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Microaggressions: Understanding ABA Model Rule 8.4(g)

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Microaggressions: Understanding ABA Model Rule 8.4(g)

- Ethical obligation of attorneys to avoid harassment and discrimination.
- Particular types of unintentional, yet repetitive, harassment and discrimination that undermine our practice and our ability to represent our clients fully.
- Backlash due to concerns about hypersensitivity and our duty to zealously advocate for our clients.

Diversity & Inclusion 360 Commission

- ABA Acknowledges Virtually No Movement in Diversity Statistics
- Given Loss of Critical Talent, Urgent Action Needed
- Action Items:
 - National Pipeline Initiatives
 - Collaboration with JAG
 - Model Diversity and Inclusion Plans
 - CLE Policy (Required Numbers of Presenters)
 - Implicit Bias Training
 - Model RPCs

A Problem Unique to the Law?

- Legal's Lag
- Continued gains in STEM fields
- Accounting, Business, Medicine Outperform

What Are Microaggressions?

Racial microaggressions are brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward people of color.

“Racial Microaggressions in Everyday Life”

What Are Microaggressions?

Began in the study of racism and now is an umbrella term for daily, interactive experiences that remind targeted people of social inequality.

What Are Microaggressions?

- “We don’t have any lesbians working at our firm.”
- Passing over/speaking over women in meetings.
- Referring to Caitlyn Jenner as Bruce Jenner.
- I never would have known you were a lesbian?

What Are Microaggressions?

- Racist jokes or Halloween costumes.
- Sexist or other inappropriate memes.
- “No, Where are you REALLY from?”
- “You are so well spoken.”
- “I never see you as a woman. You’re one of the guys!”
- Touching hair or hair wraps.

What Are Microaggressions?

- **Varied settings:** take place beyond where you might stereotypically imagine, e.g. water cooler or locker room
- **Detrimental impact:** targeted people report multiple negative outcomes in research, though they may not name them at the moment
- **Aggressor unaware or minimizing:** in almost all cases, the person doing the microaggression is unconscious of it or minimizes its impact

What Are Microaggressions?

If someone raises a microaggression and you disagree, that's probably a sign it actually happened.

Are People Being Too Sensitive?

Does this pool trivial and ignorable instances of racism with real, genuine prejudice and exclusion, detracting from real issues and chilling cooperation?

Are People Being Too Sensitive?

- Social group membership: microaggressions are not any insulting or invalidating remarks of any kind; they are remarks that reinforce specific social power dynamics
- Impact on the targeted person: as noted above, targeted people report negative impacts--the same remark can be a microaggression in one setting and neutral to positive in another.

Are People Being Too Sensitive?

- Measured by impact, not intent, just like any other form of social aggression.
- Consider the cumulative impact of microaggressives.

What Are the Impacts of Microaggressions?

- Decreased job performance
- Workplace conflict and inefficiency
- Mental health impacts
- Chronic health impacts
- Inflated performance and/or valuation of underperforming or average employees
- Failure to recruit and retain top-quality employees and/or clients

What Are the Impacts of Microaggressions?

This minority stress theory posits that persons from stigmatized social categories experience additional stress and negative life events because of their minority status—in the case of lesbian, gay, and bisexual persons (LGBs), their sexual minority status.

(Brooks, 1981; Meyer, 1995, 2003).

What Makes These Stressors Different from Everyday Life Stress?

- “... stressors are **unique** (not experienced by non-stigmatized populations),
- **chronic** (related to social and cultural structures)
- and **socially based** (social processes, institutions and structures)”

(Meyer, 2003 cited in Dentato).

What Makes These Stressors Different from Everyday Life Stress?

The stress arising from the experience of structural inequality and the microaggressions that reinforce it directly impacts employee performance, team cohesion, and a Firm's ability to recruit, retain, and promote the best attorneys.

What Does This Mean for Practitioners?

- Impact on Colleagues
 - Particularly Recruiting, Retaining, and Promoting the Best Attorneys
 - Building Client Relationships
 - Jury Impact
- Impact on Clients
- Impact on Adversaries

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Maintaining the Integrity of the Profession: Model Rule 8.4

It is professional misconduct for a lawyer to:

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

Maintaining the Integrity of the Profession: Model Rule 8.4

It is professional misconduct for a lawyer to:

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

Maintaining the Integrity of the Profession: Model Rule 8.4

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

Maintaining the Integrity of the Profession: Model Rule 8.4

It is professional misconduct for a lawyer to:
(d) engage in conduct that is prejudicial to the administration of justice;

Maintaining the Integrity of the Profession: Model Rule 8.4

It is professional misconduct for a lawyer to:

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

Maintaining the Integrity of the Profession: Model Rule 8.4

It is professional misconduct for a lawyer to:

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

Maintaining the Integrity of the Profession: Model Rule 8.4

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

Maintaining the Integrity of the Profession: Model Rule 8.4 (g)

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- Using ABA to be a “Bias Interrupter”
- Concern that “knowing discrimination establishes a very high standard of proof that exceeds the well-known standards that already exist for federal and state laws against discrimination.”

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- Do Not Read the Comments – Intention Anonymous Online Backlash
- Important Concerns re Scope and Chilling Effect.
 - Rule no longer tethers discrimination to words and actions taken in the court of representing a client that are prejudicial to the administration of justice.
 - Expanded to conduct “related to the practice of law.”
 - Social contexts? After work events?
 - Concerns advanced by organizations such as certain Fundamentalist Christian Organizations.
 - Heritage Foundation

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Practical Applications: Model Rule 8.4 (g)

- **Think About Language of the Model Rule in Context of Microaggressions.**
- **Dueling Messages**
 - **Hypersensitivity and Loss of Forest for Trees**
 - **Direct Action in Light of Real Crisis**

Questions?
