

# **CONTINUING THE DIVERSITY CONVERSATION**

**Report of the March 13, 2009  
Louisiana State Bar Association  
Second Annual Conclave on Diversity  
in the Legal Profession**

# **CONTINUING THE DIVERSITY CONVERSATION: Second Annual Conclave on Diversity in the Legal Profession**

March 13, 2009

By: Kelly McNeil Legier

On March 13, 2009, the Louisiana State Bar Association held its Second Annual Conclave on Diversity in the Legal Profession: *Continuing the Conversation*. The purpose of the Conclave was to continue the diversity discussion begun in 2008 among attorneys and judges regarding racial, ethnic, gender, sexual orientation, disability, and generational diversity. The LSBA hosted the one-day Conclave, which was approved for 6.5 continuing legal education hours (one hour of ethics and 5.5 hours of professionalism), at the Hilton Riverside Hotel in New Orleans.

The second Conclave did not simply recycle and update information provided during last year's program, and it was far from mere lecture. This year's Conclave was more interactive and allowed participants to gain skills to address everyday diversity issues in their offices and in their practices. It consisted of real conversations – dialogues among participants about diversity issues and missteps.

The morning began with a welcome from LSBA President-Elect Kim M. Boyle, Diversity Committee Co-Chair Wayne J. Lee and Conclave Chair Chauntis T. Jenkins. Dorothy “Dottie” Reese then presented an introductory session explaining how internal personal biases impact individuals' interpersonal relationships and judgments, and how micro-inequities can break an organization.

## ***The Silent Saboteur:***

### ***Micro Inequities that Can Break an Organization***

Ms. Dottie Reese<sup>1</sup> set the tone with her introductory session titled “The Silent Saboteur: Micro Inequities that Can Break an Organization.” She began with the following thought-provoking questions:

Have you ever been in a meeting and something you had stated had been overlooked by everyone, but then it was suddenly embraced by everyone else as being one of the greatest ideas as if they had never heard it for the first time. Have you ever checked your emails while you had a staff person that was talking to you about something they considered very important? Have you ever experienced one of the partners in your law firm or one of the senior leaders in your organization commending your colleagues about a law school they attended but never mentioning anything about your school? Have you ever experienced a

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<sup>1</sup> Ms. Reese is a partner in the firm DMM & Associates, LLC, in New Orleans a performance management consulting firm specializing in creating high performance organizations. She has over 30 years of administrative, consulting, teaching and clinical experiences in the public, private and non-profit sectors. Ms. Reese is certified as an advance practitioner in diversity management from Cornell University in New York, where she also serves on its faculty in the Diversity Management Program. Her areas of expertise include diversity management, leadership development and change management on a national and international level.

work environment where people never said thank you, your welcome, I appreciate what you have done, as if it didn't even matter?

Ms. Reese asked participants to consider how the absence of these simple words, phrases and behaviors impact our interactions consciously or in an unconscious basis. She explained that these words and behaviors are called micro inequities. She defined micro-inequities as “the subtle messages that devalue, discourage and will ultimately impair performance in the workplace.” Ms. Reese further explained that micro-inequities also discourage creativity and risk-taking. Mary Rowe coined the term micro-inequities; however, but Stephen Young, a vice president of J. P. Morgan Chase, popularized the term. Mr. Young said, “Micro Inequities are so ignored in organizations because the slights are culturally ingrained, and nobody even notices that they are occurring”. “I need you to get this for me” or “hand me that” without so much as a “thank you”.

Ms. Reese elaborated on some examples to demonstrate micro-inequities experienced daily in many workplaces. Another example, when an employee is speaking with someone, and he looks at his watch all the time; but when someone else enters the room, he seems to make time for the other person. Another instance occurs when someone makes time for only senior level people, such as themselves, or just ignores a staff person when they are talking in a meeting by texting or working on a computer during their time to speak, as if what the staff person is saying is not really that important. Another example is reflected when someone constantly cuts someone off when he is in mid sentence. These micro-inequities are everyday occurrences.

### ***Micro-Inequities Impact Diversity***

Micro-inequities play a role in diversity content because micro-inequities often occur when referring to people as just being different in the workplace. These perceptual differences are generally related to race, gender, sexual orientation, disabilities, age, religion, national origin and geographic diversities. Micro inequities occur when people perceive that they are being treated differently because of their differences. The concept of diversity is about knowledge, understanding, acceptance and behavior. Micro Inequities can “wall-out” a person and make them become invisible. This can make her get overlooked for raises and promotions within an organization, then companies start looking outside to fill positions when the right person was right in front of them, but actually invisible. Ms. Reese then showed a video demonstrating how someone was slighted by her boss because he did not think she could handle his request or did not handle it correctly before the meeting; he used another person in the room to follow up with his request. The boss embarrassed her, and she became invisible.

In reference to race, micro-inequities may keep a minority from dealing with high profile clients. In reference to age, micro-inequities are present when an older attorney tells the younger attorney, “All of you just have had it so easy in law school; you cannot relate to what we are talking about and you haven't had to go through what we have gone through.” Another example of an age micro-inequity is present when a senior person at the office is told by the younger people “you are nice and all, but when are you going to retire” and there aren't other people in the office referred to as grandma or grandpa. In reference to micro-inequities regarding education, a person may be considered less scholarly because he or she did not graduate from a prestigious University.

### ***Micro-Inequities Inhibit an Inclusive Environment and Impact Finances and Productivity***

When micro-inequities generate those subtle messages, they cause people to question their boundaries, their value, and the contribution they make to an organization. Those invisible forces and barriers prevent the creation of an inclusive work environment. When employees don't feel valued, -- and inevitably someone is going to experience "devalue" when micro-inequities are prevalent -- it hurts your business, impacts your clients, it effects your employee recruitment and retention, reduces productivity, and it eventually results in loss of revenue.

Not too long ago, a gallop poll survey was conducted on over one million employees from national companies worldwide and twelve questions were asked; however, the survey boiled down to one key question: "Do employees feel valued by their colleagues and their supervisors?" Organizations that received primarily yes answers had a high employee morale, good retention, high productivity and certainly had good profit margins. Micro-inequities lead to poor employee performance when a manager has low expectations. Employees have a tendency to deliver what is expected of them and when the expectation is very limited, the employer does not get very much. Although a manager may say he expects all employees to deliver and that he has high expectations for all employees, the employees do not deliver much when the manager's behavior is not consistent with the stated expectations. Ms. Reese emphasized, "If the manager's behavior is not consistent, you could very well end up with an organization of employees who quit but never leave. I am sure many of you have worked with some colleagues that have quit but have never left, and you know how that impacts productivity in an office." Bias, prejudice, racism, and the messages that they all send is just not profitable. When organizations recognize the financial impact of people not being able to communicate effectively through micro messages or micro inequities, people will take notice.

### **Suggestions Counter Micro-Inequities**

#### ***1. Create Awareness of the Importance and Impact of Micro-Inequities***

To prevent micro inequities, we first have to recognize the importance of micro inequities and recognize the impact of this invisible behavior on organizations. Ms. Reese advised that behavior change happens when micro inequities are brought to a person's conscience level. "Everyone carries blinders and a blinder in communication is when other people experience you and you may not see the behavior you are exhibiting but this is how other people experience you." She explained further that possessing "an awareness of your blinders can then bring you in touch with how the other people are experiencing you." An individual can send between forty and a hundred and fifty micro messages during just a ten minute conversation. When these micro messages take the form of a micro inequity, they may take various forms. Some micro-inequities have a tendency to be less obvious than others, and they could include behaviors that communicate lower levels of expectation and a performance of exclusion.

Ms. Reese encouraged Conclave participants to take back to their organizations and your law firms that micro inequities training is essential to diversity and inclusion training because micro-inequities training connects the dots to all efforts to create an inclusive organization. Because the behavior is so prevalent and everyone at some point or another has been on the receiving end or the sending end of micro messages and exclusionary behavior, it is easier for people to address it once they know what it is. Organizations can bring the subject of micro inequities and silent saboteurs to the forefront through discussion. Subtle discrimination is a very appropriate

topic to have with your employees, to discuss during staff meetings, and to put in newsletters. Ms. Reese emphasized that having dialogues with employees on this subject really gets people talking about ways that they exclude others and gets them thinking about ways that they can be more inclusive in their behavior and conversation.

## ***2. Examine Your Personal Lens***

Ms. Reese recommended that participants examine their personal lens for the micro-inequities that cloud their judgment when it comes to assessing other people, their performance, and their ability. She explained, “When we talk about perception, we don’t see things as they are; we see things as we are.” For example, she noted that if your organization thinks the best style for leadership is an authoritative style, then you may have a tendency to think a person is a weak leader if he or she leads with a more collaborative style of leadership. “If you think a person should lead with a more rigid style of leadership, you are not going to appreciate the differences that someone who has a different style of leading might bring.”

## ***3. Encourage Micro Affirmations***

Ms. Reese explained that an organization can effectively address micro-inequities through micro affirmation. Micro affirmations are the simple behaviors that let a person know the he is doing well and that he is expected to succeed. People exercising micro affirmations support, value, and include others. Micro affirmations include “things that we do which allow other people to feel appreciated, understood and respected.”

## ***4. Survey the Office for Micro-Inequities***

Ms. Reese explained, “You can just start asking people, do you feel respected, do you feel valued, or do you feel appreciated here.” Similarly, managers can ask, “what can we do differently, is our workforce feeling valued, do you feel that you are making a contribution.” She suggested including the micro-inequities topic in employee attitude surveys if the organization conducts them.

## ***5. Bring Attention to Micro-Inequities as They Surface***

Ms. Reese added that we all bear some responsibility in eliminating micro-inequities. She encouraged participants to bring attention to situations in which they feel that they are being excluded or being treated differently by peers or supervisors. She explained as follows:

For instance, if you have been left off of a distribution list, go and ask them to include you next time; you don’t have to overreact and you don’t have to put this person in a position where they have to figure out a way to save face. A small act of exclusion may not warrant a long and deep conversation often it is just simply enough to just ask for a small change in behavior. If the behavior is unintentional the person will probably just stop, however if it continues than maybe more serious intervention may be required.

Ms. Reese explained that employers have an obligation to make sure that concerns are fully addressed when an employee feels that he or she is being excluded or treated differently from his or her peers. Left unchecked these saboteurs can accumulate and impact the organization’s productivity. They also can impact the organization’s culture and ultimately impact the organization’s ability to attract top talent. Everyone wants to have the best and the brightest working in his or her organization.

In closing, Ms. Reese noted, “There should be an understanding that we will never get to where we want to be with diversity and inclusion efforts and organization if we are not willing to dig deeper into this topic. So, digest what you have just seen and heard here today, think about the commitment you are willing to make in order to counter the micro-inequities in your organizations and your willingness to promote inclusion in your respective office.” She added that everyone should remember that micro inequities, even those that are very small, pose a major issue for business today.

## ***Breaking Barriers Through Active Dialogue***

Michael Brandwein, a lawyer, internationally acclaimed speaker, author and consultant from Chicago, Illinois, then facilitated a three-hour workshop during which he shared stories and examples of situations in which people struggle with how to interact with people who are not like them. Mr. Brandwein provided participants with information and communications skills that would offer an open – yet controlled – environment to exchange ideas from a multitude of perspectives, even when the conversations elicited discussions on topics that were far from politically correct. Mr. Brandwein began by sharing a story from his law student years to demonstrate how people react when they do not know how to interact with each other. He said that the medical students use to shout “Law Babies Suck” at the law students; it was easy to shout at each other because they did not interact on a regular basis. He referred to this action as “S.I.C.”

### **Shun Information Communication**

Mr. Brandwein used other stories, activities and humor to help the Conclave participants realize that we all benefit from acquiring and practicing interpersonal communications skills. His advice can assist all Louisiana attorneys in the quest to become a more inclusive and cohesive Bar.

## ***Sometimes It’s Not What We Say But The Way We Say It That Offends and Prevents Inclusion***

Mr. Brandwein emphasized the importance of communications skills in creating inclusiveness and breaking diversity barriers. For example, he explained the right and wrong way to ask people if they require a wheelchair. He pointed out that if the question is posed as “Are you wheelchair bound?” (which is the wrong way) instead of “Do you use a wheelchair?” (which is the right way), the person needing the wheelchair gets embarrassed.

Using his own experience, Mr. Brandwein elaborated on appropriate interpersonal communications. He had once anxiously watched an elderly lady with a disfigured hand attempt to open a container on a plane and debated internally whether and how he could offer assistance without offending her. When he eventually asked the lady if he could help her, she became offended and indignantly responded that she did not need any help. He emphasized that interpersonal communication should be “hard skills” that people know precisely how to use rather than “soft skills.” While developing these hard skills, Mr. Brandwein recommended using the following statements when facing an unfamiliar situation:

- a. “Please excuse me, I haven’t learned what is the right way to ask this.”
- b. “Forgive me; I haven’t been in this situation before.”
- c. “I don’t know how to ask this, and I want to make sure I’m being respectful. . .”

His advice suggests that admitting that we do not know what to do in the unfamiliar situation while indicating that we sincerely want to help could diffuse a potentially offensive scenario.

Eric M. Carter, Sr., who attended and helped facilitate the table discussions, reflected on how ignorance regarding the various facets of another person's differences can make us appear insensitive or discriminatory. "[Mr. Brandwein's story] was eye opening," he said. "As polite and kind as we try to be, we can still offend because we all have blind spots. It's not that we're malicious; we just may not have seen it that way." Mr. Carter explained that "the more we honestly talk to each other, the more we expose our individual blind spots" and we become aware of the impact of seemingly innocent statements and actions on those who have different backgrounds, experiences or physical challenges. "This knowledge helps us to be more conscious and deliberate in our efforts to appreciate the difference in others." Mr. Carter recommends that lawyers get out of their comfort zones to honestly talk with people who are different than them. In doing so, he said that lawyers can avoid diversity missteps when dealing with their clients and other lawyers.

#### ***Engaging in Stereotyping or Being Too Politically Correct Can Obstruct Inclusiveness***

Mr. Brandwein discussed the dangers of stereotyping and using stereotypical phrases in casual conversation. He relayed a story during which a person instructed someone in a negotiation setting to “Jew him down.” The person receiving the instruction, who was of Hebrew descent, was offended. The “Jew him down” statement amounts to stereotyping because it references all Hebrew people as parsimonious negotiators, puts all Hebrew people in one category, and fails to consider their unique individual skills and characteristics.

Mr. Brandwein noted that people also go wrong when attempting to be too politically correct; he explained that it is important for people to feel comfortable with each other and how to refer to one another. Mr. Brandwein referenced an example about a man from a previous diversity workshop that had experienced frustration one day regarding how to refer to a black colleague when he could not remember the colleague’s name. The man tried to describe the colleague to a coworker without saying that he was “black” or “African-American” because he did not know which term was politically correct. The black colleague responded during the workshop by saying: “Refer to me as ‘Frank’ because that is my name.”

Chauntis T. Jenkins, Conclave chair, thought that Mr. Brandwein’s story made a good point. “It is not impossible to believe that one’s effort to be politically correct could be misinterpreted as mockery in the wrong setting,” she said. “The example reminds us to recognize each other as unique individuals, equally deserving of respect as fellow members of the Bar, and to let ethnicity speak for itself.”

### ***Practice Makes Perfect: Practicing Inclusive Interpersonal Communication Skills Can Convert Them To Habits***

Mr. Brandwein relayed a story about a group of high school students who engaged in bad acts and had bad things happen to them. He then asked each participant to rate the characters from one to six, with a rating of one representing the “worst” character in the story. Each person had to share their ratings with the group and then convince the other members at the table to think they way they did. Mr. Brandwein’s exercise demonstrated that what is crystal clear to one person is not always crystal clear to someone else. He also demonstrated how quickly most people pre-judged the characters.

Mr. Brandwein explained that in order to persuade one another, the participants must do more listening than talking. He asked the participants, as they proceeded through the diversity vignettes, to move slower in their judgments, ask questions, be respectful, and be humble. He recommended the following method to persuade others to a different point of view:

1. Say what you think: agree or disagree.
2. Give reasons for your opinion.
3. Listen to try and find out more about why other people think the way they do.

Luis A. Leitzelar, an attorney with Jones Walker who acted as a table facilitator, stated: “This exercise, like most of the activities and workshop discussions during the Diversity Conclave, presented an opportunity for members of the Bar to appreciate each other’s view point in an interactive way.... We should do our best to seek out each other’s unique perspective to better understand our counterparts and more meaningfully engage in the practice of law.”

### ***The Goal of Inclusion is Not Just Accepting But Valuing Our Differences***

Mr. Brandwein emphasized that the goal of the Conclave workshop was not tolerance; instead, he encouraged participants to aim higher and seek respect and fairness. He urged them to not just accept, but to *value* each others’ differences. Kim M. Boyle reflected, “Mr. Brandwein’s statement that we should value our differences is right on the mark and should be the focus of true diversity and inclusion. Louisiana is a diverse state in every sense of the word and this diversity from a racial, geographic and cultural standpoint, is one of the strengths of our state.”

Mr. Brandwein also emphasized that disrespect, discrimination and prejudice often result from not having enough accurate information; participants can gain this accurate information through “successful practice” in workshops like that of the Conclave.

In addition to practicing skills to create a more inclusive environment, Mr. Brandwein suggested that Conclave participants must change their behaviors and actions based upon the information learned during the Conclave. The positive effects from the program will increase when participants return to their workplaces with the information learned from the workshop. He rallied participants saying, “We can go out and tell people to do this and that, but it is better to show them with our own actions.”

Mr. Brandwein allowed the Conclave participants to engage in activities that made them realize how quickly they pre-judge people. Armed with basic information regarding interpersonal communication and an awareness of their personal biases and predispositions to pre-judge, the

participants were separated into groups of eight to 10 people and given several diversity vignettes to digest, discuss, and propose solutions to. The vignettes were based upon anonymous submissions by attorneys to the LSBA and the American Bar Association Young Lawyers Division. The topics touched on a host of issues.

The first round of discussions grappled with vignettes covering the following topics: (1) An “Age Old” Problem (age), (2) Hire Education (stereotyping by a person’s education), (3) Race to Judgment (race), and (4) Respect – Paid? (disability). Mr. Brandwein encouraged participants to change tables before beginning the second round of discussions. The second set of vignettes covered the following topics: (1) Stereotypes: What We Believe and Why We Believe It, (2) Wage-ing Battles About Beliefs (wage disparity based on race), (3) Understanding The Scope of “Diversity,” and (4) Happier Holidays (religion). Mr. Brandwein guided participants through difficult discussions with the help of the following table facilitators: Jennifer B. Bechet, Hon. Roland L. Belsome, Jr., Christine Changho Bruneau, Lacreacia G. Cade, Eric M. Carter, Sr., I. René DeRojas, Pamela L. Ebel, Luis A. Leitzelar, Hon. Edwin A. Lombard, Lauren B. McKnight, Jennifer M. Medley, Sharrolyn J. Miles, Pam Occhipinti, Karelia R. Stewart, and Hon. Max N. Tobias, Jr.

During lunch, Louisiana Supreme Court **Chief Justice Catherine D. Kimball** addressed the group briefly. Mr. Brandwein, serving as the keynote speaker, summarized several issues and ideas that surfaced during the workshop. He also challenged the audience to actively engage in the diversity dialogue by attending other diversity workshops and offering their assistance to the LSBA. Mr. Brandwein left participants with the following advice that we all can use to improve our interpersonal relationships and, consequently, our profession:

“We must focus first on our own opportunities for good choices. The question isn’t, ‘What’s wrong with the world?’ The right question is, ‘What’s one achievable thing I can do before the end of today that would make a positive difference?’ We tend—because it’s easier—to wait for others to come to us. But today we could send one thirty second email to the state bar saying that we at least have an interest in learning more about diversity issues and that we would consider—not volunteer or commit yet but just consider—agreeing to talk once with a group of colleagues that the bar helped assemble to think about what positive steps could be taken.

And instead of waiting for a person to approach us who may be different from us in race, religion, age, gender, physical abilities, and so on, we could make a point today of initiating a simple connection with such a person by suggesting lunch. ‘Diversity issues’ wouldn’t need to be discussed. Just eat. Talk. Listen. All we need to do is begin developing more relationships. It is undeniable that the more we know about each other, the easier it is for us to respect and the harder it is for us to misunderstand.”

After lunch, participants received practical information from two groups of highly-credentialed panelists.

## ***Exploring Batson and Its Impact on Jury Selection in a Changing Society***

Moderator **Kim M. Boyle** (partner, Phelps Dunbar, LLP, New Orleans; 2008-09 LSBA President Elect) guided a discussion addressing the impact of *Batson v. Kentucky*, 476 U.S. 79 (1986), on our changing and more diverse society. The panel consisted of the following: **Earl M. Campbell** (Assistant United States Attorney, Western District of Louisiana), **M. Nan Alessandra** (partner, Phelps Dunbar, LLP, New Orleans), **Thomas L. Lorenzi** (partner, Lorenzi & Barnatt, LLP, Lake Charles), and **Hon. Ulysses Gene Thibodeaux** (chief judge, Louisiana Third Circuit Court of Appeal, Lake Charles). The panel also explored ethical issues surrounding *Batson* violations.

After quoting the famous attorney Clarence Darrow, who wrote that Irish, Jewish, Methodist, or Agnostic jurors were preferred when he was representing an inter-plaintiff or criminal defendant but Presbyterian, Baptist, Lutheran and Christian Scientist jurors were to be avoided, Ms. Boyle noted this practice epitomizes the *Batson* issue. She summarized the history of the cases preceding *Batson* as well as the facts and holding of the *Batson* case. *Batson* held that a prosecutor use of a peremptory challenge (*i.e.*, the dismissal of jurors without stating a valid cause for doing so) to exclude jurors based solely on their race violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Ms. Boyle noted that since peremptory challenges are not included in the constitution there is no requirement under the constitution that lawyers have peremptory challenges.

### ***Batson has not cured discriminatory use of the peremptory challenges.***

Judge Thibodeaux agreed with a comment in Justice Marshall's concurring opinion in *Batson*, in which he remarked that merely allowing defendants the opportunity to challenge a discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of peremptory challenge, where it is necessary to make an absolute choice between the right of a litigant to have a jury chosen in conformity with the requirements of the 14th amendment and the right to challenge peremptorily. Judge Thibodeaux further explained that many commentators have written many articles indicating that although it has been 23 years since the *Batson* decision, it hasn't cured the sentiment that jury selection is based on gender, race, etc.

Judge Thibodeaux responded to questioning that 20% of the cases on review by writ or direct appeal raise a *Batson* issue. Even though that number is fairly high, the court does not see the full force of the challenges based on the *Batson* issues. Research reflects that there are approximately 123 reported opinions on *Batson* issues for the past ten years in the intermediate appellate courts in Louisiana, and these include only the reported decisions, not writ applications. Normally, when the record is complete in Louisiana, the records will be reviewed and a judgment will be issued by the appellate court. Louisiana probably is the only state in the country that handles *Batson* appeals in this manner. However, in a situation where a *Batson* challenge has been successful, the Supreme Court requires that the case be remanded for a new trial.

### ***The Practical Benefits of Peremptory Challenges: Shaping the Jury and Responding to Instinct***

Mr. Campbell commented that many courts do not have preempted challenges and that litigants could survive without them. Nevertheless, he likes to have them when trying cases because people who possess certain views impact the attorney's ability to convey his case. Mr. Campbell explained that there are certain kinds of categories of people who look at things on a jury through a certain kind of lens, and it is hard to determine whether a potential juror, such as a lawyer or doctor, could distance himself from a certain kind of case if selected for the jury and base his or her decisions on the facts of the case only.

Mr. Lorenzi agreed with a question regarding the ability to use peremptory challenges when a lawyer has a gut reaction that he or she just does not like a certain juror. He remarked that it is necessary in practice. For example, in one of his cases, it was important for people to understand how rice is grown, to understand why a person had to carry a gun, and to have some understanding of the French language. Accordingly, it was more important for his client to have a jury of his peers, rather than having someone testifying to explain to the jury how rice grows, which provided a good reason for his client to carry a gun. Mr. Lorenzi explained the composition of the jury in that case: there ended up being only one man who had an understanding of this and helped the other jurors to understand. When the prosecutor saw his trial going by the wayside, he provoked a mistrial. Mr. Lorenzi also commented that when he uses his peremptory challenges, it is to give his client a chance for someone on the jury to understand certain aspects of the trial that would enable the other jurors to better understand his client and the case.

### ***The Masquerade: Do Peremptory Challenges Encourage Dishonesty and Prejudice?***

The panelists discussed whether the ability to use peremptory challenges gives attorneys the opportunity to prejudice a person not chosen to be on the jury panel. Mr. Campbell explained that *Batson* referred to race and gender and demonstrated permissible exclusions. For example, challenging certain jurors in order to exclude a police officer on the jury in a criminal case would not offend *Batson*. By contrast, if the attorney were to put a white officer on the jury and not a black officer, then *Batson* would come into play.

The panelists evaluated Justice Marshall's statement that "*Batson* promotes and encourages dishonesty," which undermines the ethical obligations of attorneys in the legal profession because many attorneys are lying about the use of race, etc. when they give their reasons to the court as to why they are striking a particular juror. Mr. Lorenzi commented that although he has the greatest respect for Judge Marshall, Justice Marshall was just being too pessimistic believing that the appellate court was simply going to rubberstamp the reasons provided by the attorney. He further noted that there are enough attorneys who will do the right thing to keep others who would abuse the challenges from doing so. Judge Thibodeaux agreed that the vast majority of legal professionals are good and honest people, that they are noble professionals, and that they will have to deal with ones who aren't.

***Alternatives to Peremptory Challenges: Litigators can survive without the challenges.***

The panelists discussed alternatives if peremptory challenges are abolished. Judge Thibodeaux posited that if the peremptory challenge is abolished, then the courts could allow a more expansive attorney-conducted *voir dire*. He noted that some states have asked for explanations from the attorneys and prosecutors whenever anyone raises a *Batson* claim; some require evidence in the record, and some even request a *Batson* hearing outside of the presence of the jury. Judge Thibodeaux also suggested using “Dismissal of Charges.” For instance, if a prosecutor screws up and fails to use the challenges properly, then the charges get dismissed. Judge Thibodeaux also suggested using an affirmative race conscience jury selection, which would proportionately be represented by the community. He noted that the United States Supreme Court provided that race can be used as a factor in certain instances and that diversity is a legitimate governmental goal; we have a diverse society, and juries should reflect that society. Judge Thibodeaux also suggested changing the venue statute.

The panelists discussed whether challenges for “cause” eliminate the problem. Judge Thibodeaux explained that challenges for cause do not eliminate the issues because lawyers can use rhetorical arguments to get around the issue. Mr. Campbell explained that cause is different in every case and if society expands cause legislatively than attorneys would just have one standard for cause; this would be a problem. Ms. Alessandra further posited that eliminating peremptory challenges and switching to a cause-based challenge raises a potential problem of identifying who defines “cause.”

The panelists discussed juror questionnaires, how questionnaires affect juror selection, what impact questionnaires have on the outcome of a trial, and whether the answers should be concerns for challenge. In general, the main issue is identifying a system to look at potential juror and see if they are objective or will be objective in a particular case. For example, if the trial involves a drug case and the potential juror happens to live in a neighborhood that is primarily drug infested or does or does not take drugs, could the potential juror be objective? Similarly, if someone who just is a member of a certain organization, how much of his or her beliefs will affect the outcome of a case if selected to serve on the jury? The panelists discussed how possibly being a member of an organization, such as the ACLU, could affect a potential juror’s chances of being picked for a jury. Mr. Campbell, as a prosecutor, did not think that being a member alone would affect the outcome, but questioning regarding his or her views of the membership could reveal information that might affect the outcome of a trial.

***Counting the Costs: The Economic Impact of Abusing Peremptory Challenges & Financial Incentives to Deter Potential Abusers***

The panelists discussed the potential economic cost if a case is thrown out because of an attorney’s misuse of peremptory challenges and the parties must face a new trial. They discussed how multiple trials impact the state’s resources. Mr. Campbell noted the need for a financial fine or penalty imposed on an attorney who misuses peremptory challenges; however, *Batson* is an intent violation and not a negligent violation. Ms. Boyle referenced a 1927 federal case that imposed on an attorney a fine, which was equivalent to the cost of keeping the jury for the time

of the extended trial. Judge Thibodeaux noted that he thought if the appellate court started imposing fines, the fines would serve as deterrents.

The panelists also discussed whether courts possessed authority to levy financial penalties. The panelists concluded that the attorney's conduct could be deemed "contemptuous conduct" if a judge found the attorney's explanation "absurd." Further, the absurd explanation "could be deemed a violation of an attorney's failure to be candid with the court." The panelists noted that other instances of contempt could be identified if they combed the state statutes. It was noted that the action would qualify as "constructive contempt" by the attorney, which would trigger certain protections and procedures. A judge wanting to impose a penalty for contempt must give twenty four hour notice, hold a hearing, and safeguard the attorney's due process rights.

### ***The Weight of the Bench: The Role of Judges in Curing Batson Abuses***

Mr. Campbell noted that trial judges must be more proactive in curing *Batson* problem. They need to ask more questions of attorneys exercising peremptory challenges. For example, if an attorney said he did not like a potential juror because of a television program that he or she watches, then the judge should ask: "What is it about that program that you have problems with, which would cause you to have problems with this person?" If judges asked more probing questions of peremptory challenge explanations, attorneys would start "backtracking." Mr. Campbell commented that many judges are not asking for any explanations and are tolerating the procedures. Although more probing questioning by judges would not solve the problem, it would be a step in the right direction.

### ***The Elephant in the Room: Does the Reality of a More Diverse Society Eliminate the Need for Batson***

Ms. Boyle posed a wrap up question that brought the discussion full circle: "Since we are becoming a more diverse society, as such having a black president, should we still even be focused on these issues of the discriminatory use of peremptory challenges?" Mr. Campbell responded that the discussion was "absolutely" needed because "we are not where we should be." He explained: "We may be taking one step forward to get us where we need to be, but something happens and knocks us two steps back." He criticized people's reference to "a post-race society." He explained "Instead of striving for a post-racial society, we should be striving for a post-discrimination society. As opposed to saying let's do away with the race issue and saying that it is no longer important, [we must recognize that] the whole race issue is an important part of his heritage and where he comes from." Mr. Campbell explained how experiences should be celebrated to enrich society. "In *Batson*, we bring our experiences to the jury, and in certain experiences we should not be using them as a means to exclude," he said. "We should be using them as something we should be proud of and let's include everybody in this perfect union that we are trying to strive for."

Judge Thibodeaux noted that we are never going to have Utopia; however, there are better ways of addressing the issues than using peremptory challenges. He continued to agree with Justice Marshall about getting rid of them. Judge Thibodeaux concluded: "We need to seek excellence, not perfection, because excellence does permit mistakes, and perfection does not." He also noted, "We will never be a colorblind society until we become a color conscience one."

## ***Hitting Home:***

### ***How Diversity Practices Can Impact Your Bottom Line***

Later, moderator **Joseph K. West** (associate general counsel-outside counsel management, Wal-Mart Stores, Inc., Bentonville, Arkansas) led a discussion, titled “Hitting Home: How Diversity Practices Can Impact Your Bottom Line,” among the following panelists: **Karl J. Connor** (government affairs director, BP America, Inc., New Orleans), **Sandra Diggs-Miller** (senior counsel – litigation, Entergy Services, Inc., New Orleans), **Judy Perry Martinez**, assistant general counsel litigation, Northrop Grumman Corporation, New Orleans), and **Sherry D. Williams** (vice president & corporate secretary, Halliburton, Houston, Texas). They addressed the impact on law firms and businesses if their diversity practices are deficient.

#### ***Defining Parameters: How Does Corporate America Define Diversity?***

Mr. West asked the panelists to explain the meaning of diversity. Ms. Martinez noted that the old definition of diversity “needs to be put on the shelf because diversity used to only cover race and gender, and it is so much more than that.” She explained that diversity is an educational process that we all have to engage in on a daily basis. Further, if the mindset is that it only refers to ethnicity and gender, we need to think outside of our little boxes. She urged the audience to think further about diversity to include religious diversity, cultural diversity, sexual orientation and gender identity, and other areas that we don’t feel comfortable with, such as disabilities. She noted the importance of disabilities, such as veterans and disabled veterans, especially because our country is going to absorb somewhere around 27,000 – 37,000 disabled veterans who are going to come back into our country from overseas. Ms. Martinez summarized the fundamentals of best practices as fairness, dignity and respect. She explained, “If you keep these as your core principals in your workplace, that will get you far down the path. It is important to have an education process that teaches about diversity and plays into every day operations.”

#### ***Global Presence: The Impact of a Company’s Diverse Presence on Its Policies***

Mr. West asked Mr. Connor if it makes a difference that his company, British Petroleum, has a diverse presence. Mr. Connor explained that BP has around 100,000 employees around the world, and that it is a global and diverse company in a geographical sense; however, here in the United States, its diverse presence comes more into play, because BP deals with a lot more historical barriers with its diverse workforce. He noted that it becomes more of a human resource issue because of the people, services and values they bring to the arena. BP also considers diversity of its suppliers. BP wants to make sure it quantifies diversity in its bottom line and the bottom line of the companies that work for them as well.

In response to Mr. West’s question regarding how a company quantifies its bottom line, Mr. Connor explained that there are several reasons why people push diversity programs, one of them happens to be “the market,” which is the diversity of groups that purchase the company’s products. He gave an example of how diversity within a community impact a company’s legal strategy. When a company becomes aware that a jury pool consists of all Cajuns, the company realizes that it needs an attorney who can relate to the jury pool. The company asks potential firms questions like “how many associates or partners do you have of \_\_\_ background,” which reflects whatever questions needs to be asked to determine if the firm is a diverse firm.

### ***Exploring Implementation: How Companies Make Diversity Happen and the Call to Action***

Mr. West asked Ms. Williams how Halliburton implements diversity and makes it important. Ms. Williams explained that Halliburton is a business-to-business operation, which is something most people do not know. Halliburton starts by hiring people in the countries where it does business and eventually these people will work closely with executives and be promoted. Domestically, Halliburton's CEO knows that Halliburton's oil companies are looked upon as a White Southern man's domain. To combat this perception, the CEO he looks for qualified women engineers who can do the job. "And quite candidly," Ms. Williams noted, "sometimes they do their jobs better than the men can." Halliburton's CEO also established a President's Leadership Program, which pulls 24 executives from around the world and puts them in a one year training program; this is a precursor for being named a vice-president at Halliburton. This program also has a specific metrics for making it diverse. Halliburton also spends about 10% on diverse suppliers, such as small businesses, women-owned businesses and minority-owned businesses. The goal for the participants of the program is to be "best in class."

Mr. West explained the origin and purpose of the "Call to Action," which is a concept first used in 1999 by Charles Morgan. Morgan, who worked with Bellsouth, had five to six organizations sign a contract to bring more diversity into the profession by hiring minority-owned businesses. The progress was slow to non-existent. Later, the general counsel at Sara Lee drafted what was called "The Call to Action." Essentially, the Call to Action took the diversity effort "from the lips to the teeth." This document said that if you are a signatory, you would make a pledge to increase diversity internally as well as with the outside contractors to the signatory business. Additionally, the signatories felt if the outside firms did not bring in women or people of color than the signatory company should end their relationship with these firms.

Mr. West noted that Wal-Mart represents the "gold standard" of bringing diversity to a corporation. For instance, from 2004 until now, Wal-Mart has tripled its in-house legal department and has increased women hires from 36% to 43% and minority hires from 11% to 35%; minorities and women are represented at all levels of leadership in the company. Wal-Mart also took its outside legal work from \$250,000 to \$300,000 in this past year and told its outside counsel that it wanted them to have more diversity in its representation from outside counsel. Mr. West noted, "The intention is to get your own house in order if you are going to ask outside firms to be more diverse as well." Ms. Martinez agreed, noting that that now her legal department "looks like a rainbow;" however, Northrop Grumman must make sure that when outside firms are represented that the outside counsel brings the minorities with them, that the minority attorneys continue to do the work that outside counsel represented they would do, and that the minority attorneys are not just brought in for show.

### ***Facing the Critics: How Do Companies With Diversity Policies Respond to Pushback?***

The panelists addressed "pushback" to their companies' diversity efforts. Ms. Diggs-Miller explained that if a company is dealing with diverse companies and it is out in the open, than the companies, law firms, shareholders etc, should get a financial return from their using diverse companies. Ms. Martinez said that "pushback" has created dialogue and that negative force created positive force. "If you are the recipient of a pushback, than make sure you answer the questions that people have." She noted that if people didn't raise questions in the past, none of the panelists would be sitting here having the discussion; raising questions makes it all better.

She emphasized that “asking ‘why’ is not always a negative; it isn’t something that should make you feel defensive. Asking ‘why’ will produce the answer why you are doing things the way you are doing them.”

### ***Beyond the Rhetoric: How to Recruit and Retain in Small, Non-Diverse Firms and Areas?***

Mr. West addressed a question often posed by firms: how do you bring minority attorneys to these small towns and locations like Arkansas? For instance, the attorneys he works with have come from places like Houston and Los Angeles, and they were happy where they were before going to Arkansas. “It has been done.” Opportunities, support, and mentoring will lure minority attorneys. LSBA Diversity Committee Co-Chair Wayne Lee addressed the impact of mentoring on retention. Mr. Lee explained that “you must provide opportunities and mentors for them.” Ms. Martinez added that “you keep an open door for them to have the partners available to the associates for them to ask questions and let them know how they feel about where they are within the firm.”

The panelists explained that mentoring comes from all areas, that mentors change throughout an attorney's years of practice, and that “sometimes you become a mentor yourself, if you can find the time.” Attorney Tom Anselmo offered additional information about mentoring. First, he approached the issue from an historical perspective: the senior partners have an overarching responsibility to the clients and the people who they work with to bring to the table the sensitivity of the people who helped to form the firms. He said senior partners should be mentoring and embracing the new world of diversity on an everyday basis. They should also be mentoring their opponents and respecting the dignity of the courts. Further, senior partners should be respecting the dignity of young lawyers who don't have a clue and helping to mentor them, as they were mentored when they were young lawyers. It is also important when people come to a firm that the firm makes it known that the attorneys are participants and not just parts. This respect and attitude must come from the inside and should not be something that is forced upon them from the outside.

Mr. West added that that a non-minority must feel empathy and be able to put himself in the other person's shoes. Further, the firm must demonstrate that it is serious about these diversity issues internally and develop “measurable metrics” to assess that diversity goals are being achieved.

### ***Changing Demographics and Changing Financial Implications***

Ms. Williams explained that some people think that diversity is “just the fad of the moment and will fade out” However, she cautions against this idea. She noted that the people who leave their law firms are not going home and crying in their milk; they are getting government jobs and the Department of Justice is now more than 50% women, working in areas that make regulatory decisions about your corporations. Ms. Williams advised, “These are the people you will be dealing with when you are trying to get a break when you have broken some regulatory violation. So, it will really benefit you in some way to find out what you have in common with diverse people in a real way — individual to individual — to start building real relationships, because these relationships will pay you back over and over again over the course of a career.”

Mr. Conner noted that, in the not too distant future, the United States of America will be significantly more of a minority instead of the majority country. “So, knowing this, why wouldn’t you help the people that will help you with your bottom-line? So people don’t forget, and they reward the people who try and be progressive and reach the goals along the diversity line. They also don’t forget about the people who didn’t help you to grow and help others to grow, so unless you are about to die or retire, you need to embrace diversity in the workplace.”

Ms. Martinez explained that everyone has to be invested in the pipeline issues or there will be failures across the board. “It is a bigger issue than retention, she said, “You must keep the hoses open so that the people coming in behind you see that you have made this a better place for them.” Ms. Diggs-Miller agreed, noting that, at the end of the day, the pipeline is going to impact the bottom line, and that retention and pipelines are all factors that needed to be considered. Ms. Diggs-Miller also thought that diversity is “not a final destination but a continuing journey.”

In closing, Mr. West made observations regarding opportunity and brand. He explained: “It used to be that people saw opportunity as a one dimensional thing, such as here is your opportunities have at it.” Mr. West identified three distinct opportunities: success, failure and growth. He said that the cruelest thing you could do to someone is to let them flounder in their mistakes, instead of taking the courage to go to them and tell them what they are doing wrong, so that they will succeed. He encouraged Conclave participants to create a workplace that makes diversity an integral part of the business so that anyone would be proud to work for them.

## ***The Conclave Was Well Received***

Participants left the Conclave impressed with the program and speakers. Christine Changho Bruneau (Abbott Simses, A.P.L.C.), who also attended the 2008 Conclave, expressed that she had not thought that the Diversity Committee could top last year’s Conclave, but it did.

“I thought the Diversity Conclave was excellent,” said Ariel Campos, Sr. (Acadiana Legal Service Corporation). “I was very impressed with the caliber of the speakers. I especially enjoyed Michael Brandwein’s presentations and the manner in which he got audience participation,”

Mary K. Peyton (Blue Williams, L.L.P.) said, “I greatly enjoyed the Diversity Conclave. It openly and honestly discussed topics which are too often ignored in the everyday practice and provided valuable information from the corporate industries in Louisiana as to their interests and concerns.”

Carl A. Butler (LeBlanc Butler LLC) likewise had a positive experience, finding that the conference was “well organized and no doubt well intentioned” and that the panelists “were accomplished, prepared and thoughtful in their comments.” Mr. Butler recommended topics for next year’s Conclave, such as encouraging corporations to retain attorneys from minority-owned law firms.

Many attendees verbalized what they gained from the Conclave and their willingness to share the information with colleagues. “I found the conclave both rewarding and informative,” said Thomas P. Anzelmo (McCranie, Sistrunk, Anzelmo, Hardy, Maxwell & McDaniel). “The active interaction with the other participants was most rewarding and revealing and provided me with insight that I will be able to share with my partners and assist us in the development of the firm now and into the future.”

## ***Co-Hosts***

The event was hosted in cooperation with the Louisiana Supreme Court as well as the following local and specialty bar associations: Association of Women Attorneys – New Orleans Chapter; Baton Rouge Bar Association; Greater New Orleans Louis A. Martinet Legal Society, Inc.; Lafayette Bar Association; Louis A. Martinet Legal Society, Inc. – Greater Lafayette Chapter; Louis A. Martinet Legal Society, Inc. – Greater Baton Rouge Area Chapter; Louis A. Martinet Legal Society of Central Louisiana; Louisiana Association of Defense Counsel; Louisiana Hispanic Lawyers Association; Shreveport Bar Association; Southwest Louisiana Bar Association.

## ***Sponsors***

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Planning for next year's Diversity Conclave will begin soon.

If you have suggestions or are interested in assisting with planning future Conclaves, please contact Director of Member Outreach and Diversity Kelly McNeil Legier ([kelly.legier@lsba.org](mailto:kelly.legier@lsba.org); 504-619-0129).