

How Can California Increase the Diversity of the Legal Profession and the Judiciary?

*An Informational Hearing of the Assembly Committee on Judiciary
and the Asian Pacific Islander, Black, and Latino
Legislative Caucuses of the California Legislature*

Background Paper

By the Staff of the Assembly Judiciary Committee

I. Introduction

A workforce that reflects the diversity of our society has been shown to not only be more fair by offering more opportunity for all, but also to be a more effective workforce. Diversity of the legal profession is especially important because it provides access to our justice system and our democratic institutions, as well. Unfortunately, the legal profession is consistently among the least diverse professions. Nationwide, a shocking 88 percent of the legal profession is white. In California, the legal profession and judiciary falls far short of adequately representing the demographic makeup of the state. Despite years of concerted effort to diversify the legal profession, little has changed. In order to achieve the goal to have California's bench and bar reflect the diversity of our state and provide opportunity and justice for all, dramatic changes to state policies and priorities will be required. This paper looks at why such changes are needed, and which programs and policies appear to be most promising to address the issue.

Section II of this paper discusses the importance of diversity for the legal profession; Part III discusses just how diverse the legal profession and the judiciary are today; Part IV explains the underlying causes of the lack of diversity; and Part V reviews existing programs to increase diversity. The paper concludes with a brief overview of what additional steps could be taken to increase the diversity of both the bar and the bench.

The paper cites numerous studies and articles detailing the impact of the legal profession's ongoing struggles to properly incorporate underrepresented minorities into the study and practice of law. These studies and articles span more than a decade of research into the causes of, and solutions to, the legal profession's challenges with diversity. It should be noted that the studies do not use the same terminology to describe underrepresented groups, likely because the terminology has changed and evolved over that time period to better reflect the cultural preferences of the groups. In order to ensure that this paper accurately represents the findings and underlying data of those studies, this paper retains the terminology used in the original documents or studies which are cited.

II. The Importance of Diversity in the Legal Profession

What Diversity of the Legal Profession Means. Merriam Webster defines diversity as “the condition of having or being composed of differing elements,” especially “the inclusion of different types of people (such as people of different races or cultures) in a group or organization.”¹ Historically, the pursuit of diversity in the legal profession has meant the inclusion of more women and underrepresented minorities in the practice of law. California specifically requires the reporting of demographic data on judicial applicants and judges.² When the judicial diversity reporting statute was first established in 2006, only the ethnicity and gender of judicial applicants and judges were tracked and reported.³ The Legislature added race in 2007,⁴ gender identity and sexual orientation in 2011,⁵ and veteran and disability status in 2013.⁶

Even with a more exhaustive list, there are still other areas of diversity that are not tracked. These include professional diversity – for example, whether judges are former district attorneys and law firm partners, or public defenders and legal aid lawyers – as well as diversity based on religion, socioeconomic status, gender expression, marital status, and political affiliation.⁷ In addition, geographic diversity raises its own unique considerations and also overlaps with socioeconomic, political, racial, and ethnic diversity.

The Importance of Diversity in the Legal Profession and the Judiciary. While diversity is important for all professions, it is especially important for the legal profession. The American Bar Association (ABA) has identified four rationales for why the legal profession should make diversity a priority, discussed below. Those four rationales, as well as two more that are supported by research, are discussed below:

Demographic Need for Diversity. The first and most obvious reason for diversity is the demographic rationale: the legal profession should look like the population as a whole. The Judicial Council has acknowledged the importance of this rationale, writing that “[i]ncreasing the diversity of the state’s judicial officers so that it reflects the composition of our state’s residents works to remove barriers to access in the courts and will help increase Californians’ trust and confidence in our justice system.”⁸ Judicial diversity also encompasses more than judges:

¹ <https://www.merriam-webster.com/dictionary/diversity>.

² Government Code Sec. 12011.5(n).

³ SB 56 (Dunn), Chap. 390, Stats. 2006.

⁴ AB 159 (Jones), Chap. 722, Stats. 2007.

⁵ SB 182 (Corbett), Chap. 720, Stats. 2011.

⁶ AB 1005 (Alejo), Chap. 113, Stats. 2013.

⁷ See California Code of Judicial Ethics, Cannon 3, B(5), which requires judges to perform their duties without bias, prejudice, or harassment based on these areas of diversity.

⁸ Administrative Office of the Courts, *Pathways to Achieving Judicial Diversity in the California Courts: A Toolkit of Programs Designed to Increase the Diversity of Applicants for Judicial Appointments in California*, Judicial Council of California (Dec. 2010) p. 3.

[E]nhancing the diversity of our workforce can send an important message to all those who come to the courts whether as litigants, witnesses, or jurors: that our courts are inclusive, and that justice is being administered by individuals who share backgrounds and experiences similar to theirs. California’s judicial system operates on the premise that there is more to administering justice than providing a fair adjudicator; the appearance of fairness—including a justice system that reflects society as a whole — also plays an essential role in fostering public confidence in our system.⁹

On the flip side, a lack of diversity undermines public confidence in the fairness of our justice system. Unfortunately, as discussed in more detail below, while California’s population is getting more diverse, the legal profession, especially at the top echelons, remains primarily white and male.

Democratic Need for Diversity. The second rationale for diversity of the legal profession is that it is important to preserve our democracy. Attorneys have “been in the vanguard” of the “political, constitutional, and legislative struggles” to create and sustain our democratic institutions.¹⁰ “Without a diverse bench and bar,” writes the ABA, “the rule of law is weakened as the people see and come to distrust their exclusion from the mechanisms of justice” and from democratic institutions.¹¹

Business Need for Diversity. A third rationale – the business rationale – holds that a “diverse workforce within legal and judicial offices exhibits different perspectives, life experiences, linguistic and cultural skills, and knowledge about international markets, legal regimes, different geographies, and current events.”¹² It makes business sense to hire attorneys who “reflect the diversity of citizens, clients, and customers around the globe.” Unfortunately, as discussed in more detail below, the legal profession in general (and law firms in particular) have failed to adequately reflect that diversity. In a letter to law firm partners this past January, over 170 corporate general counsels and officers wrote that they are “disappointed to see that many law firms continue to promote classes that in no way reflect the demographic composition of entering associate class” and that partners “remain largely male and largely white.”¹³ In support of the business rationale for diversity, these in-house counsels pledged that they would direct their “substantial” outside counsel work “to those law firms that manifest results with respect to diversity and inclusion.”¹⁴ This letter was issued, at least in part, in response to the announcement

⁹ Administrative Office of the Courts, *Pathways to Achieving Judicial Diversity in the California Courts: A Toolkit of Programs Designed to Increase the Diversity of Applicants for Judicial Appointments in California*, *supra*, note 8, at vii, A Message from Chief Justice Ronald M. George.

¹⁰ American Bar Association, *Diversity in the Legal Profession: The Next Steps* (April 2010) p. 9.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ GCs for Law Firm Diversity, *Open Letter to Law Firm Partners* (Jan. 27, 2019) from General Counsels and Chief Legal Officers of more than 170 public and private companies, start-ups, and non-profit organizations.

¹⁴ *Ibid.*

by a leading national law firm with nearly 1,000 attorneys, of its partnership class of 2018, complete with a photo, apparently showing 11 white males and one white female.¹⁵

Leadership Need for Diversity. The fourth rationale for greater diversity of the legal profession is the leadership rationale. “Society draws its leaders from the ranks of the legal profession,”¹⁶ and without a more diverse legal profession, leaders in government and business will be less diverse and will not adequately represent their business or our representative democracy.

Innovative Need for Diversity. The fifth rationale for diversity in the legal profession is that it improves performance and innovation. Research shows that groups which include people with diverse backgrounds and perspectives are better at solving problems and more innovative than those which are less diverse.¹⁷ Under this rationale, law schools, law firms, government agencies, and judges and their staff will all perform better if they are sufficiently diverse.

Public Interest Need for Diversity. The sixth rationale for diversity in the legal profession is that it promotes public service. Research shows that legal professionals of color are more committed to public service and investing in their communities than other legal professionals. According to an upcoming article, national law student data “suggest a deep commitment to service work, with students of color more likely to aspire to public interest and government positions after graduation” and “legal professionals of color are more likely than whites to serve the community through public interest law.”¹⁸ Thus, under this rationale, the less diverse lawyers are, the less they are committed to public interest and government service, hallmarks of the legal professional.

Legislative Encouragement for Diversity in the Bar and Bench. Understanding the importance of improving the diversity of the legal profession, the Legislature reaffirmed its commitment to diversity just last year by adding Section 6001.3 to the Business & Professions Code. It states, in relevant part, the following:

- (a) It is the intent of the Legislature that the State Bar maintain its commitment to and support of effective policies and activities to enhance access, fairness, and diversity in the legal profession and the elimination of bias in the practice of law.
- (b) The Legislature finds and declares the following:

¹⁵ Christine Simmons, *Paul Weiss Vows to 'Do Better' After Partner Promotions Stir Diversity Debate*, N.Y. L.J. (Dec. 18, 2018).

¹⁶ American Bar Association, *Diversity in the Legal Profession*, *supra*, note 10, at p. 10.

¹⁷ See, e.g., Richard, *et al.*, *Cultural diversity in management, firm performance, and the moderating role of entrepreneurial orientation dimensions*, *Academy of Management Journal*, 47(2), pp. 255-266 (2004); Loyd *et al.*, *Social category diversity promotes pre-meeting elaboration: The role of relationship focus*, *Organization Science*, 24(3): pp. 757-772 (2013); Lount, *et al.*, *Working harder with the out-group: The impact of social category diversity on motivation gains*, *Organizational Behavior and Human Decision Processes*, 103, pp. 214-224 (2007).

¹⁸ Article to be published as: Meera Deo, *Affirmative Action Assumptions*, 52 U.C. Davis L. Rev. — (2019) (internal citations and footnotes omitted).

- (1) The rich diversity of the people of California requires a justice system that is equally accessible and free of bias and is a core value of the legal profession.
- (2) Diversity and inclusion are an integral part of the State Bar’s public protection mission to build, retain, and maintain a diverse legal profession to provide quality and culturally sensitive services to an ever-increasing diverse population.
- (3) Diversity increases public trust and confidence and the appearance of fairness in the justice system and therefore increases access to justice.
- (4) The State Bar should continue to increase diversity and inclusion in the legal profession.¹⁹

The Legislature has also stated its preference for the appointment of judges from diverse backgrounds to the bench: “The Governor and members of judicial selection advisory committees are encouraged to give particular consideration to candidates from diverse backgrounds and cultures reflecting the demographics of California, including candidates with demographic characteristics underrepresented among existing judges and justices.”²⁰

III. Diversity of the Legal Profession -- What the Data Tell Us

Despite long-standing and laudable diversity efforts by many groups and individuals, including law firms, nonprofit organizations, the American Bar Association, California State Bar (Bar) and former Governor Jerry Brown, the legal profession and judiciary still fall far short of adequately representing the demographic makeup of California. As mentioned above, the legal profession is consistently among the least diverse professions in the nation, with 88 percent of lawyers who are white, compared to 81 percent of architects and engineers; 78 percent of accountants; and 72 percent of doctors.²¹ This is true despite the fact that, as discussed above, it is particularly important that the legal profession is diverse and the Legislature has expressly identified diversity to be its goal for the profession.

California Attorneys, Generally. While one-third of the nation’s population identify as black, Latino, Asian American, or Native American, only one-fifth of law school graduates identify as such.²² Although California’s lawyers are marginally more diverse than the nation’s as a whole (80 percent are white vs. 88 percent nationwide),²³ in the context of California’s uniquely diverse demographics (37 percent white vs. 73 percent nationally),²⁴ minority underrepresentation of California attorneys is particularly problematic. Since 2001, the total number of attorneys of color in California has increased slightly across nearly all racial/ethnic groups surveyed, but this improvement

¹⁹ Added by AB 3249 (Judiciary), Chap. 659, Stats. 2018.

²⁰ Government Code Sec. 12011.5(o).

²¹ Deborah Rhode, *Law is the least diverse profession in the nation. And lawyers aren’t doing enough to change that*, Washington Post (May 27, 2015), quoting data from the Bureau of Labor Statistics.

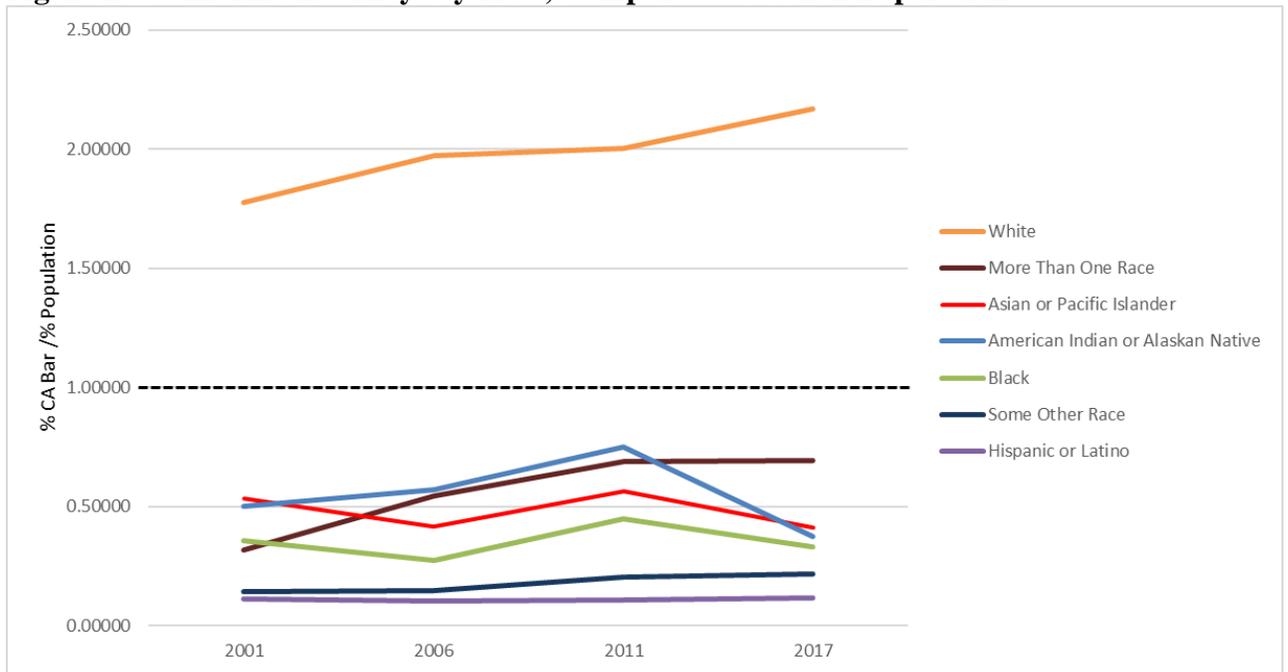
²² National Center for Education Statistics, *Digest of Education Statistics*, U.S. Department of Education (2017) Table 324.25, available at https://nces.ed.gov/programs/digest/d17/tables/dt17_324.25.asp.

²³ Office of Research and Institutional Accountability, *2017 Demographic Survey*, California State Bar (Jan. 26, 2017) p. 14.

²⁴ U.S. Census Bureau, *2017 American Community Survey 1-year Estimates: Selected Characteristics of the Native and Foreign-Born Populations*.

has at best only kept pace with demographic changes and has failed to remedy proportional disparities in the racial/ethnic composition of California’s lawyers compared with its population as a whole (Fig. 1).²⁵ In fact, the overrepresentation of white attorneys in California has actually *increased* since 2001 (given their declining representation in the state population), while the underrepresentation of other races and ethnic minorities has remained relatively flat.

Figure 1: California Attorneys by Race, Compared to Overall Population



Source: California State Bar, Office of Research and Institutional Accountability, *2001-2017 Demographic Surveys*; U.S. Census Bureau, *2001-2017 American Community Surveys*.

Women also continue to be underrepresented in the legal profession. As of 2017, 41 percent of California attorneys were women, despite women comprising just over half of the state’s population.²⁶ Encouragingly, this figure has been steadily increasing, even as the gender composition of the state’s population remains static (Fig 2).²⁷

The legal profession similarly underrepresents individuals with disabilities. While nearly 11 percent of California’s population reports having a disability, only 4.5 percent of legal professionals report having a disability.²⁸ The State Bar did not collect data on disabilities among legal professionals until the 2017 demographic survey, so it is unclear whether and how the representation of individuals with disabilities is changing over time.

²⁵ Office of Research and Institutional Accountability, *2001-2017 Demographic Surveys*, State Bar of California, <http://www.calbar.ca.gov/About-Us/Who-We-Are/Bar-Numbers> (as of Feb. 15, 2019); U.S. Census Bureau, *2001-2017 American Community Surveys*.

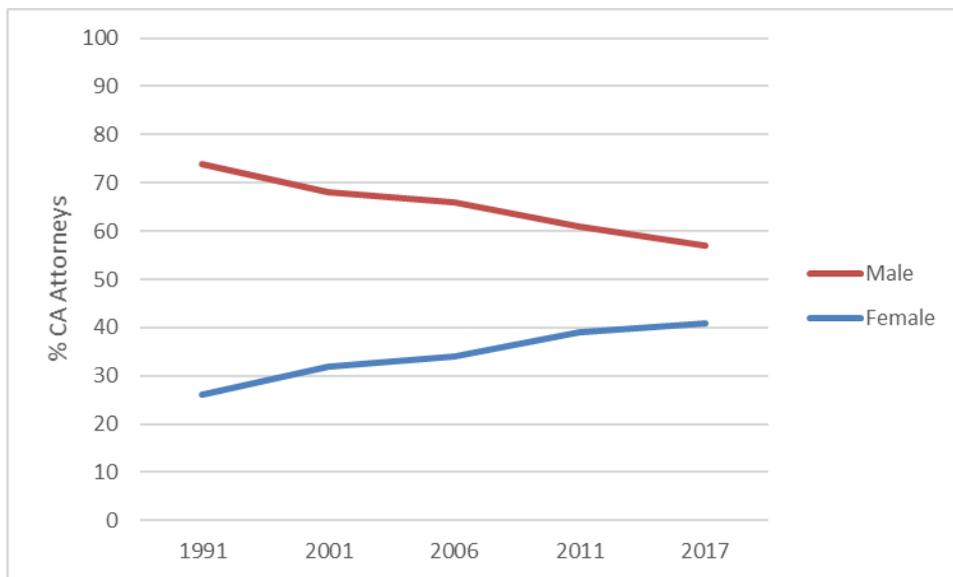
²⁶ Office of Research and Institutional Accountability, *2017 Demographic Survey*, *supra*, note 23.

²⁷ *Ibid.*

²⁸ *Ibid.*

On a positive note, legal professionals who identify as gay, lesbian, bisexual, non-heterosexual, or more than one of these sexual orientations exceed representation in California’s population as a whole, with 6.1% of legal professionals self-reporting one of these sexual orientations compared to 4.9% of the general population.²⁹ On the other hand, the California Bar underrepresents the transgender community relative to the general population of California, with only 0.5% of legal professionals identifying as transgender male, transgender female, gender variant, or another gender not listed in the Bar survey, compared with 0.76% of Californians.³⁰ However, these figures likely underrepresent the percentage of LGBTQ Californians within the legal profession and otherwise, as a large percentage of respondents elected not to provide information regarding gender or sexual orientation for all of these surveys.

Figure 2: California Attorneys by Gender



Source: California State Bar, Office of Research and Institutional Accountability, *2001-2017 Demographic Surveys*; U.S. Census Bureau, *2001-2017 American Community Surveys*.

There are a number of significant entry points to the legal profession and to advancement within the profession that may act as barriers to the goal of increased diversity in the legal profession.

California State Bar Exam. In order to practice law in California, an applicant must first pass the California Bar Exam, which consists of a multiple choice section that is standardized for bar exams across all states, and an essay section that is specific to the law of California. The Bar Exam, with its 41 percent pass rate in 2018 (a 21 percent drop

²⁹ Office of Research and Institutional Accountability, *2017 Demographic Survey*, *supra*, note 23; Gates, *Vermont Leads States in LGBT Identification*, Gallup (Feb. 6, 2017).

³⁰ Office of Research and Institutional Accountability, *2017 Demographic Survey*, *supra*, note 23.; Flores, *et al.*, *How Many Adults Identify as Transgender in the United States?*, The Williams Institute (June 2016).

since 2008 and the lowest passage rate for the July exam in 67 years) significantly limits the pool of attorneys who are licensed to practice law in California.³¹ Passage rates vary considerably along racial/ethnic lines. Sixty percent of white test-takers passed the Bar Exam in 2018, compared with 32 percent and 47 percent of black and Latino test-takers, respectively.³² These disparate passage rates mitigate the otherwise consistent increases in the numbers of test-takers from all underrepresented racial/ethnic backgrounds since 2013, including a 5.2 percent increase in Hispanic test-takers from 2013 to 2017.³³ Nonetheless, white test-takers achieved a significantly higher average Bar Exam score than underrepresented groups did during the same period.³⁴

Judicial Clerkships. Judicial clerkships, where new lawyers assist judges in writing their decisions, are often the most competitive jobs a new lawyer can get and can be a stepping stone to the most lucrative and respected jobs in the legal profession. Despite the fact that white students comprise only 58.2 percent of students at top law schools, they represent 82.4 percent of federal law clerks and 80.2 percent of state clerks.³⁵ By contrast, Asian Americans comprise 10.3 percent of the graduates at top law schools, but represent only 6.5 percent of federal law clerks and 4.6 percent of state clerks.³⁶ Since 2005, fully 85 percent of United States Supreme Court clerkships, the most prestigious of these positions, have been granted to white applicants.³⁷ Additionally, less than one-third of these positions are held by women, despite the fact that more than half of current law students being women.³⁸

Law Firms. Racial and ethnic minorities are further underrepresented in the private legal profession's top echelons. Nationally, though racial/ethnic minorities comprise about 39 percent of the population,³⁹ these groups comprise less than seven percent of law firm partners and fewer than nine percent of general counsels at large corporations.⁴⁰ It is tempting to attribute the dearth of minority partners to a lag in impending diversity improvements, as minority attorneys accrue the experience necessary to land these influential positions. However, this explanation is dubious at best since the percent of minority partners has remained static, rather than gradually increasing, over the past decade (Fig 4). This suggests that barriers continue to impede career advancement for attorneys of color.

³¹ Miller, *Nearly Six in 10 Failed California's July 2018 Bar Exam*, The Recorder (Nov 16, 2018), quoting data from the California State Bar.

³² The State Bar of California, *Advancing Diversity and Inclusion in the Legal Profession* (2019).

³³ Bolus, *Performance Changes on the California Bar Examination: Part II*, Research Solutions Group (2018) p. 23.

³⁴ *Id.* at p. 30.

³⁵ National Association for Law Placement, *Clerkship Study Alumni Clerk Findings* (2019) Table 46.

³⁶ Chung, *et al.*, *A Portrait of Asian Americans in the Law*, Yale Law School and National Asian Pacific American Bar Association (2017).

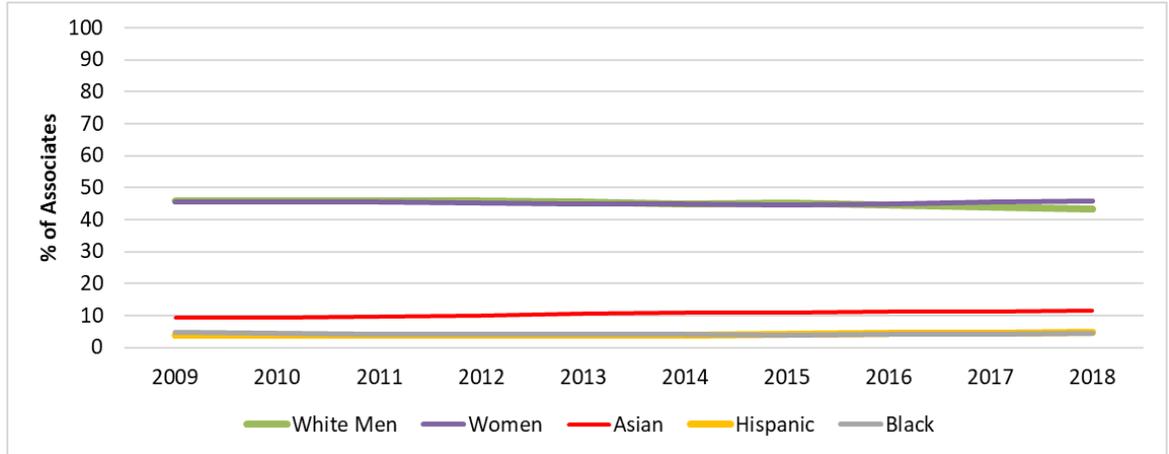
³⁷ Mauro, *Shut Out: SCOTUS Law Clerks Still Mostly White and Male*, National L.J. (Dec. 11, 2017).

³⁸ *Ibid.*

³⁹ U.S. Census Bureau, *2013-2017 American Community Survey 5-Year Estimates* (2017).

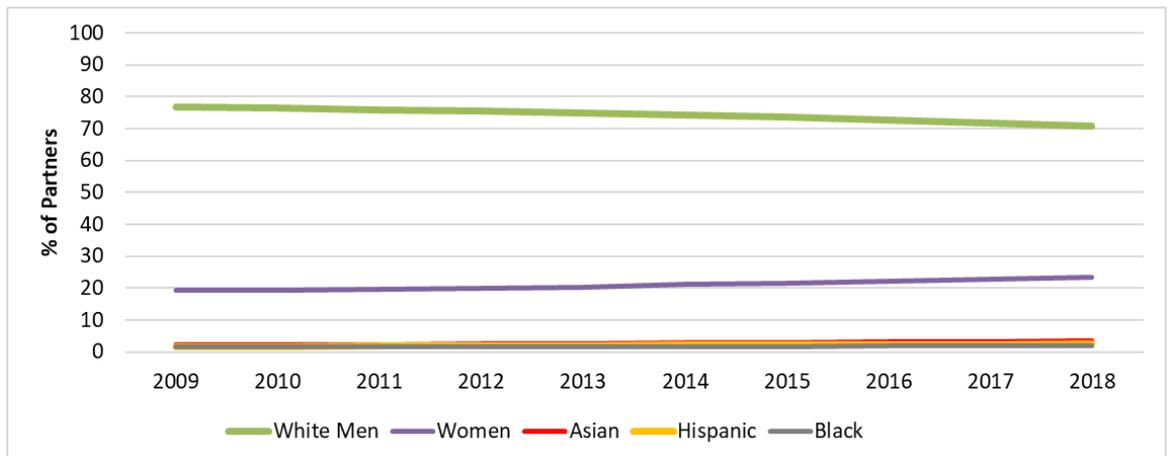
⁴⁰ Rhode, *Law is the least diverse profession in the nation*, *supra*, note 21, quoting data from the U.S. Equal Employment Opportunity Commission.

Figure 3: National Law Firm Associates by Race and Gender



Source: National Association for Law Placement, *2018 Report on Diversity in U.S. Law Firms* (Jan. 2019), Table 2.

Figure 4: National Law Firm Partners by Race and Gender



Source: National Association for Law Placement, *2018 Report on Diversity in U.S. Law Firms* (Jan. 2019), Table 2.

Despite women comprising 49 percent of recent law school graduates⁴¹ and 41 percent of attorneys in California,⁴² women are dramatically underrepresented in the top echelons of the legal profession (Fig 3 and 4). Only one-fifth of law firm partners and general counsels of Fortune 500 corporations are women, and women make up only 17 percent of equity partners and 7 percent of chairs or managing partners for the nation’s 100 largest

⁴¹ National Center for Education Statistics, *Digest of Education Statistics*, *supra*, note 22, at Table 324.40, available at https://nces.ed.gov/programs/digest/d17/tables/dt17_324.40.asp (as of Feb. 26, 2019).

⁴² Office of Research and Institutional Accountability, *2017 Demographic Survey*, *supra*, note 23.

law firms.⁴³ These striking gender inequalities in career achievement are often erroneously attributed to the possibility that women take maternal leave from the labor force, thus stalling their career advancement. However, even among women who work similar hours and do not take time out of the labor force to have children, the likelihood of women becoming partners is still nearly 40 percent less than that of similarly situated men.⁴⁴

One brighter note of increasing diversity can be found in the dean's offices of our nation's law schools. Fully 35 percent of these law school deans are women;⁴⁵ and while not on par with the percentage of women who are graduating from law schools, this figure is significantly higher than the percentage of women partners in law firms. Ten percent of deans at ABA-accredited law schools are women of color, and their numbers were increased by the recent selection of Jenny Martinez to be the dean of Stanford Law School.⁴⁶

Prosecutors. Prosecutors, who exercise the discretion to determine who to prosecute for criminal wrongdoing and what charges to file, are truly the “gatekeepers” of the criminal justice system. Unfortunately, prosecutors in California, like lawyers in general, do not reflect the diversity of California's population. White attorneys are heavily overrepresented among prosecutors. Seventy percent of prosecutors are white, compared with 37 percent of the population. Latinos are heavily underrepresented, making up only 9 percent of prosecutors, but 38 percent of the population.⁴⁷ Interestingly, the percentage of black prosecutors (5.8%) is largely reflective of the percentage of blacks in the state population at large (5.7%).⁴⁸

The Judiciary. Limited career advancement among attorneys of color extends to judicial appointments, as well. As discussed in Part II, above, it is important that judges look like the parties whose cases come before them. Unfortunately, as with partners in law firms and prosecutors, judges do not reflect our diverse population.

At the federal level, the Trump administration has not appointed any black or Latino judges to circuit courts, nor any black women to the bench.⁴⁹ In fact, only three people among the Trump administration's 150 judicial appointments identify as black. The United States Court of Appeals for the 4th Circuit, whose jurisdiction includes the highest percentage of black residents in the nation, currently has no black female judges. The 7th Circuit Court of Appeals is now entirely white.

⁴³ Rhode, *Law is the least diverse profession in the nation*, *supra*, note 21, quoting data from the U.S. Equal Employment Opportunity Commission.

⁴⁴ Dau-Schmidt, *et al.*, *Men and Women of the Bar: The Impact of Gender on Legal Careers* 16 Mich. J. Gender L. 101, 102 (2009).

⁴⁵ Sloan, *More minority women ascend to law dean jobs*, *The National Law Journal* (Jan. 10, 2019).

⁴⁶ Sloan, *Stanford names Jenny Martinez as new law dean*, *The Recorder* (Feb. 6, 2019).

⁴⁷ Bies, *et al.*, *Stuck in the '70s: The Demographics of California Prosecutors*, *Stanford Criminal Justice Center* (July 2015) p. 10; U.S. Census Bureau, *2017 American Community Survey 1-year Estimates: Selected Characteristics of the Native and Foreign-Born Populations*, *supra*, note 24.

⁴⁸ *Ibid.*

⁴⁹ Johnson, *Trump is undoing the diversity of the federal bench*, *Washington Post* (Jan. 22, 2019).

California's state courts also lack both racial and gender diversity. As of 2019, 21 of California's 58 county courts are exclusively white; 12 are exclusively male; and 10 consist exclusively of white, heterosexual, able-bodied males.⁵⁰ Although the Brown Administration made diversifying the judiciary a priority, the increased diversity in judicial representation kept pace with, but did not exceed California's demographic changes (Fig 5). As a result, the major disparities in judicial representation that preceded the Brown Administration have largely persisted.

One important and positive change over time is the significant strides that black judges have made in the last decade, going from being vastly underrepresented in the judiciary to the point where they are just exceeding their representation in the population.⁵¹ This diversity is extremely limited in terms of geography, however, given that 41 of California's 58 county trial courts still do not have a single black jurist.⁵² Native Americans have also gained significant ground, but remain underrepresented on the bench.

Also, gay, lesbian, and bisexual representation on the bench is roughly equivalent to the gay, lesbian, and bisexual population of the state as a whole, with 4.7% of judges and 4.9% of the general population identifying as gay, lesbian, or bisexual, respectively.⁵³ However, transgender representation on the bench appears to pale in comparison to the general population, with only a single self-identified transgender judge in California (i.e. 0.0008%) compared with 0.76% of the general population.⁵⁴ Again, these figures likely underrepresent the percentage of Californians, including judges, who identify as LGBTQ, since the survey relies upon self-reporting and a large percentage of respondents on all of these surveys did not provide information on sexual orientation or gender.

Unfortunately, all other underrepresented groups have seen very little change over the last decade and are represented on the bench at a much lower rate than they are represented in the state's population. Notably, Hispanic representation on the judiciary has stagnated over the past decade. The number of Hispanic judges in the state is only reflective of one quarter of their proportional representation levels.⁵⁵ Though the judiciary has experienced a one percent increase in non-white representation since the beginning of 2018, whether this reflects an increase in proportional representation on the bench cannot be determined at this time, because population demographics have not yet been released for 2018.⁵⁶ Judges with disabilities are also proportionally underrepresented relative to the general population, with only two percent of California

⁵⁰ Judicial Council of California, *Demographic Data Provided by Justices and Judges Relative to Gender, Race/Ethnicity, and Gender Identity/Sexual Orientation* (Dec. 31, 2018).

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*; Gates, Vermont Leads States in LGBT Identification, *supra*, note 29.

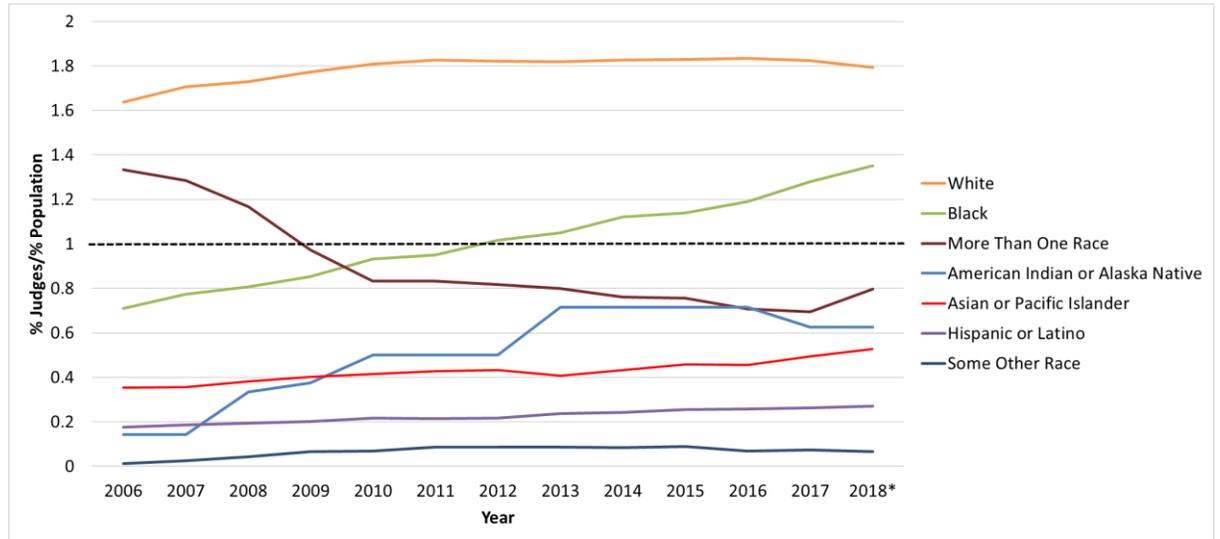
⁵⁴ *Demographic Data 2018*; Flores, *et al.*, *supra*, note 30.

⁵⁵ Judicial Council of California, *Demographic Data Provided by Justices and Judges Relative to Gender, Race/Ethnicity, and Gender Identity/Sexual Orientation* (Dec. 31, 2017).

⁵⁶ Judicial Council of California, *Demographic Data Provided by Justices and Judges Relative to Gender, Race/Ethnicity, and Gender Identity/Sexual Orientation* (Dec. 31, 2018).

judges reporting that they have a disability compared with nearly 11 percent of the state’s population.⁵⁷ This represents a 0.5 percent decrease since the beginning of 2018, and points to an underrepresentation of individuals with disabilities on the bench even relative to their already reduced presence in the legal profession as a whole.⁵⁸

Figure 5: California Judges by Race, Compared to Overall Population



Source: Judicial Council of California, *Demographic Data Provided by Justices and Judges Relative to Gender, Race/Ethnicity, and Gender Identity/Sexual Orientation*, (Dec. 31, 2018); U.S. Census Bureau, *2007-2017 American Community Surveys*.⁵⁹

IV. Underlying Causes of Lack of Diversity in the Legal Professions

The lack of diversity in the legal profession and the judiciary can be traced to two primary causes. First, reflecting educational institutions and professions more broadly, people of color are underrepresented in colleges, universities, and law schools. Academic pipeline problems are particularly troublesome for underrepresented minorities, and issues can be attributed to numerous hurdles to advancement that these students often face in the United States including institutional biases, the overall educational achievement gap, and the discriminatory impact of standardized testing. These problems begin long before students apply to law school and extend at least through the time when they take the Bar Exam. Second, assuming that all of the pipeline issues are overcome and students of color are able to graduate from law school and pass

⁵⁷Judicial Council of California, *Demographic Data Provided by Justices and Judges Relative to Gender, Race/Ethnicity, and Gender Identity/Sexual Orientation*, *supra*, note 56; *2017 American Community Survey 1-year Estimates: Selected Characteristics of the Native and Foreign-Born Populations*, *supra*, note 24.

⁵⁸ Judicial Council, *Demographic Data 2017*, *supra*, note 55.

⁵⁹ 2018 population demographics were not yet available. Representation in 2018 was calculated based on population demographics from the *2017 American Community Survey 1-year Estimates: Selected Characteristics of the Native and Foreign-Born Populations*, *supra*, note 24.

the Bar Exam, new attorneys of color who enter the legal profession find that insufficient support and opportunities exist to boost them (and women) to the highest levels of the profession. Accordingly, both partners at large law firms and judges – individuals typically considered to be at the height of the legal profession – still remain overwhelmingly white males.

Deficiencies in K-12 Education Impact the Educational Pipeline to College and Law School. The roots of the legal profession’s diversity problems begin long before a prospective law student contemplates a legal career or sits for the Law School Admissions Test (LSAT). The achievement gap between white and minority students begins early in a child’s life and can become significant by the time the student reaches elementary school.⁶⁰ According to the United States Department of Education, the achievement gap is especially acute in reading and writing, subject areas considered essential to a legal career.⁶¹ Across all professions, the K-12 achievement gap is strongly correlated with race. Even when controlling for gaps in income, poverty rates, unemployment rates, and parental educational attainment, black and Latino students tend to perform worse than their white peers throughout the educational system.⁶² Although high school graduation rates for minority students have increased significantly since 1990, and evidence suggests that the minority achievement gap is narrowing,⁶³ minority students continue to lag behind their white peers.⁶⁴

America’s Higher Education System is Failing to Help Students of Color Overcome Systematic Barriers. Even for minority students that successfully complete high school, significant barriers to higher education remain. Nearly every college in the United States requires students to submit standardized test scores, typically the SAT or ACT, that are intended to serve as a predictor of future performance. Ample evidence suggests that minority students traditionally score lower than their white peers on these exams. For example, the median score on the SAT Math section is 511. White students score an average of 534 points on the exam, while their black peers score 106 points lower.⁶⁵ According to an in-depth study of the SAT, that test showed significant racial bias and “treats African Americans unfairly.”⁶⁶ Although limited to “the verbal test and the African American subgroup, these findings are important because they show the SAT, a

⁶⁰ Cunningham & Steele, *Diversity Pipeline Programs in Legal Education: Context, Research, and a Path Forward*, AccessLex Center for Legal Education Excellence (2015) p. 4.

⁶¹ National Center for Education Statistics, *Digest of Education Statistics*, *supra*, note 22, at Table 225.80, available at https://nces.ed.gov/programs/digest/d17/tables/dt17_225.80.asp (as of Feb. 26, 2019).

⁶² The Educational Opportunity Monitoring Project, *Racial and Ethnic Achievement Gaps*, Stanford University Center for Education Policy Analysis, available at <https://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/>

⁶³ *Ibid.*

⁶⁴ National Center for Education Statistics, *Digest of Education Statistics*, *supra*, note 22, at Table 104.10, available at https://nces.ed.gov/programs/digest/d17/tables/dt17_104.10.asp (as of Feb. 26, 2019).

⁶⁵ Reeves, & Halikias, *Race gaps in SAT Scores Highlight Inequality and Hinder Upward Mobility*, The Brookings Institute (Feb. 1, 2017).

⁶⁶ Santelices & Wilson, *Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Function*, Harvard Ed. Rev. Vol. 80 No. 1 (2010) p. 126.

high-stakes test with significant consequences for the educational opportunities available to young people in the United States, favors one ethnic group over another.”⁶⁷

Several follow-up studies have replicated these results and several theories suggest that the SAT verbal exam may exacerbate language biases used by sub-groups based on cultural exposures, and that these biases tend to benefit white test takers.⁶⁸ The ACT reflects similar racial biases.⁶⁹ Accordingly, even students that overcome the adverse impacts of the achievement gap in K-12 education face significant barriers to acceptance at four-year universities.

Additionally, although minority students have experienced improved success in their rates of K-12 degree completion, black and Latino students are less likely to immediately enroll in college after graduation, compared to their white peers. Delaying college enrollment typically decreases the chances that a student will complete their bachelor’s degree; reduces the chances the student completes the degree within four years; and lessens the likelihood that the student will pursue graduate education after obtaining their bachelor’s degree.⁷⁰

Pipeline Issues Continue Through Law School. Fewer people of color go to college, fewer still go to law school. Should a student successfully complete their bachelor’s degree and seek graduate education, much like the SAT and ACT, graduate-level admissions examinations pose a significant barrier for underrepresented minority populations to access a graduate degree. The Educational Testing Service (ETS), maker of the Graduate Record Exam (GRE), directly states that “Despite the extensive work that ETS does to ensure that the GRE tests are as free from bias as possible, *disparities in performance among underrepresented groups still exist.*”⁷¹ Specifically impacting the legal profession, a survey of LSAT results over a six-year period in the mid-2000s indicates that a troublingly low percent of black and Latino students score at levels deemed a median for matriculation to ABA approved law schools on the LSAT: only six percent of black students and 15 percent of Latino students attained the median matriculation score on the LSAT.⁷² Given the LSAT’s outsized role in law school admissions, the LSAT further reduces the comparatively narrow pool of minority students who seek admission to law school.

Once in law school, minority students again face significant hurdles. According to the State Bar of California, 22 percent of black, 11 percent of Latino, and 11 percent of API students who started ABA accredited law schools in 2013 failed to complete their degree,

⁶⁷ Santelices & Wilson, *Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Function*, *supra*, note 66.

⁶⁸ *Ibid.*

⁶⁹ Reeves & Halikias, *Race gaps in SAT Scores Highlight Inequality and Hinder Upward Mobility*, *supra*, note 65.

⁷⁰ A. Cunningham & P Steele, *Diversity Pipeline Programs in Legal Education: Context, Research, and a Path Forward*, *supra*, note 60, at p. 6.

⁷¹ Education Testing Service, *GRE: Guide to the Use of Scores* (2018) p. 14 (emphasis added).

⁷² Redfield, *The Educational Pipeline to the Legal Profession: A Primer Guide* (2013).

compared to only 6 percent of white students.⁷³ Those figures improved for those who entered law school in 2015; 16 percent of black, 10 percent of Latino, and 9 percent of API students failed to complete their degree compared to only 7 percent of white students.⁷⁴ However, there is still a significant racial disparity in law school dropout rates.

The California Bar Exam is a Significant Hurdle for all Law Graduates, But Especially for Underrepresented Minorities. For those students who are able to graduate from law school, they face further barriers to entering the legal profession when sitting for state-run bar examinations. According to the ABA, nationally, the eventual bar passage rate for minority students trailed their white peers by ten percent – 85 percent to 95 percent, respectively.⁷⁵ The extremely high passing score on the California Bar Exam (the second highest in the nation) further exacerbates this problem; according to the State Bar, only 32 percent of black test takers; 47 percent of Latino test takers; and 49 percent of Asian test takers passed the bar exams offered in 2018, compared with 60 percent of their white peers.⁷⁶

If California’s passing score were reduced to the national average score, the racial disparities would not disappear, but they would be significantly reduced. California requires an unusually high “cut score,” or passing score, to pass the exam. California maintains its very high cut score despite the fact that the Bar’s own survey found that a minimum score closer to the national average (138.8) would validly reflect competence on the exam to a 95 percent confidence level.⁷⁷ California currently employs a cut score of 144, nine points above the national standard of 135 and the second highest in the nation. Based on data compiled by the Bar regarding the July 2018 Bar Exam scores by race/ethnicity, applying the national cut score standard of 135 in California would have increased the passing rate of white test-takers by 43 percent and increased the passing rates of Asian, Latino, and black test takers by 64 percent, 68 percent, and 125 percent, respectively.⁷⁸

Additionally, unlike the SAT or the GRE, there has been no conclusive study of the Bar Exam to determine if any one aspect of the bar exam poses latent racial bias. A recent Bar report assessing demographic factors contributing to the dramatically declining Bar Exam passage rates, *Performance Changes on the California Bar Examination: Part II*, attempts to use complex statistical analyses to describe the contribution of race/ethnicity to performance on the Bar Exam, concluding that, when all other contributing factors are

⁷³The State Bar of California, *Advancing Diversity and Inclusion in the Legal Profession*, *supra*, note 32.

⁷⁴ State Bar of California, *Diversity & Inclusion Plan: 2019-2020: Biennial Report to the Legislature*, (March 15, 2019), p. 14.

⁷⁵ American Bar Association, *Embracing Opportunities for Increasing Diversity in the Legal Profession: Collaborating to Expand the Pipeline* (2006).

⁷⁶ State Bar of California, *Advancing Diversity and Inclusion in the Legal Profession*, *supra*, note 32; it is unclear why the Bar used a four-year period, since full-time law school is three years.

⁷⁷ State Bar of California, *Final Report on the 2017 California Bar Exam Standard Setting Study* (Sept. 12, 2017) p. 16.

⁷⁸ Mnookin, *The Time Is Now For California To Lower Its Bar Exam Pass Score*, *Above The Law* (Jan. 15, 2019), quoting analysis of data from the State Bar of California.

held constant, the racial/ethnic effect on bar exam performance is “very slight,”⁷⁹ adding that “[c]are should be taken to not over-interpret these smaller effects or construe them to be indications of bias in the bar exam.”⁸⁰

However, the report also alludes to the failure of this assessment to account for racial/ethnic biases in factors that are being held equal which, by their own report, are highly correlated with Bar Exam performance.⁸¹ For instance, only six percent of black and 15 percent of Latino LSAT test-takers exceeded the median matriculation score for that exam;⁸² and it is reasonable to expect that non-white individuals who experienced a disadvantage on one standardized test (i.e. the LSAT) overlap significantly with those who performed poorly on another (i.e. the Bar Exam). The Bar report notes that “[i]n statistically isolating the relative impact between the two sets of credential variables, the analysis did not yield unambiguous results due to their complex relationship, as well as measurement issues involving correlations between highly standardized (LSAT and bar exam scores)...metrics.”⁸³ In other words, it is possible that biases intrinsic to the construction of the test underlie demographic disparities in Bar Exam passage rates. As discussed below, the State Bar has committed to review the Bar Exam and specific questions for possible inherent bias.

Additional factors may impact the bar exam pass rate beyond the exam itself, including access to bar prep courses and financial support to study for the Bar exam (including support from law firms). The Sacramento Bee noted that one repeat test taker spent on average \$800 per exam including registration fees and other costs associated with traveling to the exam location, and when additional costs, including the registration fees for bar preparation courses, are added onto fees associated with the exam, students may pay several thousand dollars in order to take the exam.⁸⁴ This is cost prohibitive for many students who lack outside financial support. There appears to be no comprehensive programs aimed at assisting minority students increase their achievement on the Bar Exam. Furthermore, despite the evidence that the cut score may be undercutting diversity of the legal profession in California, the California Supreme Court and the State Bar have not committed to lower the current cut score.⁸⁵ In fact, the cut score is not scheduled to be reviewed for another six years.

Even if Applicants Pass the Bar Exam, the Bar’s Handling of Applicant Fitness Can Raise Questions of Bias. Once an applicant successfully completes the Bar Exam, admission to the Bar is contingent on passing an examination of “moral character,” which seeks to identify dishonorable or unscrupulous behavior in the applicant’s past that may

⁷⁹ Bolus, *Performance Changes on the California Bar Examination: Part II*, *supra*, note 33.

⁸⁰ *Id.* at p. 42.

⁸¹ *Id.* at p. ii.

⁸² Cunningham & Steele, *Diversity Pipeline Programs in Legal Education: Context, Research, and a Path Forward*, *supra*, note 30, p. 6.

⁸³ Bolus, *Performance Changes on the California Bar Examination: Part II*, *supra*, note 33.

⁸⁴ Morrar, *Should state adopt lower passing score for the bar exam? Current one may harm students of color*, The Sacramento Bee (Jan. 7, 2019).

⁸⁵ Mnookin, *The Time Is Now For California To Lower Its Bar Exam Pass Score*, *supra*, note 78.

preclude the fair and impartial practice of law.⁸⁶ The State Bar reviews each moral character application for indications of “serious issues” by exploring such factors as recommendations and references from employers, criminal convictions, drug and alcohol abuse, debt, and violations of school honor codes. If an application is flagged for potential issues based on these criteria, the applicant is referred to the Committee of Bar Examiners for consideration.⁸⁷ According to the State Bar’s *2019-2020 Diversity & Inclusion Plan* submitted to the Legislature, this process involves attending informal interviews and undergoing questioning by a panel comprised of members of the Committee of Bar Examiners’ Subcommittee on Moral Character.⁸⁸ The panel then makes a positive, negative, or other recommendation to the full Committee, which reaches a final determination as to whether the moral character of the applicant is satisfactory for admission.⁸⁹ Due to the subjective assessment of character involved in this process, determinations of moral character beyond criminal history are likely affected by implicit biases. An analysis of a random sampling of 100 applicants denied admission to the Bar based on moral character in the past ten years revealed that people of color with no criminal history are significantly more likely to be denied admission based on moral character than white applicants. Fully 42 percent of people of color in the sample of applicants denied admission due to moral character did not have a history of criminal offense, compared with only 30 percent of white applicants. These results suggest that the subjective assessment of moral character beyond evidence of criminal behavior may present an additional obstacle to applicants of color, but a larger sample of applicants unsuccessful due to moral character is necessary to confirm these findings. The State Bar’s *2019-2020 Diversity & Inclusion Plan* highlights intended expansion of ongoing efforts to provide staff involved in the moral character determination with training on mitigating implicit bias. Whether such training is effective in eliminating bias in the moral character determination process remains to be seen.

Bias Obstructs the Path to Career Advancement. Whether a young lawyer aspires to be a judge, a high-profile prosecutor, or a prominent civil litigator, many powerful legal careers develop in large law firms. As noted in Part III, above, large law firms struggle to maintain diversity and provide sufficient professional growth and development opportunities to women and attorneys of color. As a result, the ranks of partners remain largely white and male. These firms and their partners appear to exhibit internal biases in hiring, training, and retention that curtails opportunities for both minority and female attorneys. For example, the discriminatory role of utilizing social networks in hiring and promotion is well documented. For example, one study suggests that the use of employee referrals in hiring at predominantly white firms reduces the probability of hiring a black applicant by 75 percent when compared to more broad-based job advertising and hiring practices.⁹⁰

⁸⁶State Bar of California *Moral Character* (2019), <http://www.calbar.ca.gov/Admissions/Moral-Character> (as of May 6, 2019).

⁸⁷ State Bar of California *Moral Character*, *supra*, note 86.

⁸⁸ State Bar of California, *Diversity & Inclusion Plan: 2019-2020: Biennial Report to the Legislature*, *supra*, note 74, at p. 16.

⁸⁹ *Ibid.*

⁹⁰ Pager & Shephard, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 *Ann. Rev. Sociology* 181 (2008).

The discriminatory impacts of social networks within firms likely explains why so many firms see significant attrition within the associate classes of minority and female lawyers when compared with the retention rate of their white male peers. As of 2011, black attorneys accounted for 4.3 percent of all law firm associates, but only two percent of partners.⁹¹ Although many law firms have developed mentoring programs designed to support minority associates, too frequently these programs fail to properly support associates or prevent implicit biases from impacting career building opportunities. A unique study of six large law firms that closed following the 2008 recession empirically demonstrates the role that in-firm social networks can play in career advancement of minority associates. The study followed 1,400 attorneys who lost employment as a result of firm closures (as opposed to their performance) and found that black associates were 16 percent less likely than any other racial category of newly unemployed attorneys to regain employment; furthermore, those attorneys who did find work were less likely to do so at a large, prestigious law firm that was on par with their prior employer.⁹² Further highlighting the role of social networks in hiring and advancement, black associate attorneys were also less likely than their former colleagues to regain employment at the same firm when hiring resumed. However, this gap in reemployment was not evident in the rehiring rates of black partners, who presumably were able to overcome a degree of social networking bias on their path to becoming partner at the original firm.⁹³

The experience of Asian American attorneys also highlights the difficulty that underrepresented groups have in advancing their careers. While Asian Americans represent more than 10.3 percent of graduates of the top 30 law schools and comprise 11.4 percent of law firm associates, they comprise only 3.1 percent of law firm partners and have the highest associate to partner ratio of any racial or ethnic group.⁹⁴ Their law firm attrition rate, similar to all other underrepresented groups, is disproportionately high.

Similar social network impacts persist in the hiring practices of in-house counsel seeking employment outside of law firms. In response to a letter signed by over 170 general counsels seeking greater diversity in the legal profession, a prominent black labor attorney recently noted, “I and many other understand the business reality is that majority in-house decision-makers hire other majority lawyers with whom they have personal relationships, without regard to race or other reasons. It makes sense to want to work with your friends. It makes sense that most majority lawyers friends look like them. I’m sure that racially diverse lawyers would also love to work with their black and brown friends if they were so empowered. But that is not the current reality and won’t be for some time to come.”⁹⁵

⁹¹Rider, *et al.*, *Career Mobility and Racial Diversity in Law Firms*, 2nd Annual Conference of the Research Group on Legal Diversity (2015).

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Chung, *et al.*, *A Portrait of Asian Americans in the Law*, *supra*, note 36, at pp. 12, 17-18.

⁹⁵ Prophete, *A Black Partner Responds to GC's on Law Firm Diversity*, *The Recorder* (Jan. 20, 2019).

A Lack of Diversity in the Ranks of Attorneys Carries Over to the Bench. Given the outsized role that many law firms play in identifying future leaders within the legal profession, it is unsurprising that diversity within the judicial ranks is likewise consistently dominated by white jurists. Despite well-intentioned efforts of many political leaders, the current lack of diversity in the judicial ranks can quickly lead to completely homogeneous courts. For example, since Donald Trump assumed office, the 7th Circuit Court of Appeals has lost its sole black jurist, and despite four vacancies on the court during the President’s tenure, Trump has appointed only white justices to fill those vacancies.

Within California, the outsized role played by locally-based Judicial Selection Advisory Committees, secret local organizations that help the governor’s office “vet” potential judicial candidates, arguably perpetuates the role of social networks in judicial appointments.⁹⁶ Although the groups, in theory, help the governor better understand a judicial applicant’s local reputation, the groups rely on local legal networks, which as noted above, tend to be highly homogenous (i.e. white and male) to do the vetting. Without a specific gubernatorial directive to reach out to minority bar associations, these groups can frequently bypass or insufficiently consider minority applicants and promote candidates they know professionally and personally, who tend to be like them (i.e. also white and male). Given the secrecy of the membership of these organizations, the risk that they perpetuate an “old boys’ club” that overlooks qualified minority applicants for the bench can be quite high if insufficient guidance is provided from the governor’s office to seek out a diverse candidate pool.⁹⁷ While it is important to fully vet judicial applicants, it is not clear that the vetting process requires the use of secret groups operating without needed transparency.

Arbitration. The lack of diversity of the bench also translates to a lack of diversity in arbitration, where more and more Californians are forced to take their cases because of the ubiquity of mandatory arbitration clauses in contracts. Arbitrators are typically retired judges, so the fact that the majority of judges are white and male means that a majority of arbitrators are also white and male. Jay-Z raised this concern when he challenged the American Arbitration Association’s purported lack of qualified black arbitrators on its roster: “It would stand to reason that prospective litigants – which undoubtable include minority owned and operated business – expect there to be the possibility that the person who stands in the shoes of both judge and jury reflect the diverse population.”⁹⁸

V. Existing Programs to Help Increase Diversity in the Legal Profession and the Judiciary

As discussed above, the causes for the legal profession’s lack of diversity, particularly at its highest ranks, start before preschool, so it logically follows that efforts to reverse those

⁹⁶ Trover, *et al.*, *Judicial Selection in California*, Stanford Law School, Law and Policy Lab (2017).

⁹⁷ *Ibid.*

⁹⁸ Packel, *Jay-Z, Quinn Emanuel Say AAA Offers Only “Token” Black Arbitrators*, The Recorder (Nov. 28, 2018).

causes must also begin as early as possible. Many of those efforts are tracked in the *Pipeline Diversity Directory*, which was created by the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline and the Law School Admission Council “in response to the critical need to increase diversity in the educational pipeline leading to the legal profession.”⁹⁹ The Pipeline Diversity Directory is an ever-growing searchable database that lists hundreds of programs nationwide, 30 of which are in California; however, not all of the listed programs appear to be operational.¹⁰⁰ A more recent analysis of diversity pipeline programs identified 26 programs nationwide, almost all of which focus on one part of the diversity pipeline: with 36 percent focusing on high school; 27 percent on law school; 17 percent on students in four-year colleges; and less than 15 percent on early interventions (prior to high school).¹⁰¹ Examples of these programs are discussed below.

Diversity Pipeline Programs: Preschool through High School. Some diversity programs begin at the preschool level, such as Georgetown University Law Center’s partnership with a District of Columbia public charter school to promote high quality early literacy development by encouraging parents to read to their children.¹⁰² At the elementary school level, at least one law firm has created a charter school for underserved children,¹⁰³ while other firms have created mentoring programs for younger children.

At the high school level, California Partnership Academies, established pursuant to Education Code Section 54690 *et seq.*, are school-within-a-school academies that combine academic and career technical education, business partnerships, mentoring, and internships.¹⁰⁴ Some of these academies, including the Law and Public Policy Academy at C.K. McClatchy High School in Sacramento, focus on the law and provide “avenues to success and impart work-based learning experiences and college and career planning throughout high school.”¹⁰⁵ These academies graduate students at a higher than average rate; and more of their students meet the requirements for admission to the University of California and the California State Universities.¹⁰⁶

⁹⁹ American Bar Association & LSAC, *Pipeline Diversity Directory* (2015), available at: <http://apps.americanbar.org/abanet/op/pipelndir/>.

¹⁰⁰ Many of the links in the Pipeline Diversity Directory are no longer valid, so it is not clear how many of these programs still exist today.

¹⁰¹ Cunningham & Steele, *Diversity Pipeline Programs in Legal Education: Context, Research, and a Path Forward*, *supra*, note 60, at pp. 11-12.

¹⁰² While this program is discussed in Nance & Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 Conn. L. Rev. 271, 297 (Dec. 2014), committee staff did not discover any current information about the program.

¹⁰³ *Ibid*; Sonnenschein, Nath & Rosenthal created the Legacy Charter School in an underserved area of Chicago to help children prepare children for college at a young age.

¹⁰⁴ High Innovations and Initiatives Office, *Program Overview the Partnership- Academy Model*, California Department of Education, available at: <https://www.cde.ca.gov/ci/gs/hs/cpaoverview.asp>.

¹⁰⁵ <http://www.mcclatchylppa.com/curriculum.html>.

¹⁰⁶ Career Academy Support Network, *Profile of The California Partnerships Academies 2009-2010*, University of California, Berkeley & California Department of Education (Oct. 2011), pp. 5-6.

Law schools have created similar law academies to help underserved groups develop an interest in the law. For example, the University of the Pacific’s McGeorge School of Law has an Educational Law Project Manager who works with high schools “to groom underprivileged students for professional careers” and teaches at the “law-themed charter high school” that McGeorge helped found.¹⁰⁷ The University of California, Irvine’s Saturday Academy of Law helps high school students “develop stronger critical reading, writing and speaking skills, while providing [them] with the opportunity to learn about exciting careers in law.”¹⁰⁸

Additional programs include the National Association of Women Judges’ Color of Justice program for youth in grades 7 through 12, which “encourages girls and minorities of all age levels to consider legal and judicial careers by bringing them together with judges and lawyers, and providing them with resources to pursue their goals.”¹⁰⁹ Local courts in California also offer a variety of court tours, “diversity day at court,” and youth leadership academies to encourage students from underrepresented communities to go to college and consider law as a career.¹¹⁰

While not strictly a diversity initiative, Chief Justice Tani Cantil-Sakauye, in collaboration with the State Superintendent of Public Instruction and the California Department of Education, established a K-12 Civic Learning project to help develop an informed public understand the importance of a fair and impartial judiciary and to understand their roles when they come to court as jurors, litigants, or witnesses. This group works with experts and leaders from law, education, business, labor, and other stakeholder groups “to assess the civic learning landscape and craft recommendations to ensure that all California students gain the civic knowledge, skills and values they need to succeed in college, career and civic life.”¹¹¹

High School to College to Law School. There are specific programs designed to help high school students interested in the law gain admission to and complete college and then attend law school. ChangeLawyers (formerly the California Bar Foundation) funds organizations that support high school and college students from diverse backgrounds who want to become attorneys through its Diversity Pipeline Grant program so that “a state as diverse as California [has] a justice system led by advocates of all ethnicities and races.”¹¹²

¹⁰⁷ Nance & Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, *supra*, note 102, at p. 298; McGeorge School of Law, *Bulgeron Will Work With NP3* (Jan. 18, 2008), available at: <https://www.mcgeorge.edu/news/news-2008/bulgeron-will-work-with-np3>.

¹⁰⁸ Nance & Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, *supra*, note 102, at p. 299; UC In\rvine Saturday Academy of Law, available at: <https://apps.law.uci.edu/SAL-app>.

¹⁰⁹ <https://nawj.org/catalog/community-outreach-programs/color-of-justice-program>; Judicial Council, *Pathways to Achieving Judicial Diversity in the California Courts*, *supra*, note 8, at 69-70.

¹¹⁰ Judicial Council, *Pathways to Achieving Judicial Diversity in the California Courts*, *supra*, note 8, at pp. 70-71.

¹¹¹ California Task Force on K-12 Civil Learning, *Revitalizing K-12 Civic Learning in California: A Blueprint for Actions*, California Department of Education (Aug. 2014), p. 1.

¹¹² California Change Lawyers, *Application: 2018 Diversity Pipeline*, available at: <https://www.changelawyers.org/diversity-pipeline-grants.html>.

The 2+2+3 Pathway to Law Initiative, created by the State Bar’s Council on Access and Fairness, links community colleges with law schools and their undergraduate counterparts, with the goal of creating a smooth passage for students of color from community college, to four-year college, and on to law school.¹¹³ Twenty-nine community colleges and eight California law schools – USC’s Gould School of Law, Loyola Law School, the University of San Francisco School of Law, Santa Clara University School of Law, and University of California law schools at Berkeley, Davis, Irvine, and Los Angeles – and their undergraduate counterparts participate in the program. Student participants receive early exposure to the law school experience; individual mentoring from law school advisors; financial aid counseling; LSAT preparation; and waived application fees to the participating law schools.

In a program called JusticeCorps that helps prepare students for law school and also helps provide legal assistance to unrepresented litigants, the Judicial Council partners with AmeriCorps to recruit and train college students and recent college graduates to assist unrepresented litigants navigate California’s court system. The program not only provides interested students with a much better understanding of the law, but also helps improve access to justice for the many unrepresented Californians trying to navigate a system that was designed for attorneys.

Holistic application review policies to college and graduate school, particularly, law school --with no required minimum scores for standardized tests such as the SAT or ACT, the LSAT, and the GRE (which some law schools have begun accepting)-- help support more diverse admissions. Holistic application review helps improve diversity, since “traditional admissions criteria such as standardized test scores may have weak correlation with long-term outcomes, and have been found to disadvantage women and underrepresented minorities, as well as older students.”¹¹⁴ If too much emphasis is placed on standardized testing or if a school has a (assuredly unofficial) minimum standardized test score cut off, the school “may lose important opportunities to benefit from the breadth of talent and skills that a wider range of viable graduate school candidates could bring. There is also resarh suggesting that noncognitive variables correlate better with the outcomes of certain populations of underrepresented minority students.”¹¹⁵

Law School. Law schools also provide academic support programs to help law students who enter law school with academic credentials that may leave them less prepared than other students for law school.¹¹⁶ For example, UC Hastings College of the Law offers its Legal Education Opportunity Program (LEOP) “to make legal education accessible to students from adverse backgrounds.”¹¹⁷ Students in the LEOP are able to “participate in a

¹¹³ See, e.g., <https://www.scc.losrios.edu/administrationofjustice/223-program/>.

¹¹⁴ Kent & McCarthy, *Holistic Review in Graduate Admissions: A Report from the Council of Graduate Schools*, Council of Graduate Schools (2016), p. 1 (internal citations omitted).

¹¹⁵ *Ibid.* (internal citations omitted).

¹¹⁶ Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 Geo. J. Legal Ethics 1079, 1085 (Fall 2011).

¹¹⁷ <https://www.uchastings.edu/academics/academic-success/legal-education-opportunity-program>.

cooperative academic support program dedicated to their success in law school,” including academic resources, programs, and services.¹¹⁸

Beyond directing resources to students, a growing body of scholarship suggests faculty diversity is critical to maintaining a positive law school experience for underrepresented minorities. Minority faculty members serve not only as mentors for students of color, but also as role models in overwhelmingly white institutions. As Dean Kevin Johnson of the UC Davis School of Law notes, “The presence of historically underrepresented minorities on law faculties sends an unmistakable message to students of color—and most effectively teaches them—that they in fact belong in law school and the legal profession, as well as that they have the ability to be top-flight lawyers scholars, judges, and policy makers.”¹¹⁹ The Association of American Law Schools encourages institutions to hire diverse faculty as a means of strengthening the institution and its broader educational mission. The Association of American Law Schools suggests that law school deans prioritize diversity; engage existing faculty on the need to promote diversity within the institution; and encourage the appointment committee to interview diverse candidates for faculty positions, even if a specific interviewee does not meet a pressing curricular need of the law school.¹²⁰

Seven Silicon Valley companies, including eBay, Facebook, and Uber, and their outside counsel have joined forces on a new program called the Law in Technology Diversity Collaborative. It provides about a dozen first-year law students from “underrepresented backgrounds” with an opportunity to split their summers between the legal department of one of the participating companies and one of 12 law firms.¹²¹ The Collaborative began in 2016 and was founded by eBay’s senior director of compensation, benefits and equity compliance, David Pilson, who stated, “At the time [I joined eBay in 2014], I was the only African-American in eBay’s legal department. Working in Silicon Valley can be isolating at some points. And so that’s kind of where my passion for the program developed.”¹²² The program is open to nine law schools, including California’s Santa Clara Law and four of the UC law schools, and is similar to existing programs by other companies, including Google and Adobe.

The Bar Exam. To be licensed as attorneys, law school graduates must pass the bar exam in the state where they wish to practice.¹²³ The vast majority of law school

¹¹⁸ <https://www.uchastings.edu/academics/academic-success/legal-education-opportunity-program>.

¹¹⁹ Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 Iowa Law Rev. 1549, 1558 (2011).

¹²⁰ Association of American Law Schools, *Recruitment and Retention of Minority Law Faculty Members* (Revised July 2017), available at: <https://www.aals.org/about/handbook/good-practices/minority-law-faculty-members/>

¹²¹ Spiezio, *Facebook, eBay and 5 Other Tech Companies Partner with Firms for Diversity Pipeline Program*, Corporate Counsel by law.com (Feb. 12, 2019).

¹²² *Ibid.*

¹²³ Some states provide reciprocity to the bar examinations of other states, allowing attorneys who pass the other state’s bar examination to practice law in that state. California is not such a state and requires all persons who wish to be licensed, including very successful and experienced attorneys who have practiced law for decades without being disciplined in other states, to pass at least a portion of the California Bar Exam. Attorneys who are licensed by other states can still work in legal positions in California, however,

graduates enroll in preparation programs, which generally cost thousands of dollars and last for months. These programs focus on the general, substantive material that all exam takers need to pass the bar exam. There are other programs that focus more on underrepresented groups.

The non-profit Minority Legal Education Resources has been offering its Bar Process Management course to law school graduates of color in Illinois as an addition to the general bar preparation classes for years with significant success. Unfortunately, that success did not translate to California last July when the program was piloted in San Diego. Just under 15 applicants participated in the program, seven from the University of San Diego School of Law, but only two passed the Bar Exam.

The “productive mindset intervention,” also called the California Bar Exam Strategies and Stories Program, was designed by a team of law and psychology professors and involves an introductory film, audio and written stories from prior test takers, and participants writing letters to future bar exam test takers on their insights and strategies. It was designed to improve all test takers, but particularly those from “historically underrepresented groups.” Initial data from a study of the program that took place during the July 2018 bar exam shows a substantial improvement in bar exam passage rate – 18.2 percent higher than the control group – but “revealed no differential impact across demographic groups.”¹²⁴ Thus, if this intervention were intended to improve diversity, it did not succeed, although the study’s authors believe that a larger sample size in future testing could reveal some differences among racial and ethnic groups. It is worth noting, however, that these results only included test takers who were able to complete the Bar study strategies course or the Bar study strategies course, as well as the intervention program. It is thus possible that the effect of this intervention was inflated by the difference in curriculum length, with the intervention group benefiting from the attrition of less dedicated test-takers, or from additional structured preparation time, regardless of content.

Legal Practice. As early as 1996, the legal community understood that proper training and exposure to client work for young associates was critical to the associate’s eventual elevation to partnership at large law firms.¹²⁵ To increase law firm diversity many firms have taken some, or all, of the following steps to boost minority recruitment and retainment:

- In-house mentoring programs;

such as in-houses legal counsel positions, as long as they do not misrepresent themselves as being licensed in California and do not seek to represent their clients in state court. This practice, that is reportedly widespread but for which no data is available, means that out-of-state attorneys are not subject to oversight by the State Bar and do not pay annual dues to the State Bar, which deprives the State Bar of authority and funding to carry out its regulatory duties.

¹²⁴ Memo from Victor Quintanilla, *et al.*, to the State Bar, re *Designing Productive Mindset Interventions that Promote Excellence on the Bar Exam*, (Feb. 20, 2019), p. 8, Attachment A to State Bar, *Diversion & Inclusion Plan*, *supra*, note 74.

¹²⁵ Gulati & Wilkins, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 Cal.Law Rev. 493, 625 (1996).

- Scholarship assistance to minority summer associates;
- Networking opportunities for minority attorneys; and
- Diversity training for senior attorneys and clients.¹²⁶

Too frequently, however, these measures fail to provide ample opportunity for minority and female associates. The in-house efforts typically fail because of a dearth of meaningful engagement from partners involved in the program, the overall desire for partners to “seek protégés who remind them of themselves” outside of formalized mentorship programs, and the ongoing network bias of existing partners that deny minority and female attorneys the type of client contact necessary for advancement.¹²⁷ Chronicling the failure of many in-house efforts to boost diversity at the partnership ranks, a 2016 survey by the ABA noted that only half of associates who identified themselves as women of color were given access to “high-quality” assignments and exposure to clients, compared with 81 percent of their white, male peers.¹²⁸

The Judiciary. To its credit, the California judiciary has attempted to improve the diversity of its ranks. Some of these efforts aim to target students in the educational pipeline; including law academies that expose underrepresented minority students to lawyers and judges; programs supporting the growth and development of moot court or mock trial programs at predominantly minority high schools; and pre-law days at local courts and law firms for undergraduate students.¹²⁹ These programs also include local diversity committees that work in coordination with the county bench to identify future judges, a judicial mentorship program to pair judicial candidates with existing judges, and seminars designed to assist minority applicants through the judicial application process.¹³⁰ Although some of these efforts date back to the Schwarzenegger Administration, the diversity of the bench has improved little in the last decade when compared to California’s demographic changes during that same time period.

To address implicit bias in both the judiciary and the legal profession overall, AB 242 (Kamlager-Dove) is currently working its way through the Legislature. It would require the State Bar to develop specific training for all active attorneys on implicit bias and bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system. In addition, that bill authorizes the Judicial Council to develop training for all judges, subordinate judicial officers, trial court managers, supervisors, and other court staff on implicit bias with respect to characteristics of a protected group status, and requires all court staff who, as part of their regular job duties, interact with the public on matters before the court to complete two hours of the training developed by the Judicial Council every two years. That bill recently passed the

¹²⁶ Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, 4 Colum.J.Race&L. 1 (2013).

¹²⁷ Schreiber & Eligon, *Elite Law Firms All-White Partner Class Stirs Debate on Diversity*, New York Times (Jan 27, 2019).

¹²⁸ Zraick, *Lawyers Say They Face Persistent Racial and Gender Bias at Work*, The New York Times (Sept. 6, 2016).

¹²⁹ Judicial Council, *Pathways to Achieving Judicial Diversity in the California Courts*, *supra*, note 8.

¹³⁰ *Ibid.*

Assembly Judiciary Committee and is now before the Assembly Appropriations Committee.

Years of Diversity Programs and Efforts, But Little Improvement. Unfortunately, despite numerous and long-standing programs to diversity the legal profession, only some of which are discussed above, diversity has not significantly increased. As discussed above, while California has become more diverse, existing programs have barely kept pace with the changing demographics of the state and have not appreciably moved the needle. The profession and the judiciary, especially at the top ranks, remain significantly overrepresented by white males and underrepresented by everyone else, particularly women of color. Some of the reasons identified for the lack of change are:

- Most program are focused on law school entry, too late to make a real difference;
- Most programs are isolated, uncoordinated, and have unclear goals;
- Most programs have not been evaluated for their effectiveness;
- Many programs have been funded only intermittently; and
- There is a lack of “commitment at the top” to the goal of diversity.¹³¹

VI. What More Can be Done to Increase Diversity in the Legal Profession and the Judiciary

The following is an unexhaustive list of methods, programs, and ideas that may help improve the diversity of legal professionals:

*To Improve the K-12 Pipeline to College and Law School:*¹³²

- Focus on early and rigorous intervention
- Develop strong mentor connections throughout the programs
- Establish formalized partnerships across pipeline programs
- Establish partnerships vertically among different segments of the education pipeline
- Rigorously evaluate diversity pipeline programs
- Require and support evaluation of diversity programs

To Improve Access to College and Law School:

- Eliminate or reduce reliance on standardized testing for admission to college and law school

¹³¹ Cunningham & Steele, *Diversity Pipeline Programs in Legal Education*, *supra*, note 60, at p. 14.

¹³² *Id.* at pp. 11-12.

- Eliminate minimum standardized test scores
- Increase the use of holistic admission policies

To Improve Completion of Law School and Passage of the Bar Exam:

- Work with law school deans to improve retention rates at law school (State Bar planned action)
- Collect additional demographic data from non-ABA law schools (State Bar planned action)
- Review the entire bar exam and each question for bias (State Bar planned action)
- Revise the bar exam based on the actual practice of law
- Expand and study the California Bar Exam Strategies and Stories Program (State Bar planned action)
- Reduce the passing score on the bar exam

To Reduce Attrition and Improve Advancement in the Legal Profession:

- Use existing and expanded attorney surveys to support the development and evaluation of retention initiatives (State Bar planned action)
- Create new and expanded MCLE elimination of bias curriculum (State Bar planned action)

To Improve Selection Process for Appointment to the Judiciary:

- Eliminate the secret selection advisory committees--or at least significantly increase the transparency of the committee members and their roles--and increase the number of persons of color who serve on the committees
- Update required judicial diversity reports in Government Code Section 12011.5 (n) to show change over time and comparison to California's population as a whole population
- Work with Judicial Council to update its Judicial Diversity Toolkit, originally published in 2010 (State Bar planned action)

To Improve Data about Non-Binary Individuals in the Legal Profession and the Judiciary:

- In order for the State Bar and the Judicial Council to gather a more holistic view of the legal profession and the judiciary when collecting self-reported data, allow

responding parties to self-identify their gender identity in categories outside of the traditional binary choice of male or female.

In addition to the list above, it is hoped that this informational hearing will generate new and creative approaches to tackle the persistent lack of diversity of both the bar and the bench, especially at the top echelons, in order for the profession to represent all of California and truly provide access to justice for all.