



MASSBAR

A S S O C I A T I O N

via electronic mail

October 21, 2020

Christine P. Burak
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: Comment on Proposed Amendments to SJC Rule 4:02

Dear Ms. Burak:

On behalf of the Massachusetts Bar Association (“MBA”), I hereby submit this comment in full support of the proposed amendments to Supreme Judicial Court Rule 4:02, Periodic Registration of Attorneys (“Rule”). For numerous reasons, including those discussed below, the MBA strongly supports the mandatory collection of demographic information from attorneys throughout the Commonwealth of Massachusetts.

The MBA is committed “[t]o serv[ing] the legal profession and the public by promoting the administration of justice, legal education, professional excellence, diversity and unity in the legal profession and respect for the law.”¹ The proposed mandatory, annual collection of demographic information from the members of the bar would provide data through which the Board of Bar Overseers and other interested organizations, including the MBA, would be able to measure improvement in diversity.

¹ Massachusetts Bar Association Bylaws, Article II, <http://www.massbar.org/about-the-mba/mba-bylaws> (last visited October 6, 2020).

Many industries have struggled to increase diversity, and research has shown that “[e]stablishing and tracking clear metrics is critical.”² A lack of data has prevented improvement in diversity in “[m]any companies... As a result, they aren’t able to accurately identify problems or launch targeted interventions to solve them.”³ Simply put, without demographic data, it is impossible to know the diverse (or lack thereof) makeup of Massachusetts attorneys, and therefore difficult to identify areas in need of improvement, to develop programs to promote diversity, equity and inclusion, and to measure the success or effectiveness of such programs. As summarized by the Harvard Business Review, to increase diversity:

Collect, Count, and Compare. Set goals, collect data, and examine change over time and in comparison to other organizations... **By collecting and analyzing data on diversity over time**, comparing those numbers to the numbers at other organizations, and sharing them with key stakeholders, **companies can increase accountability and transparency around diversity issues...** [An] identified shortfall can lead to concrete goal setting about numbers and timelines for increasing [diversity in an identified area]. In turn, these goals can be made available to key internal and external stakeholders to promote accountability.⁴

The MBA recognizes that, in 2019, the Supreme Judicial Court conducted a voluntary demographics survey, which was completed by 22,743 out of an untold number of attorneys.⁵ While this survey is helpful, the voluntary nature naturally provided for limited data and selected data being volunteered. However, of the limited respondents, 20,043 self-identified as White, 574 identified as Asian, 519 identified as Hispanic or Latinx, 494 identified as Black or African American, 91 identified as American Indian or Alaskan Native, and 27 identified as Native Hawaiian or Pacific Islander.⁶ In addition, 1,447 of respondents elected not to answer the question.⁷ What remains unknown is why lawyers declined to participate in the survey, and the demographic characteristics of those non-participatory attorneys as well as the attorneys who opted not to answer the question. Moreover, new attorneys are admitted to practice each year. Thus, an annual, mandatory demographic survey would be a contemporaneous count, and an extremely helpful and effective tool to measure the landscape and diversity of the bar.

² Matt Krentz et al., *Fixing the Flawed Approach to Diversity*, Boston Consulting Group (January 17, 2019), <https://www.bcg.com/publications/2019/fixing-the-flawed-approach-to-diversity>.
See also, Vivian Hunt et al., *Delivering Through Diversity*, McKinsey (January 2018), https://www.mckinsey.com/~media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20diversity/delivering-through-diversity_full-report.ashx.

³ Matt Krentz et al., *Measuring What Matters in Gender Diversity*, Boston Consulting Group (April 3, 2018), <https://www.bcg.com/publications/2018/measuring-what-matters-gender-diversity>.

⁴ David Pedulla, *Diversity and Inclusion Efforts That Really Work*, Harvard Business Review (May 12, 2020) <https://hbr.org/2020/05/diversity-and-inclusion-efforts-that-really-work> (emphasis added).

⁵ Supreme Judicial Court Demographic Survey Results, <https://tinyurl.com/y6rs7zg2> (last visited October 6, 2020).

⁶ *Id.*

⁷ *Id.*

The need for diversity within the legal profession is clear. As the American Bar Association’s National Task-Force on Lawyer Well-Being found, “[e]xemplary standards of professionalism are inclusive. Research reflects that organizational diversity and inclusion initiatives are associated with employee well-being, including, for example, general mental and physical health, perceived stress level, job satisfaction, organizational commitment, trust, work engagement, perceptions of organizational fairness, and intentions to remain on the job. Unfortunately, however, a lack of diversity and inclusion is an entrenched problem in the legal profession.”⁸

Research conducted within the Commonwealth mirrors the national findings. The SJC Steering Committee on Lawyer Well-Being members found that one “major issue negatively affecting well-being in the legal profession” was “[a]lienation [r]esulting [f]rom a [l]ack of [d]iversity and [i]nclusiveness.”⁹ The Report went on to explain how a lack of diversity affects every area of the legal practice, which we do not recount in full here, and refer you to their exemplary work in this area.¹⁰

A recent article written by a brave attorney, Danielle Johnson, also highlighted a Black woman attorney’s experience in Massachusetts, including increased scrutiny by court officers upon entering the courthouse and inside the courtroom.¹¹ Attorney Johnson aptly referred to herself as “the only grain of pepper in a sea of salt” when sitting among fellow attorneys in court.¹² This anecdotal evidence has been echoed by other members of the Massachusetts bar, supporting the need for more diversity within our ranks.

Attorney Johnson’s accounts are not foreign to attorneys of color. Recent reports by the Supreme Judicial Court Standing Committee for Lawyer Well-Being, following a series of Town Hall meetings with the various affinity bar membership, highlight that attorneys of color continue to experience challenges of discrimination no matter how far in their career they have advanced.

In addition to being essential for lawyer well-being, diversity is important for the profession in numerous practical ways. “Diversity represents reality”, “breeds innovation”, “allows [law firms]

⁸ National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, American Bar Association (August 2017) at 15-16, <https://www.americanbar.org/content/dam/aba/images/abaneews/ThePathToLawyerWellBeingReportRevFINAL.pdf>

⁹ Hon. Margot Botsford et al., *Supreme Judicial Court Steering Committee on Lawyer Well-Being Report to the Justices* (July 15, 2019) at 13-14, <https://www.mass.gov/doc/supreme-judicial-court-steering-committee-on-lawyer-well-being-report-to-the-justices/download>.

¹⁰ *Id.* at 13-14.

¹¹ Danielle Johnson, *Walk in My Shoes: A Day in the Life of a Black Woman Attorney*, 64 Bos. B.J. (May 28, 2020), <https://bostonbarjournal.com/2020/05/28/walk-in-my-shoes-a-day-in-the-life-of-a-black-woman-attorney/>.

¹² *Id.*

to attract top talent”, “allows [law firms] to gain clients”, and “leads to economic growth.”¹³ Notably, “If a law firm is demographically representative of the general population, more people will feel comfortable with that firm, and the firm will attract a wider range of clientele.”¹⁴ Diversity also improves discussion and strategy:

Presenting an idea to a diverse group of people typically will result in a greater discussion than presenting the same idea to a homogeneous group of people. People from different backgrounds have different opinions on certain topics based on their own personal experiences. These opinions can result in disagreements among lawyers about how best to proceed with their case. Disagreements or conflicts are the foundation for innovative thought. Lawyers who need to convince others that their course of action is the best will need to think about their positions more closely than they would if their opinions were unopposed. The discussions that occur as a result of these disagreements can lead to advancements that improve the firm as a whole.¹⁵

In industry, diversity has been found to “contribute to a company's performance and help drive value creation” by attracting “top talent”, “improv[ing] the quality of decision making”, “increas[ing] innovation and customer insight”, “increas[ing] employee satisfaction”, and “improv[ing] a company’s global image”.¹⁶ There is no reason to think that diversity within the bar would not provide the same benefits for lawyers.

In addition, due to the nature of the legal profession, diversity of the bar is essential to promote justice. The Criminal Justice Policy Program at Harvard Law School recently published a report, *Racial Disparities in the Massachusetts Criminal System* (“Harvard Report”), which found:

Black and Latinx people are overrepresented in the criminal caseload compared to their population in the state. White people make up roughly 74% of the Massachusetts population while accounting for 58.7% of cases in our data. Meanwhile, Black people make up just 6.5% of the Massachusetts population and account for 17.1% of cases. Latinx people are similarly overrepresented, making up 8.7% of the Massachusetts population but 18.3% of the cases in the sample.

¹³ Edward T. Kang, *Diversity and Its Impact on the Legal Profession*, Law Practice Today (September 14, 2016), <https://www.lawpracticetoday.org/article/diversity-impact-legal-profession/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Vivian Hunt et al., *Delivering Through Diversity*, McKinsey (January 2018) at 23-24, https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/delivering%20throug%20diversity/delivering-through-diversity_full-report.ashx.

In addition to being overrepresented relative to their share of the state population, Black and Latinx people are less likely than White people to have their cases resolved through less severe dispositions such as pretrial probation or continuances without finding (CWOs). Among those sentenced to incarceration, Black and Latinx people sentenced to incarceration receive longer sentences than their White counterparts, with Black people receiving sentences that are an average of 168 days longer and Latinx people receiving sentences that are an average of 148 days longer.

... Our analysis shows that one factor—racial and ethnic differences in the type and severity of initial charge—accounts for over 70 percent of the disparities in sentence length.¹⁷

The Harvard Report also highlighted the role of the prosecutor in plea bargains:

Because all but 2.04% of cases in our data set disposed of all charges without a trial, the plea bargaining process has a tremendous impact on sentence forms and sentence lengths... The charging decisions of police and prosecutors have a significant effect on the ultimate sentence that a person receives.

The Harvard Report concluded, in part, that the evidence was “consistent with racially disparate initial charging practices leading to weaker initial positions in the plea bargaining process for Black defendants, which then translate into longer incarceration sentences for similar offenses.”¹⁸ The racial inequities in the criminal justice system highlights the need for a racially diverse bar. It is likely that a more diverse bar would lead to more diverse prosecutors, which would in turn likely reduce the “racially disparate initial charging practices” which negatively impact the criminal justice system in Massachusetts today. At minimum, diversity in the criminal and justice systems is inherent to a society where perspectives, life experiences, socioeconomic and other factors improve the administration of justice for all.

In light of the importance of diversity in regards to lawyer well-being, the practical benefits to the bar, and the impact on justice, the MBA wholeheartedly supports the proposed Rule to collect demographic data on an annual, mandatory basis. The MBA expects the demographic questions will be as inclusive and respectful as possible, and in consultation with experts in the field. The

¹⁷ Elizabeth Tsai Bishop et al, *Racial Disparities in the Massachusetts Criminal System*, Criminal Justice Policy Program at Harvard Law School (September 2020) at 1-2, <http://cjpp.law.harvard.edu/assets/Massachusetts-Racial-Disparity-Report-FINAL.pdf>

¹⁸ *Id.* at p. 64

MBA, and its Diversity, Equity, and Inclusion Committee, are readily available to discuss and support the ongoing development and finalization of the specific demographic questions.

The collection of demographic data is one important step towards increasing diversity throughout the Massachusetts bar as well as the MBA. The MBA applauds the Supreme Judicial Court and its Standing Committee on Lawyer Well-Being for proposing a sensible solution to the current lack of demographic data, which will benefit bar associations throughout the Commonwealth (including the MBA) as well as other legal organizations and law firms.

Sincerely,

A handwritten signature in blue ink that reads "Denise I. Murphy". The signature is fluid and cursive, with a large initial "D" and "M".

Denise I. Murphy
President