

CLE Seminar for In-House Counsel

2021 Winter Webinar Series

Trends in Diversity, Equity, and Inclusion

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Presenters

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Diversity

ETHNICITY Industry experience
Years of experience
Gender Intersectionality
Disability **LGBT+** Religion
Age Nationality **RACE** Faith
Lived Experience

Inclusion

Empathy LEARNING
RESPECT Understanding
Support
Accountability **AWARENESS**
Collaboration Communication

Recent Legal Developments

A Path Forward

Equal Pay Laws

Federal Laws

- **Equal Pay Act**
 - Requires employers to provide men and women with equal pay for equal work
- **The Civil Rights Act: Title VII**
 - Prohibits discrimination based on protected categories, including discrimination in pay because of sex

State Laws

- **California Equal Pay Act:**
 - Prohibits employers from paying employees less than what they pay employees of opposite sex for substantially similar work
 - Expanded and now employers are also prohibited from paying employees less based on race or ethnicity
- **Other States** have also adopted equal pay laws:
 - Colorado, New York, Maryland, Nebraska, Massachusetts

Pay Equity - A Continuing Issue



2020 In-house counsel compensation survey*

- "Males made more than females in <total> compensation in most positions."
- "...in GC and CLO positions at high-revenue companies <with one exception>, women earn less than men...At the highest revenue, the gap is greatest."
- Greatest differential related to bonus not salary.

<https://www.majorsl.com/en/knowledge-library/research/2020-global-in-house-compensation-survey>



Global in-house bar association with over 45,000 members in 85 countries

- *CLO Survey* from 2018, 2017, and earlier show a **consistent pay gap at every pay category**, from under US\$200,000 per year to US\$600,000 and above.
- Canadian respondents of ACC's *2018 Global Compensation Report*, male in-house lawyers made **158 per cent** of their female colleagues' total compensation. Their performance-based bonuses were nearly double.
- *2019 GC Landscape* report showed that, in the U.S., the average male general counsel (GC) makes **39 per cent more** than his female peers.

Simon Fish, "GC and the Gender Pay Gap," Canadian Lawyer Magazine, August 7, 2019, <https://www.canadianlawyeromag.com/in-house/news/opinion/gender-gap-and-the-gc-277324>

Pay Data Reporting

California - SB 973

Requirement to submit employee pay data to the State of California

Goal

- To address the continuing gender pay gap
 - As of 2016, in California, women working full time still made a median 88 cents for every dollar earned by men
 - Gap increases even further for women of color

History

- Employers with 100 + employees: history of reporting demographic data to EEOC via EEO-1 report
- In 2016, the Obama Administration announced intent to expand the EEOC reporting requirements to include pay data (EEO-1 Component 2)
- Component 2 was never implemented by the Trump Administration

Pay Data Reporting - continued

California - SB 973

Covered employers

Law requires private California employers to submit specified pay data to the California Department of Fair Employment and Housing:

1. Employers that are required to file an EEO-1 report under federal law, and
2. Have 100 or more employees (with at least 1 employee in California)

Required reporting

- Number of employees by race, ethnicity, and sex in certain job categories
- Earnings by specified pay bands for each of the employees in each of those categories
- First report is due **March 31, 2021**

➤ **Expectation - other states will follow suit**

California - Setting Trends?

Diversity on Corporate Boards

California

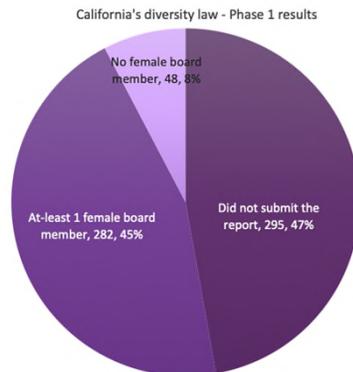
- 2018 became first U.S. state to pass a law mandating diversity on boards: SB 826
- SB 826: requires public companies headquartered in CA to have women on their boards:
 - Phase 1 - by Dec. 31, 2019:
 - One woman on board
 - Phase 2 - by Dec. 31, 2021:
 - Companies with boards with four or fewer members to have at least one female director
 - Companies with five-member boards to have at least two female directors
 - Companies with six or more directors to include three or more female directors

California - Setting Trends?

Diversity on Corporate Boards

2019: only 173 publicly held corporations reported compliance

2020: 282 publicly held corporations reported compliance



Source: Board Diversity: No Longer Optional, <https://corpgov.law.harvard.edu/2020/10/11/board-diversity-no-longer-optional/#2b> (Oct. 11, 2020) ; California's Secretary of State - March 2020 Report

California - Setting Trends?

Diversity on Corporate Boards

- AB 979 (approved September 30, 2020):
 - Requires public companies headquartered in California to expand board diversity.
- Phase 1 - by Dec. 31, 2021:
 - At least one director from an underrepresented community
- Phase 2 - by Dec. 31, 2022
 - Nine or more directors: minimum of three
 - More than four but fewer than nine directors: minimum of two
 - Four or fewer directors: minimum of one

Other States are following suit and similar laws were enacted in Maryland, Illinois, New York. Additional states are also implementing legislation.

There have been legal challenges to the gender requirements. Similar challenges are expected for the diversity requirements.

Impact of Diversity

Diversity on Corporate Boards

Does diversity on boards really matter? Yes!

According to an analysis by McKinsey & Company:

- Companies in the top quartile of gender diversity on executive teams were 25% more likely to experience above-average profitability than peer companies in the 4th quartile
- Companies with more than 30% women on their executive teams are significantly more likely to outperform those with between 10% and 30% women, and these companies in turn are more likely to outperform those with fewer or no women executives

Allyship

The Framework

Allyship terminology

Privilege: an unearned advantage given by society to some people but not all.

Alternative language:

A **benefit** enjoyed by some people but not all.

An **advantage** not enjoyed by everyone.

That comes to you as a result of **good luck** or **good fortune**.

With thanks to @frameshiftllc

Allyship terminology

Oppression: systemic, pervasive inequality that is present throughout society, that benefits people with more privilege and harms those with fewer privileges.

Marginalized Person or Group: a person or group who does not enjoy the same privileges as the rest of society.

Marginalization: the process by which individuals or groups are excluded from full participation in social, economic and political life.

With thanks to @frameshiftllc

Some other important concepts to understand...

Intersectionality: The concept that people can be subject to multiple identities that intersect and interact with each other, coined by legal scholar Kimberlé Crenshaw (e.g. a black transgendered woman; a white gay parent).

Power: The ability to control circumstances or access to resources and/or privileges.

With thanks to @frameshiftllc

What is an ally?

Ally: a member of a social group that enjoys some privilege and works to end the marginalization of others through self-education and action-oriented support.

Sources of Privilege or Advantage

- Part of the dominant ethnic and/or racial group
- Male
- Masculine
- Cisgender (your gender identity is the same as that assigned to you at birth)
- Straight
- Able-bodied
- A legal resident or citizen
- Speak the dominant language, especially with high-status accent
- Neither "too young" nor "too old"
- Certain height/size/shape
- Not a mother/primary parent
- Not a caregiver
- From an upper or middle class family
- _____

With thanks to @frameshiftllc

Sources of Power and/or Privilege

- ✓ Educated.
- ✓ Technically experienced.
- ✓ Wealthy (compared to peers).
- ✓ Management position.
- ✓ Professor, teacher, supervisor, teaching assistant, etc.
- ✓ Parent or family leader.
- ✓ Any position in a hierarchy that is not the bottom of the hierarchy.
- ✓ Widely recognized as an expert.
- ✓ Large audience (social media following, fans, etc.).
- ✓ Access to media (reporters, TV shows, editors, etc.).
- ✓ Respected by powerful people.

- _____
- _____

With thanks to @frameshiftllc

Explore your own privilege

Questions to ponder...

- What social identities (race/ethnicity, class, sex, gender, sexual orientation, age, ability, religion etc.) of yours hold privilege?
- How do you currently use your privilege? Who benefits?
- Are you willing to use your privilege to educate others who **also** have your same privilege/s but are unaware of it?
- What's your first memory of your privilege? Is it easy for you to recognize your privilege in everyday situations?

With thanks to CCDI

Now that you know the characteristics that empower you to be an ally, you can use your privilege for good!

Ally is a verb, not an identity.

Being a marginalized person takes no action - it is an identity.

Acting as an ally is about action - it is not an identity, which is why we talk about "allyship" and "allyship skills".

Depending on what is most relevant about you to the situation, **you may switch between being marginalized and acting as an ally.**

Allies are NOT saviors – saviors come to dominate, allies come to *participate*.

With thanks to @frameshiftllc and CCDI

Allyship In Action

Why allyship?

- “For all the talk about how important diversity is within organizations, white and male executives aren’t rewarded, career-wise, for engaging in diversity-valuing behavior, and nonwhite and female executives actually get punished for it. **The challenge of creating equality should not be placed on the shoulders of individuals who are at greater risk of being crushed by the weight of this goal.**”

– Stefanie K. Johnson and David R. Hekman, March 23, 2016, [Women and Minorities are Penalized for Promoting Diversity](#) Harvard Business Review.

Myth of meritocracy

Terminology

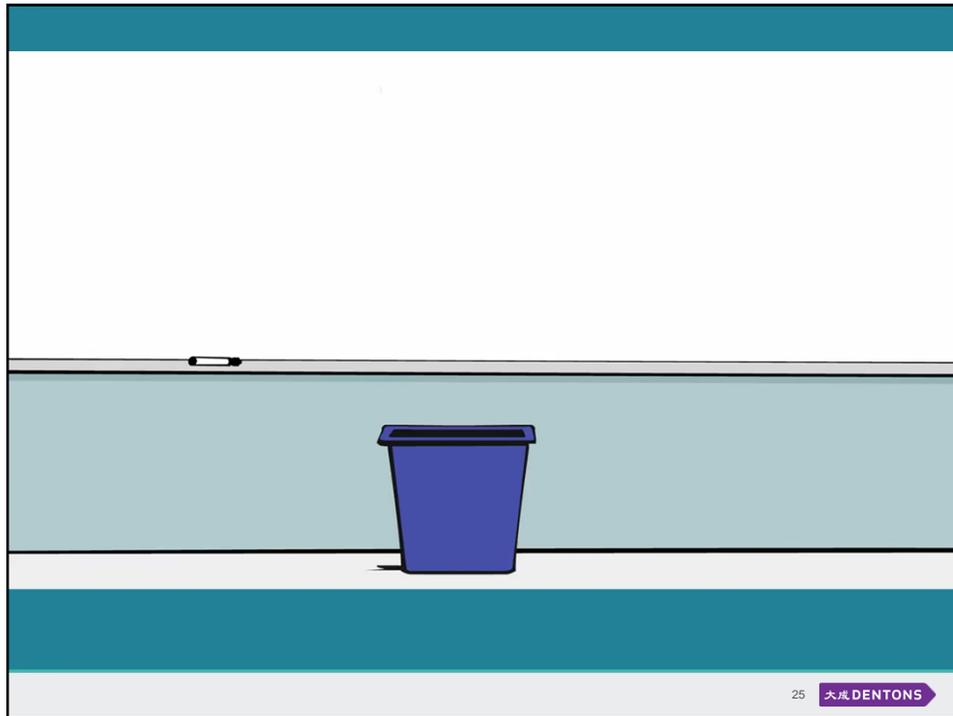
Merit: as the quality of being good and deserving praise.

Meritocracy: a social system, society, or organization in which people achieve success or gain power because of their abilities.

Let’s take a closer look...

Remember what we just learned about privilege and advantages that some have and others do not?





Privilege, marginalization and allyship in action

Example

Privilege: In a new job, everyone believes that you were hired because you have the skills for the job not because you are non-majority group in appearance or a woman.

Marginalization: People's/society's assumptions that you are less competent because your race/ethnicity is not the same as the majority group or because you are a woman.

Marginalized person: A racial or ethnic minority person or a woman who wants to advance to a leadership position.

Ally: A person who:

- speaks up to put a stop to “harmless” racist or sexist remarks
- insists on a diverse slate of candidates in recruitment and promotion discussions
- seeks out opportunities to learn about the barriers to advancement of women and racial/ethnic

Basics of allyship skills: THE DO NOTS

- **DO NOT** expect to be taught or shown.
- **DO NOT** compete for the gold medal in the “Oppression Olympics” - you don’t need to compare how your struggle is just as bad.
- **DO NOT** behave as though you know best.
- **DO NOT** take credit for the labour of those who did the work before you stepped into the picture.
- **DO NOT** make assumptions (e.g. that every member of an underrepresented group feels oppressed or marginalized).
- **DO NOT** suggest that you understand the challenges someone else has faced.

With thanks to [The Guide to Allyship](#)

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What if I make a mistake?

Apologize, correct
yourself,

and move on.



With thanks to CCDI

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Motivators for Allyship

1. Equity and Fair Play

- **Sense of “fair play”** = a perspective or lens that predisposes some individuals to be more highly attuned than others to recognizing issues of fairness and inequality in the way resources are shared in society.



- It is possible for one’s sense of fair play to change through self-education, learning from others and self-reflection.

Catalyst, May 4, 2009. Report: Engaging Men in Gender Initiatives: What Change Agents Need to Know. <https://www.catalyst.org/research/engaging-men-in-gender-initiatives-what-change-agents-need-to-know/>

Motivators for Allyship

2. “The Business Case”

More diverse organizations perform better.

- ✓ Better understand their target audiences
- ✓ Better at retaining talent
- ✓ More productive
- ✓ More creative thinkers and better innovators
- ✓ Exhibit enhanced decision-making
- ✓ Manage risk better
- ✓ Better reputations
- ✓ Better financial performance – more profitable and greater value creation



Deloitte.

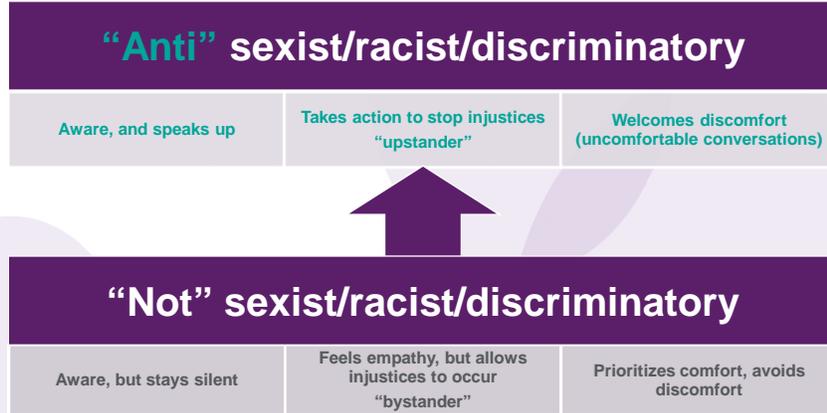
BCG

McKinsey&Company

MSCI

CREDIT SUISSE

The Difference Between “Not” and “Anti”



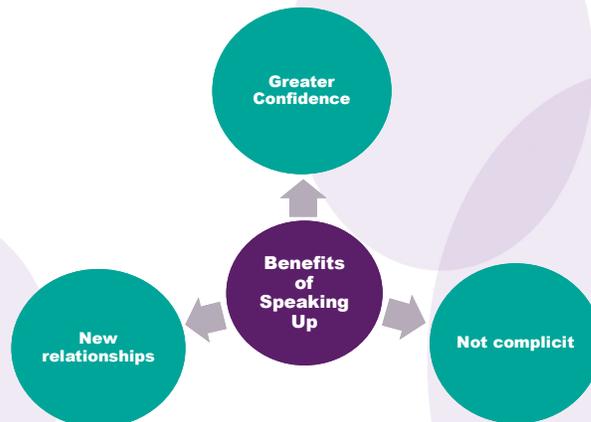
Microaggressions

Indirect and subtle, often unintentional verbal or non-verbal expressions of discrimination

- ❖ A non-majority group colleague is complimented for speaking the dominant language perfectly, but it's actually his first language.
- ❖ A Black man notices that a white woman flinches and clutches her bag as she sees him in the elevator she's about to enter, and is painfully reminded of racial stereotypes.
- ❖ At the beginning of a meeting, a colleague introduces all of the men using their first and last names and introduces the women using their first names only.
- ❖ Upon finding out a colleague is gay, someone immediately says, “Oh, you should meet my friend X, she's gay too!”
- ❖ A Dentons colleague refers to our business services professional colleagues as “non-lawyers”.

<https://www.vox.com/2015/2/16/8031073/what-are-microaggressions>
<https://www.businessinsider.com/microaggression-unconscious-bias-at-work-2018-6?r=US&IR=T#oh-sorry-wrong-person-3>

Benefits of Speaking Up and Taking Action



Catalyst, June 25, 2020. How Combative Cultures Prevent Men from Interrupting Sexism (Infographic). <https://www.catalyst.org/research/combative-culture-sexism-infographic/>
Catalyst, June 9, 2020. Report: Interrupting Sexism at Work: How Men Respond in a Climate of Silence. <https://www.catalyst.org/research/interrupting-sexism-silence>

Strategies for Speaking Up and Taking Action

When you hear something that doesn't sound quite right...

- **Seek clarity:** "Tell me more about _____."
- **Offer an alternative perspective:** "Have you ever considered _____?"
- **Speak your truth:** "I don't see it the way you do. I see it as _____."
- **Find common ground:** "We don't agree on _____ but we can agree on _____."
- **Give yourself the time and space you need:** "Could we revisit the conversation about _____ tomorrow?"
- **Set boundaries:** "Please do not say _____ again to me or around me."

<https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist>

Thank you

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