Session 304 | The Silk Road to Nowhere: Overcoming Roadblocks to Leadership

While companies and law firms boast their DEI statistics, insufficient AAPI representation at the leadership levels in in-house departments is a common trend. This Program explores (i) what US companies (including federal contractors) can do from the perspective of federal labor and employment law; and (ii) what AAPI in-house counsel can do to overcome barriers to upper management and to foster communities where AAPI employees can be successful. Amidst the current economic downturn that has resulted in budget cuts and layoffs, having the tools to navigate these challenges is become increasingly relevant to ensure that AAPIs are not disproportionately impacted. Our panel will provide practical tips from employment lawyers and in-house counsel on positioning your department for success when it comes to: hiring, promoting, and retaining AAPI talent; optimizing interpersonal skills; navigating corporate politics; overcoming common roadblocks when transitioning to senior positions; and how to properly interpret federal government reports, like EEO-1s, that reveal the demographics of companies. Our goal is to empower attendees with practical tools to reach positions of leadership in their organizations.

MODERATOR:
Amy Hsu, Corporate Counsel, Google

SPEAKERS:
Tina Lam, Of Counsel, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Susanna Lee, Corporate Counsel, Salesforce, Inc.
Saema Somalya, Executive Vice President – Legal and Risk, Remitly Global
Rishi Varma, General Counsel & Corporate Secretary - Hewlett-Packard Enterprises
Elimination of Bias Credit:
This CLE discusses the barriers, such as prejudices and discrimination, AAPI attorneys face and how to overcome those challenges. Additionally, this CLE also highlights current lawsuits aimed at DEI programs that have traditionally been used to encourage hiring, retaining, and promoting people of color, women, and other minority groups. We will also discuss best practices for maintaining DEI programs.
The Silk Road to Nowhere: Overcoming Roadblocks to Leadership (CLE 304)

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#NAPABA23
Speakers

- Tina Lam, Of Counsel, Ogletree Deakins
- Susanna Lee, Corporate Counsel, Salesforce, Inc.
- Saema Somalya, Executive Vice President - Legal and Risk, Remitly Global
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Moderator

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Agenda

1. Intro
2. Statistics from The Asian Portrait Project 2.0
3. The Current State of the Law
5. Current Trends in Diversity, Equity, and Inclusion ("DEI")
6. Overcoming Challenges
7. Perceived Barriers to Career Advancement
8. Workplace Behaviors
9. Traits Associated with Asian American Lawyers
10. Best Practices Considerations for DEI Programs
11. Q&A
12. Closing
Statistics from The Asian Portrait Project 2.0

- While AAPI continue to be the largest minority group at major law firms, they also continue to experience the highest attrition rate.
- AAPI accounted for 7.8% of attorneys overall in 2019, but they also encompassed 10.4% of attorneys who left firms that year.
- AAPI also have the lowest ratio of partners to associates, which remains unchanged from 5 years ago.
- In 2020, 90% of equity partners were white.

Only 4.3% of equity partners at major firms in 2020 were AAPI.

SOURCE: A portrait of Asian Americans in the Law 2.0 (https://www.asiaportraitproject.org/)
The Current State of the Law

- Federal employment laws prohibit the use of race in making employment decisions
  - Title VII of the Civil Rights Act of 1964
  - Executive Order 11246 (federal contractors)
  - Title VI
  - Equal Protection
  - State/Local Laws

SOURCE: A portrait of Asian Americans in the Law 2.0 (http://www.asianamericansinlaw.org); American Bar Association; U.S. News & World Report

- **Title VII of the Civil Rights Act of 1964:** “It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

- **42 U.S.C. § 1981:** “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws . . . as is enjoyed by the white citizens.”

- **Executive Order 11246:** “The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of
pay or other forms of compensation; and selection for training, including apprenticeship.”

- **Title VI of the Civil Rights Act of 1964**: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

- **Equal Protection Clause**: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

- **State/Local Laws**: As of September 2023, twenty-three states have tried or are in the process of trying to enact laws or have enacted local/state laws to address DEI programs.
What is an Affirmative Action Program?

An affirmative action program is a management tool designed to ensure equal employment opportunity. A central premise underlying affirmative action is that, absent discrimination, over time a contractor's workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects. Affirmative action programs contain a diagnostic component which includes a number of quantitative analyses designed to evaluate the composition of the workforce of the contractor and compare it to the composition of the relevant labor pools. Affirmative action programs also include action-oriented programs. If women and minorities are not being employed at a rate to be expected given their availability in the relevant labor pool, the contractor's affirmative action program includes specific practical steps designed to address this underutilization. Effective affirmative action programs also include internal auditing and reporting systems as a means of measuring the contractor's progress toward achieving the workforce that would be expected in the absence of discrimination.” 41 CFR Section 60-2.10

What is an EEO-1 Report?

The EEO-1 report is a mandatory annual data collection that requires all private sector employers with 100 or more employees, and federal
contractors with 50 or more employees meeting certain criteria, to submit demographic workforce data, including data by job category and sex and race or ethnicity to the EEOC.” EEOC (https://www.eeoc.gov/data/eeo-1-data-collection).
Current Trends in Diversity, Equity, and Inclusion (DEI)


Facts: Students for Fair Admissions sued the University of North Carolina (UNC) and Harvard College and alleged their admissions processes violated the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act of 1964 by using race and color as a factor in the admission process.

Holding: (6-3) Harvard College’s and UNC’s admissions program violated the standards of the Equal Protection Clause and Title VI by using race and color as components because precedent requires (1) it satisfy strict scrutiny; (2) not rely on racial stereotyping; and (3) possess a logical end point.
Current Trends in Diversity, Equity, and Inclusion (DEI)

1. Letters from Attorney Generals to Fortune 100 CEOs:
   - July 13, 2023 – 13 states (AL, AR, IA, IN, KS, KY, MO, MS, MT, NE, SC, TN, WV):
     - “We urge you to immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices. If you choose not to do so, know that you will be held accountable — sooner rather than later — for your decision to continue treating people differently because of the color of their skin.”
   - July 19, 2023 – 21 states (AZ, CA, CO, CT, DE, DC, HI, IL, MA, MD, ME, MI, MN, NV, NJ, NM, NY, OR, RI, VT, WA)
     - DEI programs “are ethically responsible, good for business, and good for building America’s workforce”
     - “[C]orporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination.”
Current Trends in Diversity, Equity, and Inclusion (DEI)

2. Lawsuits:
   - September 15, 2022 - Pharmaceutical company sued for its “Breakthrough Fellowship Program”, which gave Black, Latino, and Native American college seniors with summers internships (i.e., 2-year post college employment & scholarship)
   - August 22, 2023 – Two law firms sued for its diversity fellowships that were for underrepresented groups in the legal industry
Current Trends in Diversity, Equity, and Inclusion (DEI)

- Your AANHPI Wasn't Silent: Litigation in the Tech Industry
- AANHPIs are publicly filing lawsuits alleging discrimination and retaliation against tech employers, speaking out after decades of silence.
- Participation in ERGS and workplace activism amidst the surge in hate crimes against AANHPI population during COVID-19.
- An analysis by USA Today found that at a major social media company, 46% of employees were Asian American in 2021, the most recent year for which data is available, but just 27% of executives. White employees, on the other hand, accounted for 39% of the workforce but 58% of its executives.\(^1\)
- Buck Gee (an executive advisor to Ascend Foundation) requested a racial breakdown from his former employer, a well-known tech company. Just 15% of Asian and Pacific Islanders were identified as having high leadership potential despite comprising 60% of the workforce.\(^1\)

\(^1\)Methodologies used to gather these statistics are unknown by the presenters.

“The tech industry has made progress in becoming more racially diverse in its workforce but has made virtually no progress in becoming more racially equitable in its leadership pipeline.”

- Buck Gee, Ascend Foundation

Overcoming Challenges
Perceived Barriers to Career Advancement

- Lack of Formal Leadership Training Programs
- Inadequate Access to Mentors and Contacts
- My Work Goes Unrecognized
- Limited Opportunities to Develop Better Skills
- Family Demands (e.g., Caring for Children or Aging Parents)
- Insufficiency of Good Assignments
- Limited Opportunities Due to Geographic Location
- Colleagues’ Lack of Willingness to Work with Me

SOURCE: A Portrait of Asian Americans in the Law 2.0 (https://www.asiansintheaworkforce.org/)

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Workplace Behaviors

- Trying to downplay traits that may bring attention to your Asian identity
  - Male: 43.8%
  - Female: 46.4%

- Seeking association with other (non-Asian American) identity groups for support
  - Male: 54.0%
  - Female: 65.5%

- Seeking association with other Asian Americans for support
  - Male: 72.4%
  - Female: 89.9%

- Compensating for, or trying to emphasize, certain traits others may perceive you to lack because of your Asian identity
  - Male: 57.4%
  - Female: 63.9%

- Avoiding association with other Asian Americans
  - Male: 11.0%
  - Female: 11.0%

Percent engaging in behavior at least sometimes

Source: A portrait of Asian Americans in the Law 2.0 (https://www.asiaportraitproject.org/)
Traits Associated with Asian American Lawyers

- Hard-working: 98.2%
- Responsible: 87.0%
- Logical: 9.0%
- Careful: 79.3%
- Quiet: 56.7%
- Racist: 69.0%
- Introverted: 64.0%
- Awkward: 61.1%
- Empathetic: 20.0%
- Creative: 12.0%
- Assertive: 4.0%
- Extroverted: 3.5%
- Aggressive: 2.6%
- Loud: 1.7%
- Disorganized: 1.0%

SOURCE: A portrait of Asian Americans in the Law 3.0
(https://www.asiannatlawsproject.org/)
Best Practices Considerations for DEI Programs

- Review company policies
- Provide training to stakeholders
- Foster inclusion in business resource groups (BRGs), employee resource groups (ERGs), and affinity groups
- Expanding opportunities & removing barriers
Q&A

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Thank you

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