no requirement that the offending activity be committed in connection with one’s law practice. There is no limiting language that says you can’t deceive, or misrepresent, etc., “in connection with your practice,” or “on behalf of a client.” It says you can’t do those bad things…period. That shows that this rule is very broad reaching. Remember that the long arm of the disciplinary system applies to your private life, and this rule is proof. For the purposes of this paper, however, let’s stick with some bad actions that might occur in the context of your practice and evaluate how they violate the rule.

One of the most common ways that lawyers violate Rule 8.4(c) is by misrepresenting the status of a matter to a client.4 In this instance you can see some interplay with another rule, specifically, the rule on Communication. Rule 1.4 states:

4 Michels at 1044.
Rule 1.4. Communication
(a) A lawyer shall:
   (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
   (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
   (3) keep the client reasonably informed about the status of the matter;
   (4) promptly comply with reasonable requests for information; and
   (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

That language in 1.4(a)(3) is tough for some lawyers to handle. It's not easy to keep our clients reasonably informed and still attend to the myriad of responsibilities that are pulling at our collective shirt tails own any given day. In fact, it's quite tough to actually complete the tasks we're supposed to do for clients, no less tell them about what’s going on. Those two realities often conspire against us and sometimes a lawyer will take a shortcut as a result. Maybe they won’t tell the client what’s going on. Or maybe one of the reasons they don’t keep the client adequately informed of developments is because the lawyer isn’t actually doing anything that will cause a “development” of any kind. Either way, the lack of communication usually leads to some irate calls, emails, and texts from the client. And that’s where the lawyer who is having trouble managing their time could get into trouble. Maybe when the client finally gets through to the lawyer, the lawyer lies about what they have (or haven’t done). That’s an example of the type of misrepresentation to which Rule 8.4(c) refers. Note that in such a case, the lawyer might also have violated another rule that bars lawyer lies, Rule 4.1 (Truthfulness in statements to others). That rules states, “In the course of representing a client a lawyer shall not knowingly:
   (a) make a false statement of material fact or law to a third person.”

The other example where lawyers could get in trouble with Rule 8.4(c) that’s worth exploring deals with social media. There is a lot of information that's out there for lawyers to harvest while representing a client. Some of it is public information and available to everyone.
But some of the good stuff is behind a wall. The questions lawyers must consider is, can a lawyer “mine” for information? How far can a lawyer go? The only way we could mine for information is if we somehow obtain access to a person’s Facebook page. We know that hacking into someone’s profile would be criminal and, therefore, a violation of Rule 8.4(b). But what about using some other assertive tactic that’s short of criminal behavior? To explore that, consider the following hypothetical:

You represent someone who is involved in a dispute. You think your adversary will be filing a complaint soon, so you’re getting prepared for the apparent litigation. You know that you will need to call Susan as a witness in that litigation, but you don’t know much about her. Before you commence litigation you ask your client, Andrew, to “friend” Susan on Facebook. You tell Andrew, “just try to be social and let’s gather information we could use against her in litigation.”

When I present that hypo to people face-to-face, I get a lot of furled brows and pursed lips. “That doesn’t smell right,” they say. One person from the Midwest hit the nail on the head when he said, “That’s just dirty pool.” Both reactions reveal two things: the behavior doesn’t feel right, and yet it’s hard to articulate the exact problem.

The conduct isn’t an outright lie. Neither the lawyer nor its agent is actually making an improper misrepresentation. If it were, the statement(s) might violate one of the rules on misrepresentation in the disciplinary code. I call those rules the “Fab Five of Attorney Lies.” The 5 rules that address misrepresentation are Rules 8.1, Rule 3.3, Rule 4.1, Rule 7.1, and Rule 8.4. Each one of these explains when misrepresentations are inappropriate and they address those improper statements in different contexts. This appears to be some sort of manipulative conduct, rather than an outright lie, which makes it a bit more difficult to assess. After all, much of what we do in the adversary system has some manipulative flavor to it, right?

This fact pattern isn’t one that I came up with on my own- it’s a question that was raised to the Philadelphia Bar Association Professional Guidance Committee. In March of 2009 the Committee released Opinion 2009-02 that addressed the topic. An inquirer asked the Committee to determine if it was reasonable for a lawyer to use a third person to gain access to someone’s social media page in order to gather information that might be used against that person. The third person wouldn’t be instructed to speak any untruths, only to remain silent
about their true motives. The Committee opined that the behavior would be improper.

The Committee stated that “the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive” 2009-02 at 3. You might recall that Rule 8.4(c) is a critical part of the rule on Misconduct (or as I’ve referred to it elsewhere in this text, “the Stupid Rule”). That section states that it is professional misconduct for a lawyer, “to engage in conduct involving dishonesty, fraud, deceit or misrepresentation…” The opinion further explained that the conduct was problematic because, “it omits a highly material fact, namely, that the third party who asks to be allowed access to the witness’s pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness” 2009-02 at 3. Thus, it isn’t an affirmative misrepresentation that triggers the ethical violation, rather it’s the omission of a material fact that constitutes deception.

The Committee made that clear when they stated, “The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony. 2009-02 at 3. Thus, the Committee disapproved of the conduct because it was deceptive.

e. The Scariest Subsection

A common theme throughout the rules is promoting the administration of justice. Of course, part of that means policing those situations where lawyers obstruct the administration of justice. There are a few rules that address such instances, the most obvious of which is Rule 8.4(d) which makes it professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. In fact, the rule says exactly that:

5 It should be noted that the opinion doesn’t only state that the omission is deception. The Committee mentioned very briefly that they believed that the conduct also constituted the making of a false statement of material fact to the witness and would therefore be a misrepresentation that violates Rule 4.1. Unfortunately, the opinion says absolutely nothing else about the apparent 4.1 violation, so it’s unclear how they arrive at that conclusion.
It is professional misconduct for a lawyer to (d) engage in conduct that is prejudicial to the administration of justice;

It seems like a pretty vague standard. However, we get some guidance from my home state (once again). A great description of that standard -- a phrase that gives the rule some teeth -- came out of a case I read in New Jersey some time ago. There the court called the offending actions any act that is “flagrantly violative of acceptable professional norms” [citation omitted]. It’s so broad isn’t it? Think about how much bad behavior would fall into this category. I think the incredible breadth of this rule is one reason why some jurisdictions like Alaska chose not to enact 8.4(d).

Hopefully when you thought about how broad this rule is, you remembered something I said earlier: if you do something repulsive, they’re gonna find a way to get you. And after you realize the enormous breadth of 8.4(d), now you understand why I said that Rule 8.4(c) and (d) are the sections they’ll use to getcha.

f. Discrimination

I can’t decide if subsection 8.4(g) is important. It’s not about the content of this section—it deals with discrimination and harassment, two obviously vital concepts. The rule reads:

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 reason I’m not sure it’s important is because the ABA just adopted this model rule subsection. Until very recently, there wasn’t any model rule that dealt with discrimination (an abomination that I’ll talk about in the program). Since there was no model rule on the topic, many
jurisdictions adopted their own version of an anti-discrimination/anti-harassment rule. Thus, I’m not sure that the ABA’s version of 8.4(g) is very relevant. If many states already have a rule, then they probably like their version and they might be unlikely to change it. Only time will tell.

A great example of a state creating their own rule instead of accepting the vacuum created by the ABA is Oregon. There, the drafters created Rule 8.4(a)(7) which makes it professional misconduct for a lawyer to, “in the course of representing a client, knowingly intimidate or harass a person because of that person’s race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.” Note a few things in that Oregon rule. First, it purports to limit the breadth of the rule to situations where one is “representing a client.” Second, there is a state of mind element — the lawyer must “knowingly” take the offending actions. Third, the offending behavior is not just harassment, it’s broader. It includes intimidation as well. Fourth, and finally, notice the protected classes. Do they sound familiar? If you know that state’s rules, then you’ll realize that they sound a lot like the protected classes in the Oregon mandates regarding Access to Justice. That’s because there is a connection in that regard.

It has long been a lawyer’s responsibility to protect the disenfranchised. Sometimes, however, members of the bar do not live up to that standard. Thus, the rules need to have a section which reminds us that we are not permitted to discriminate, harass, and otherwise treat people inequitably. But that doesn’t exactly sound aspirational, does it? Nope. And that’s the problem with the current rules— they are not very aspirational. That’s why states like Oregon have instituted formal “Access to Justice” education. The mandatory education in that regard is how the Bar is taking the concept to the next level. Not only must we refrain from discriminating against people, but we must actually take positive efforts to ensure that they have adequate access to the justice system. It’s a great example of 21st Century thinking on the part of the modern Bar Association, because it’s about creating rules that establish boundaries but also
imposing obligations that require lawyers to take the aspirational steps that we consider critical to improving society.

4. The rules tell us to improve the quality of justice

I’ve long believed that the rules of ethics do far more than just encouraging access to justice for marginalized groups. In fact, they give lawyers directives to improve the quality of justice for all. For instance, in the Preamble to the Rules, we find the following section:

Preamble [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

What does it mean to have a “special responsibility?” The very nature of the word “special” means that it’s something out of the ordinary. When read in connection with the rest of the section, I believe that the special responsibility includes ensuring that the “quality of justice” is in step with societal advancements. For instance, there was a time when our practice was made up of almost all white men. But as society advanced, we grew to appreciate the importance of diversity. In fact, the practice eventually made diversity a goal and today we have a significant emphasis on that — including, in some states, MCLE that’s geared toward elimination of bias. That requirement is an example of how we took our “special responsibility for the quality of justice,” made changes in the practice and brought about a desired change.

Today we have an opportunity to do that again, in an even bigger way. An example of the latest evolution in thinking is the idea of “access to justice.”

As I mentioned earlier, the idea of ensuring that more people have access to justice is not a new concept. What is new, however, is the emphasis. It’s only been the past several years that you’ve heard people talking about this concept in a more vocal manner. In fact, we see a reference in the rules:
Preamble [6] …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.

If lawyers actually pursue the mandate of the rules— if we devote time and resources to ensure equal access to our justice system for all, then we could make wide reaching societal change. That change affects people beyond the practice because it’s a society-wide effort. By reducing these obstacles to justice, lawyers have a real chance to save the world.

5. The Rules tell us to help the disadvantaged…and that’s about Access to Justice

The lawyer’s duty to help the poor has been long established. Actually, it’s not just the “poor” because the category also includes the “disadvantaged” and the “undeserved.” What the issue is really about is helping people obtain access to justice. The category thus includes those people who have a barrier to access to justice and usually that barrier is a financial one. This obligation has been accepted in the practice for some time now.

We see a reference to this duty as far back as 1965 in the now outdated disciplinary rules, the Model Code of Professional Responsibility (that Code was eventually scrapped in its entirety and our existing disciplinary rules are based on the Model Rules of Professional Responsibility which were promulgated by the ABA in 1983). The Code stated, “As a society increases in size, sophistication and technology, the body of laws which is required to control that society also increases in size, scope and complexity. With this growth, the law directly affects more and more facets of individual behavior, creating an expanding need for legal
services on the part of the individual members of the society," in other words, as society advances, the obstacles to access to justice increase. That only enhances the need for lawyers to help the disadvantaged. Over the years, scholars have expanded upon that idea.

Professor Deborah L. Rhode (now of Stanford Law School) set forth a variety of justifications for the pro bono duty in an article she wrote back in 1999 in the Fordham Law Review. She explained that, “Lawyers have a monopoly on legal services, thus creating the duty to help provide them for the poor.” Additionally, lawyers are a key guardian of justice and for that reason we have the obligation to provide legal services for those who can’t afford them. Professor Rhode pointed to a more practical justification as well: “the benefit that such work confers upon the lawyers themselves,” which includes the, “intrinsic satisfactions that accompany public service.” She continued, “The primary rationale for pro bono contributions rests on two premises: first, that access to legal services is a fundamental need, and second, that lawyers have some responsibility to help make those services available. The first claim is widely acknowledged.” Proof that it continues to be is widely acknowledged comes from the State of New York where recently Chief Judge Jonathan Lippman of the New York Court of Appeals acknowledged that “lawyers have a professional responsibility to promote greater access to justice.”

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6 See the Model Code footnote to EC 2-25, citing Comment, Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution, 26 U. PITT. L REV. 811, 811-12 (1965).


pursuit of equal justice for all, rich and poor alike, has been the hallmark of our profession.” And the responsibility doesn’t stop with practicing attorneys. He continued, “each attorney has an obligation to foster the values of justice, equality, and the rule of law, and it is imperative that law students gain a recognition of this obligation as part of their legal training.” 11

The idea that lawyers should “give back” isn’t so controversial. In fact, my gut tells me that the majority of people in the practice would agree with the need for lawyers to help the disadvantaged community. In theory, it seems to simply be an extension of our otherwise accepted societal wide notion of helping the needy. The problem is that many lawyers don’t actually feel compelled to act. In practice is appears that, if left to our own devices, most lawyers won’t accept that responsibility and won’t actually provide services to the disadvantaged. So what’s a bar association to do?

In the late 1960s the ABA believed that we needed to do something. Unfortunately, the motivation for addressing the pro bono obligation did not come from an altruistic place. For those of you who have heard me speak before, you know that I point out that the collective bar’s historical position on a variety of issues was somewhat selfish in nature. That applies in the area of “access to justice” as well. Here was the bar was motivated by protectionist concerns. That’s illustrated in a footnote to the Model Code which states, “The issue is not whether we shall do something or do nothing. The demand for ordinary everyday legal justice is so great and the moral nature of the demand is so strong that the issue has become whether we devise, maintain, and support suitable agencies able to satisfy the demand or, by our own default, force the government to take over the job, supplant us, and ultimately dominate us.”12


So there is the big dilemma: the powers that be acknowledge the lawyer’s responsibility to help the disadvantaged, but they see that the Bar won’t voluntarily fulfill that duty. Thus, we see that the issue isn’t about whether they duty to help the disadvantaged exists— it’s about whether lawyers should be forced to do so. That idea is at the heart of the debate about pro bono services. As Professor Rhode stated, “while most lawyers acknowledge that access to legal assistance is a fundamental interest, they are divided over whether the profession has some special responsibility to help provide that assistance, and if so, whether the responsibility should be mandatory.”

Over the years, bar associations and courts countrywide have considered whether the best way to get lawyers to fulfill our pro bono obligation is to make the obligation mandatory. As one would imagine, there is great disagreement on the topic. A recent article on law260.com reminded us that, “The debate over mandatory pro bono is not new. In the 1970s and 80s, many states considered adopting such policies.” That most states gave serious consideration to the concept back in the late 70s makes sense— it was at that time that the ABA was considering major amendments to the Model Code of Professional Responsibility (as I mentioned earlier, that Code was eventually completely replaced by the Model Rules of Professional Responsibility in 1983). The article continued, “In 1977, the State Bar of California proposed a mandatory 40-hour per year requirement for practicing attorneys. After heated and vitriolic debate, the proposal was rejected. Similarly, in 1978 a proposal for mandatory pro bono in New York state resulted in a firestorm of controversy and was not adopted. As recently as 2010, the Mississippi

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13 Rhode at 2419

Supreme Court proposed mandatory pro bono rules. That proposal was withdrawn after nearly unanimously negative feedback from throughout the state.”

One might except that the rationale for objecting to a mandatory pro bono requirement is motivated by basic selfishness. While I’m sure that’s the case for some people, it’s not the argument of everyone. In fact, even those lawyers who are most dedicated to pro bono work have come out in opposition to the idea of mandatory service.

An article on law360.com recently authored by Daniel Grunfeld, Mitchell A. Kamin, David A. Lash and Amanda D. Smith made a compelling case against the imposition of mandatory pro bono requirements. They said that, “State bar mandated pro bono for lawyers is ill-advised. It will create enormous pressures on our already strained system of delivery of legal aid to the poor and, counter-intuitively, will result in less and lower quality legal services to those who need them most.” They said it will put a greater burden on legal services companies to oversee the lawyers, at a time when their resources are very low. Additionally, they are concerned that small to medium sized firms will be hit hard. Large firms already have an internal pro bono requirement, along with an infrastructure to assist them. The small to medium sized firms have no such apparatus and, as a result, will feel a larger hardship. “Compelling those who cannot (or are not willing to) contribute their time is sure to result in the half-hearted services that have long been feared. Asking someone with no expertise to take on a case requiring specialized knowledge is an opportunity for rampant malpractice. Expecting experts from legal aid organizations to fill that knowledge gap is economically and practically impossible.

The task is too overwhelming, the energy misspent.”


So how have the rules dealt with the pro bono obligation? We can start by evaluating the ABA’s first ethics code, the Model Code of Professional Responsibility. You might recall that the Code broke things out into EC, or “ethical considerations” and DR for “disciplinary rule.” When one peeks at the Code’s language for pro bono publico service, we can see that it’s simply recommended as an ethical consideration:18

EC 2-2419 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC 2-25 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. Every lawyer should support all proper efforts to meet this need for legal services.

When one reviews this language carefully, one can see that it’s a bit internally inconsistent. How could that be? Remember, every disciplinary code is the product of compromise. A bunch of people who are charged with creating the code all make their opinions about the proposed rules be known and, ultimately, the drafting body votes on the final language. In this case, I think the compromise created language that is somewhat contradictory.

18 Note that footnotes from the original text have been omitted.

19 http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf, last checked by the author on December 27, 2014
Sure, in EC-25 the code reinforces the moral obligation for lawyers to give unto others when they state that, “The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer,” and that, “Every lawyer…should find time to participate in serving the disadvantaged.” But it’s interesting how the code seems to limit the efforts of lawyers. In that very same section, the drafters remind us that legal aid and legal offices and other programs have developed and they state that, “Every lawyer should support all proper efforts to meet this need for legal services.” What’s the inconsistency? They could have reminded lawyers of their personal duty to go and represent the poor on their own, but they didn’t. Instead, they seemed to tie the lawyer’s responsibility to supporting the legal aid offices. The quote I mentioned in the footnote to EC-25 earlier is consistent with that point: “… the issue has become whether we devise, maintain, and support suitable agencies able to satisfy the demand.” To many it might seem as if I’m splitting hairs, but I don’t think so. My personal (and somewhat educated) opinion is that if the drafters wanted to make the obligation more personal, they would have. This language smells like a compromise to me. It seems as if the last line of the section is very carefully crafted to give lawyers an “out.” Lawyers could fulfill that personal obligation by simply supporting those organizations, instead of getting their individual hands dirty. I think that the anti-lawyer-obligation crowd didn’t want to go too far, so this language is what they agreed upon. Maybe I’m being overly cynical, but I doubt it.

Of course, this is only the backdrop, as the Model Code was rescinded in place of the Model Rules of Professional Responsibility in 1983. The current version of that code contains Rule 6.1. Now, I know what you’re thinking: some states don’t have Rule 6.1 exactly. You’re right about that. Some states have tweaked the rule somewhat, and others have even scrapped it all together and introduced resolutions that are far broader than Rule 6.1 — like Oregon. However, when we look at the larger pro bono initiatives like the one in Oregon we see that many of the principles that were espoused in Rule 6.1 are actually incorporated into those states’ efforts.
Thus why it's still valuable to consider the details of the ABA's version of 6.1. Okay, back to that Rule which states:

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:

(a) 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

(b) 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. [End of Rule]

The key difference in the current rule is that there can be no mistaking the personal obligation of the lawyer. In marked contrast to the Model Code, the first section of Rule 6.1 clearly states that the obligation can be fulfilled by either service to individuals, or service to organization. Furthermore, the personal obligation is quantified: the rule recommends 50 hours of service per year. Note, however, the key word in that sentence— it is a recommendation.

*https://courts.arkansas.gov/rules-and-administrative-orders/%5Bcurrent%5D-arkansas-rules-of-professional-conduct*, last checked by the author on 12/27/2014. Copyright restrictions prevent me from reproducing the ABA rules, so I've used the Arkansas Rule. Arkansas has incorporated the ABA rule verbatim, but it's not subject to the copyright restrictions.
The rules state that a lawyer, “should aspire” to providing the 50 hours of service. As we can see, the idea that lawyers should have a mandatory pro bono obligation has not been adopted by the ABA.

The other important element to notice is that the obligation isn’t just about helping the poor. Yes, subsection 6.1(a) addresses the obligation to help those with “limited means”. But the following subsection goes further. In Rule 6.1(b) we are encouraged to provide “additional services” to organizations that address civil rights, public rights, religious organizations, educational organizations, etc, which might not be able to afford normal legal fees. Thus, the rule appears to go beyond just helping the poor and addresses the wider “access to justice” issue.21

6. An individual strategy for eliminating bias in the legal profession

Access to justice is about removing barriers. Well, one of the barriers that exists in the legal profession is exclusion. Some groups are actively excluded from areas of the practice and that is the reasons that we put an emphasis on elimination of bias and inclusion in the world of MCLE. The one thing that seems to be missing from a lot of that education, however, are strategies to actually execute on our mandate to promote inclusion in the practice. Well, I have some direction in that regard…and it came from a high school principal.

I hate graduations. Even when they are for my own children, the graduation ceremonies bore me to tears. But this past month I attended my son’s graduation from high school and I was struck by the interesting speakers. In particular, I heard a message from, Dr. Michael W. Vinella the Principal of East Brunswick High School in New Jersey. Dr. Vinella gave 10 bits of advice for graduates, and when I heard them, I immediately thought about this program on

21 If you’re interested in the aspirational standard set forth in Oregon (which I mention in the program) you can find it here: https://www.osbar.org/_docs/rulesregs/bylaws.pdf#nameddest=13.1
inclusion. After obtaining the good doctor’s permission, I’ve adapted them for this CLE program — we’ll go through them from #10, down to #1 below.

First, an important concept: Dr. Vinella described your “5 feet of space.” This program is all about that space…that space around you where you have the most opportunity to affect others. The place where you can personally, and instantaneous create a change in culture. This program focuses exclusively on your 5 feet of space and how you can improve diversity in the practice of law by focusing and executing in that 5 feet of space. That’s why the majority of this program will focus on action items. Ways that you can interact with people in that 5 feet of space in a way that will advance the cause of diversity.

What’s important to realize, however, is that it’s not just about considering how you behave within that 5 feet of space while you’re at work. Instead, if lawyers truly want to promote inclusion in the practice we must put greater emphasis on how we behave in all aspects of our life. Pay attention to your 5 feet of space in your entire life, not just your professional life.

Every lesson on execution starts with a small bit of theory. That’s because if you want to make any real change, you must follow what I call the MPH approach. You must have the right Mindset, develop a successful Process, and put it together to ensure the right long term Habits. So let’s talk about the first element, which is broken down into four bits of theory that help explain the right Mindset necessary to create change in your 5 feet of space.

10. Get the right Mindset

  a. You gotta want it

To make a change, you must actually WANT to act. You must have a mindset that is not only open to improving the cause of diversity, but being committed to making a change. That’s not as easy as it sounds. Many of us sit through these seminars because we’re required to do so…and we prefer that change occur, but we don’t personally want to shoulder the burden of
bringing about a change. Thus, your mindset must change you need to actually have the desire to take action.

b. Be a better Josh Groban than me.

Josh Groban sings a song called “You raise me up.” But overtime I try to sing it, I mess it up. Usually, my lyrics end up like this:

You raise me up, so I can stand on mountains;
You raise me up, to walk on stormy seas;
I am strong, when I am on your shoulders;
- Cause you……..are the wind beneath my wings

You can probably tell that I smushed two different songs together there. But the title of the song —”You raise me up” — is what this element is really all about. It’s about having the mindset of someone who is a contributor, not a contaminator. A contributor raises other people up. A contributor can also be the wind beneath someone else’s wings…so I guess my mash up kinda works. And that must be the quality of your attitude when you are interacting with people in your 5 feet of space. You must always be thinking about how you can work to positively contribute to your space. Every action plan that comes later in this program is designed to raise up, or build up, those who enter your space. It’s all about how you will contribute to the betterment of those with whom you interact. It also means that you need to avoid allowing others to contaminate your space.

Cynicism is easy. And people who are cynical create havoc, and it happens fast. They’re like weeds…they don’t need a lot of water (encouragement) and they get out of control fast. People who come into your space might be cynical and they might be hostile to your desire to bring about diversity in the practice. When faced with those type of contaminators t’s easy for us to be passive…but we can’t. We can’t contaminate the space and we can’t allow others to do so. Your mindset must be as follows: You must seek to send off every person better than when they entered that space.
c. It’s an ongoing effort

There’s a concept that runs through these two bits of advice on mindset and that is diligence. You’ve got to want to make a change, and you need to be a contributor…always. Success on both of those fronts is an ongoing effort. It takes diligence. You need to realize that every interaction you have with another person is meaningful. There is not designated time to deal with diversity issues…every moment is an opportunity to deal with diversity issues. And in every interaction you have the opportunity to contribute or contaminate. One of the failures of most CLE education about this topic is that it’s forgotten once the program is over. If there’s anything you remember from this course, it’s that diversity should be an effort you consider at all times and in all interactions. I genuinely think that that’s one reason we’ve struggled to make serious gains in the practice. You can’t relegate this issue to the back of our mind. Push it forward. Here’s a good, sticky saying that might resonate and help you stay on course: “Don’t put diversity in the back of the bus.”

9. Hope without action is futile

It is absolutely possible, and probably, that you will make beneficial change that will advance the cause of diversity. You must set your sights high in that regard and be optimistic. It’s tough, I know. But it’s critical that you have hope…and that you believe things can get better…and that you can be the impetus for that improvement. Just like I mentioned above—how you can’t let contaminators soil your space, you likewise can’t let contaminators soil the space between your ears. Don’t let them get into your head and sap your optimism. Staying optimistic and having hope is a necessary ingredient to being able to execute. And the extension of that is….being optimistic, but failing to actually taking any action is worthless. Hope without action is futile. Toward that end, here is our first action item: Put a recurring reminder in your to-do list to pop up in two months that reminds you to consider whether you
have actually taken any action toward improving diversity (sit tight…the recommendations of what actions you can take are around the corner…we are almost there). Force yourself to review whether you are actually taking action.

8. Communicate effectively and responsibly

In order to unite your space and those in it in real life or virtually, you will need to communicate effectively and responsibly. That means that while you are engaged in this effort to advance the cause of diversity, make sure to choose your words wisely and make sure you think before your thumbs get to work. And remember— your digital footprint never goes away. What you say, will be frozen in time FOREVER. Treat every moment, in reality and virtual reality…as a Freeze Frame. This is a particularly important issue, given the on line world.

Because of social media, our 5 feet of space an instantaneously turn into infinity. And because we don’t have someone physically in our face, we might not realize that they have entered our 5 feet of space…and we might let our guard down. We might revert back to a racist joke, or share a meme that smacks of bias. But there is never a time, in reality or in our virtual life, we could let bias slip in. Maybe a concept that will help you appreciate the seriousness of this item is the following: If you share something that is inappropriate and no one ever heard anything you said but that moment— that Freeze Frame— how would you feel about that becoming your legacy?

Here’s the action item related to diversity: Stop pushing the line while on line. When you’re on social media, consider all of the world in your 5 feet of space. Do you have an anonymous twitter handle where you post inappropriate items? Delete it. Make a change even if you don’t have an anonymous profile— are there posts in your timeline that hold back the progress toward diversity? Delete them. Have other people posted comments on your timeline which are inappropriate? Delete them too. Now. Go do it right now, then come back to these
materials. That’s an action that you can take right now that advances the cause because it removed damaging material from the world.

This is particularly important for process in the practice because we all know today that there is no longer a separation between our personal and professional lives. If a potential client goes on our personal Facebook page and sees racist sounding information, you are contaminating the practice. People will think that it’s okay to behave that way, as long as it’s done on your personal time. It’s inappropriate and if you truly want to make a change to the practice you need to self-police your own virtual 5 feet of space.

7. Do what you say

While in your space, make sure your actions are in alignment with what you say. You will not be able to improve your space or influence those who enter unless you are true to your word. In common parlance…talk the talk AND walk the walk. That, according to Dr. Vinella, is becoming a lost art in our world. Here’s how we can put that idea into action in a diversity context (and I think you’ll see elements of several of the items I’ve discussed reflected in this action item):

Develop 4 statements that you can use to broach the topic of diversity in the practice. These statements should be applicable to any type of interaction, whether you’re in a courtroom, at the closing table, in a networking context, or any place else. Memorize those 4 statements and actually use them.

For example, if you’re sitting at a CLE event and the room happens to be overwhelmingly full of white males (which happens far more often than we’d like to admit), maybe you turn to the person next to you and mention, “I don’t see a single African-American face in this room.” That will bring the issue to the forefront. You might get a person to consider that inequity when they otherwise would not have noticed it. That’s how we advance the cause
of diversity—sometimes simply by pointing out that it exists in real life and bringing it to someone’s attention.

Another example: Maybe you’re at a closing and you hear your adversary’s secretary translating for someone is Spanish. You could ask them where they learned the language. It’s possible that they were born in another country, or maybe they learned it as a child from their immigrant family…who knows. The point is that it could lead to a conversation that involved discussion about diversity and that’s the goal. Listen, it’s not always going to work—that person might not actually be a minority and they might have learned the language in school, and then maybe you won’t have an opportunity to advance diversity. You’ll never know if you don’t try. But it’s important to walk the walk and try to actually going up these issues within your 5 feet of space because just getting to know someone…exposing the differences, interacting…these conversations break down barriers. And that’s a tangible thing that you can do, personally, to promote diversity and inclusion.

Here’s a way for you to really kick it up a notch. Why not develop these diversity-aimed ice-breaker lines every day? Look at your calendar. Where will you be today/tomorrow? Maybe you create some icebreakers that you can use that day in those contexts. THAT would show commitment, for sure.

### 6. Be Yourself

You will not be able to have any effect on the cause of diversity if you are not authentic. You need to really believe this stuff. You need to believe that this is important and worthwhile. If you don’t, people will see through you and your efforts will end of setting back the cause instead of advancing it.

One must stay true to who you are in your space. Don’t try to be a person that you’re not just because you think it advances the cause. There’s a difference between changing how you
behave to add action items which promote diversity to your daily routine, and playing a role or becoming a person that you think is the right type of character. If you are not an authentic person, your execution will suffer.

Not only must you be yourself, but you must be proud of who you are as well. That’s particularly important when we find ourselves confronted with one of the contaminators we discussed earlier. When you find yourself with a contaminator inside your 5 feet of space, stand your ground and be proud of yourself. Do not allow others to dictate what you do – do what is right. There are going to be people who come into your space and try to derail you. They’re going to hear your statements and push back. Don’t let them. Stay the course. There are some action items you can employ to execute in that regard.

Develop 4 defensive statements. I’m talking about 4 statements you can throw out there when a contaminator enters your space and tries to throw you off your game. For instance, I could envision someone who is not serious about diversity to hear something you’ve said about the topic and reply with, “You know I’m tired of hearing about diversity all the time. It’s always about bias, and diversity, blah, blah, blah. It’s enough already. I’m not a racist and I don’t want to hear about it anymore.” Maybe your response could be, “You know, I hear that a lot, but tell me, what have you actually DONE to promote the cause recently?” Of course, you might want to phrase the line in a less accusatory manner. I’ll let you change the delivery to find the voice that works for you.

5. Don’t be a Debbie Downer.

There are some Saturday Night Live sketches that I love and I’m slightly old school in that regard. Anything with Eddie Murphy, for sure. And pretty much anything with Chris Farley. I love that skit with “Debbie Downer” too. Didn’t see it? Go check it out on line, then come back. No time to do that? Okay, here’s what it is: Debbie Downer was that person who sits with a
group and constantly points out the negative angle in any conversation. In the process, she brings pessimism to the entire situation.

Don’t be Debbie Downer. Nobody likes a downer.

No one wants to enter your space to listen to you complain. There’s a difference between complaining and making progress toward dealing with a difficult situation. Of course you need to bring up problems if you want to ultimately deal with fixing them. But make sure that you have a solution to improve your space. Make sure that you also present the solutions to improving diversity—don’t just harp on the problems. Critics are a dime a dozen. Our world needs more ethical problem solvers.

The action items here relate back to those icebreaker statements I mentioned earlier. Think about the quality of those statements. Make sure that you couch them in positive, optimistic terms. More importantly, make sure that you provide solutions. For example, remember the statement I recommended that said something to the effect of, “What have you done lately to improve diversity?” You need a follow up that sounds like, “Well, here are some things you can do….” Then you need to actually provide some examples of action items that other person could take. And those action items could resemble the tasks discussed in the next few sections…read on…

4. Take risks

When we enter difficult situations, it’s a good idea to make a plan. That way you have a framework for how to deal with things—it’s the P in the MPH approach. You need a Process that you’ll follow in order to achieve your goals. Those action items I mentioned above are a perfect example of things you can do to develop a process that will help address diversity with the goal of improving inclusion in the practice of law. But my boxing hero Mike Tyson had an interesting line. He said, “Everyone has a plan until you get punched in the mouth.”
Mike knew that a great fighter must adapt. If your plan is thrown off course, you need to find a way to change and still accomplish the goal. The same holds true in the world of fighting for diversity. As you enter the diversity space, or as people enter your 5 feet of space, you need to make this commitment—opting out will not be an option. If someone throws you a curveball, you need to find a way to persist in the fight. And sometimes that means that you’ll need to go out of your comfort zone. Meet the challenges in your space head on and use the knowledge and skills you were given to take risks.

You will face challenges….people who are opposed to the fight for diversity will try to throw you off. But your success will be measured by getting up one more time than being knocked down. And if they are successful in derailing you, don’t fret- failure is okay as long as you learn from it and use the new knowledge to improve your space.

Here’s what you can do. When you find yourself in a situation where someone is fighting with you…when you find yourself feeling uncomfortable, allow yourself to feel strange. It’s risky, because you don’t have any idea where the conversation is going to end up. There is no safety net- you are improvising. But you need to allow yourself to feel vulnerable. It’s difficult skill to develop— the ability to allow yourself to feel uncomfortable, and to continue to press on despite that sense of unease. But the truth is that that is when real progress begins. Force yourself to stay in the zone during times like that and remain engaged. Here are a few steps to follow in that regard:

First, realize that you are in improvisation territory, and let yourself remain there. In fact, force yourself to remain there…in that uncomfortable space.

Second, quickly ask yourself, “is this a safe situation?” If the other person is full of animosity and there is the possibility of a physical confrontation, then you need to extract yourself from the situation. But if it’s safe…
Third, react like a jazz musician. What I mean by that is you need to listen to what the other side is saying and respond to their cues. It’s common for someone in a tense situation to simply pursue their beliefs, and almost push their ideas down the other person’s throat (so to speak). But a jazz improviser listens to what the other musicians on stage are doing and they go with that flow. The best band leaders ultimately lead their bandmates to a place they want to be…and that’s what you have to do with a contaminator in a diversity situation. Let them speak. Let them vent. Let them say the absurd things that hurt you to the core. Then, go with that flow and persuade them. Take them to the place you want them to be, instead of shouting over them, or conducting your own one-sided conversation in response to their positions.

3. Be the leader of your space

In the previous point I alluded to leading a contaminator to a place in a conversation. Leading another person in that context is time consuming and it takes patience. And that quality — patience — is one of the most important attributes of being a leader. And let’s face it, if you are taking on the responsibility of changing people’s minds about diversity, then you are taking a leadership position (and good for you). That’s why Dr. Vinella says that you need to be the leader of your space. This element is really about the quality of the interaction that you engage in when you improvise in that “risky,” scary situation. Resolve yourself to the fact that it might take some time. A leader puts in the necessary time to get the results they want. Great leaders listen, collaborate and do not communicate partial facts about their space. That takes dedication and patience. Be patient and get in the conversation for the long haul. Convincing someone that promoting diversity in the practice is important is not a quick conversation. It’s not easy. Be patient and be willing to put in the time to make a difference.

There’s another aspect to this leadership thing. It’s not just about your own personal attributes, but it’s about developing the necessary attributes in your team. In that regard, it’s
about being a mentor. Mentorship is more than supervision- it's about teaching, inspiring, guiding, and developing another person.

The action item here should be clear: get your team involved. Those are the people who are usually in your 5 feet of space- focus on them as well. Get your office involved in the cause for diversity. Enlist them in this effort. Encourage them to take action in their own 5 feet of space. Put them into some uncomfortable situations (in a productive way, of course). You know the old saying “familiarity breeds contempt?” I've always believed that familiarity defeats contempt. Identify four places that you could go….with your team….that would allow you to interact with a diverse group. Make a firm outing there. And while you are there, actually interact.

The other way you can put this into action in your practice, and show leadership in the process, is to make sure that the actions you’ll take to promote diversity are in that plan. That shows a sense of dedication to the mission, it shows your team that you’re serious, and it ensures that you will actually take the steps necessary to bring about inclusion in your firms proverbial 5 feet of space.

2. Have an attitude of gratitude

As you embark on this effort to promote inclusion and advance the cause of diversity in the practice, you will be entering a new phase of life. It will be one that is full of excitement, frustration, and hopefully rewards. But as you move into this next space, keep in mind that you won't always be successful. You won’t always realize a “win” and you won’t always feel rewarded. As Dr. Vinella said, not everyone will receive a trophy and life is not all about unicorns and rainbows. But it’s important to be grateful, despite the challenges.

Gratitude is one of the essential elements of success in any endeavor. In the diversity context you can take the following action item: be thankful not only for the rewards and the
trophies, but be thankful for the tough ties and the failures as well. It’s those challenges that help you grow. Being faced with a roadblock is an opportunity to develop an argument against that impediment. In addition, every interaction can make some difference. Be thankful for the opportunity to interact because even if you’re not successful, you probably made some impact—sometimes just advancing the dialogue, or putting the right idea in someone’s head is important.

In that regard, appreciate all who enter your space no matter if they agree with you or not. If we all learn to appreciate one another and our differences, our individual spaces will improve and diversity will be advances. Respect all who enter your space and keep in mind a simple thank you goes a long way. Which brings me to another action item: when you see people who are committed in your space, thank them. When you are able to convince someone to take a step to eliminate bias, thank them. That sense of graciousness encouraging and it keeps old momentum going. You can even go further—get their contact info. Seek them out. Become part of their team and vice-versa.

1. Appreciate those in your space

The final element is related to gratitude. Dr. Vinella put it to the high school graduates this way:

The speed of events in your next space will move even faster, but remember to take the time to appreciate those people in your space. Graduates, look up in the stands. These are the people who are currently in your space and will always be there. Just because you are moving on to a different space make sure to always keep room for these people.

And that leads me to the final action item: Make sure not to leave behind the people who are in your space now. Improving diversity in the practice means expanding your life, not restricting it. It’s about broadening your perspectives and others’, not limiting them or leaving an old life behind.