

DOING GOOD *and* BEING BAD



Managing Risks Around Diversity and Inclusion at Law Firms

by **Kenneth E. Sharperson**

“Diversity unified, whoever you are.”
—Beastie Boys, Open Letter to New York¹

The success of any legal practice is based on its ability to understand and meet the needs of its clients, and the need for diversity in the legal profession continues to grow due to client demand.² Litigation is all about understanding and taking risks to obtain a favorable result for a client. But an exception is the risks associated with diversity and inclusion, which are often mismanaged.³ While New Jersey law firms are increasingly adopting diversity policies, these good intentions may actually increase the risk of discrimination and cause workplace resentment.⁴ Indeed, the diversity efforts of a well-managed law firm seeking to create a positive work environment for all employees can produce negative results, subjecting the firm to legal liability.⁵

The presence of an official diversity policy and training helps protect employers when it comes to legal claims of discrimination—making organizations less accountable for discriminatory practices.⁶ Although diversity training and audits that aim to prevent harassment and discrimination are important for any organization, they do carry certain legal

risks that cannot be entirely eliminated. With proper care, however, employers can take steps to minimize the chances that their efforts will come back to bite them, and avoid scrutiny by government and regulatory agencies. Because of the potential legal minefields, diversity management and training in law firms must be properly managed to decrease exposure to issues that may affect the successful implementation of diversity initiatives.⁷

Government Enforcement

Successful implementation of a diversity program can be challenging for a law firm. On the one hand, the firm seeks to promote a diverse workplace to reap the benefits of a diverse workforce, while at the same time avoiding potential legal exposure if a discrimination action were brought against the law firm.⁸ Making the task more challenging is the fact that the Equal Employment Opportunity Commission (EEOC) unveiled an updated strategic enforcement plan (SEP) for fiscal years 2017-2021.⁹ The SEP “established substantive area priorities and set forth strategies to integrate all components of EEOC’s private, public, and federal sector enforcement to have a sustainable impact in advancing equal opportunity and freedom from discrimination in the workplace.”¹⁰

The EEOC identified the following substantive area priorities, which law firms should heed when considering the management of their diversity programs:

1. eliminating barriers in recruitment and hiring
2. protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination
3. addressing selected emerging and developing issues
4. ensuring equal pay protections for all workers
5. preserving access to the legal system
6. preventing systemic harassment¹¹

The increase in EEOC investigations of systemic discrimination creates a need for law firms to create effective diversity training programs and perform an audit to study their diversity initiatives in order to minimize risks and determine whether there are any issues that may be a red flag for the EEOC.¹² Law firms, however, must be aware that any documents created in these internal audits to ‘minimize risks’ may be used as evidence in an EEOC action or litigation.¹³ Thus, protecting the information that comes out in diversity training and diversity audits should be a priority for law firms.¹⁴

Law firms must also be aware that Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁵ allows the government to compel financial institutions and their vendors to diversify their workforces to include women and minorities “to the maximum extent possible.” Section 342 covers the 12 regional Federal Reserve Banks, the Consumer Financial Protection Bureau, the Federal Reserve Board of Governors, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the National Credit Union Administration, the Office of the

Comptroller of the Currency, the Securities and Exchange Commission, and the Department of the Treasury Department Offices, as well as all entities that contract with or are regulated by an agency.¹⁶

Dodd-Frank requires that the impacted federal agencies set up “Offices of Minority and Women Inclusion” under Section 342,¹⁷ to encourage greater diversity in the financial services industry.¹⁸ Each office is required to have a director and is responsible for all matters related to diversity in management, employment and business activities of regulated financial institutions.¹⁹ In an effort to assist the entities required to comply with Section 342, six federal financial regulatory agencies recommended joint standards for assessing the diversity policies and practices of the institutions they regulate, which are “intended to promote transparency and awareness of diversity policies and practices within the institutions.”²⁰ In its simplest form, the joint standards will review how regulated entities promote diversity and inclusion in hiring practices as well as supplier diversity.²¹

The increased compliance reviews and enforcement actions in Section 342 are designed to incentivize contractors, including law firms, to enhance their actions with respect to diversity and inclusion.²² A failure to do so “based on the misperception that Dodd-Frank only applies to financial services companies,” could have harmful financial consequences to a law firm.²³ Not only could a law firm “lose revenues from government contracts terminated for diversity-related failures, it also could incur substantial fines for deficient diversity-related practices.”²⁴

In short, law firms must be aware of the importance of installing effective diversity programs, but also should be aware of the federal agency regulations that may affect the implementation and success of their diversity programs.

Diversity Training

In order to implement diversity initiatives, law firms often hire a diversity consultant to lead training and form affinity groups.²⁵ Diversity consultants attempt to educate lawyers about their colleagues, by “(a) alerting them to differing and sometimes incorrect perceptions they may have about each other, (b) pointing out the possibility that some minority lawyers believe that they are being discriminated against, and (c) illustrating how stereotypes can often result in discriminatory behavior.”²⁶ A law firm must be careful with the diversity trainer it hires because there have been instances where diversity trainers have promoted racial stereotypes, and lawsuits have ensued.²⁷ Indeed, there are numerous instances where utilizing the wrong consultant to provide diversity training has led to legal issues for a company.²⁸

The legal ramifications²⁹ of negative diversity training can be manifested in several ways:

1. In discrimination litigation, discriminatory remarks made in diversity training can be used as evidence in a discrimination lawsuit.
2. Diversity audits may be disclosed in discovery.
3. Diversity process may encourage groups or individuals to litigate.

The first example of diversity training gone awry occurred over 20 years ago.³⁰ In *Hartman v. Pena*,³¹ the Federal Aviation Administration was sued for sexual harassment after it subjected employees to three days of diversity training that made white males feel like scapegoats. In *Hartman*, the plaintiff was forced to participate in an exercise where males were forced to walk through a gauntlet of female employees to mimic the sexual harassment that the women at the FAA experience.³² The plaintiff contended that the women touched his genitalia

and that he was ridiculed by the male participants.³³

In denying summary judgment, the Court noted:

because the gauntlet exercise was designed to demonstrate sexual harassment in a ‘hands on’ approach, it is difficult to accept the argument that an exercise created to be sexually harassing was not. The fiction, Hartman contends, took on life. Hartman would not distinguish pretense from reality in terms of the alleged touching of his genitalia. At a minimum, there is a genuine issue as to whether and at what point the simulation became the act. Accordingly, summary judgment is denied as to the claim of sexual harassment.³⁴

In *Stender, v. Lucky Stores*,³⁵ a group of Lucky’s grocery chain employees filed a class action complaint on behalf of African-American and female employees working in retail stores in Lucky’s Northern California Food Division, alleging lack of promotions for women. The court ordered Lucky to turn over the notes of the managers’ comments elicited at a sensitivity training for managers. Specifically, the court noted:

[The Diversity trainer] requested that each person at the meetings volunteer a stereotype that they had heard in the workplace. In response to this question Hoffman remembered hearing that “women won’t work late shifts because their husbands won’t let them;” “the crew won’t work for a Black female;” “women are better with customers than men are;” and “women need training and an opportunity to do floor work.” R.T. at 6-923-24 (Hoffman).³⁶

These comments were held by a court to be admissible as evidence of discriminatory intent within the organization, and the plaintiffs were awarded over \$90 million in damages.³⁷

In *Fitzgerald v. Mountain States Tel. &*

Tel. Co.,³⁸ the jury awarded the plaintiff \$250,000 for emotional distress resulting from the defendant’s refusal to contract with the plaintiff for allegedly discriminatory reasons; however, the court remanded for a new trial because the evidence suggested the award was the product of passion and prejudice.³⁹

Because a law firm can sometimes face liability for the acts of a diversity consultant, it is necessary to protect the firm from liability through indemnification agreements with the diversity consultant, and with additional insured endorsements to the diversity consultant’s liability insurance.⁴⁰ The simplest way to protect the firm is to place an indemnification provision in the contract with the diversity consultant.⁴¹ In simple terms, a contractual indemnity provision serves as a means by which the parties to a contract may, through unambiguous terms, specify which party will be held financially responsible for certain losses, thus allowing the parties to effectively manage, shift and anticipate the risks that may be associated with contractual undertaking.⁴²

A simple and enforceable indemnification agreement⁴³ may contain the following language:

Each Party agrees to indemnify and hold the other harmless from any liability to third persons, including court costs and reasonable attorneys’ fees incurred in defending against any such liability, that may arise against the other Party as an incidence of a debt or obligation for which the nonliability of the other Party is established by this Agreement. Each Party represents and warrants to the other that he or she has not incurred any debt, obligation, or other liability, except for those described in this Agreement. Any debt, obligation, or other liability not described in this Agreement will be the sole responsibility of the Party who has incurred or may incur it, and each Party agrees to pay as it becomes due, and to hold the other Party and his or her property

harmless from, any such debt, obligation, or other liability.⁴⁴

In this sample provision, both parties agree to compensate the other party for losses arising out of the agreement, to the extent those losses are caused by the indemnifying party’s breach of the contract or negligence.

By including a simple indemnification provision in the contract, a law firm can protect itself as well as be provided with a defense from the indemnitee. Importantly, New Jersey courts recognize the enforceability of express indemnification agreements contained within commercial contracts⁴⁵ as parties in a commercial setting are allowed to freely negotiate the allocation of tort liability regardless of fault.⁴⁶ However, agreements to indemnify another for the indemnitee’s own negligence, either partial or sole, are not enforceable unless the intent to indemnify is unequivocally spelled out in the contract.⁴⁷ Therefore, it is necessary to carefully craft the provision so the court will enforce it in the event a law firm faces a lawsuit as a result of diversity training gone awry.

In sum, while the importance of diversity training cannot be dismissed, it should focus on communicating appropriate workplace behaviors rather than seeking to learn about employees’ privately held attitudes about race, disability, gender, or other protected characteristics.⁴⁸ Further, while some diversity trainers may still advocate the latter approach, if not managed appropriately diversity training can generate significant legal risks because the information shared in training could be damning evidence in any later lawsuit.

Diversity Audits

In addition to diversity training, law firms also may perform diversity audits to assess the effectiveness of the diversity management within a law firm.⁴⁹ A diversity audit assesses the number and

proportion of women and minorities in the law firm's workforce, and their positions.⁵⁰ The audit may also assess the law firm's recruitment and retention policies, as well as interview employees to learn about the perceptions of the firm's diversity initiatives.⁵¹

Typically, a firm's diversity committee performs the diversity audit.⁵² The diversity committee later meets with management to recommend areas where there can be improvement within the firm.⁵³ However, without the ability to claim a privilege, the process and results of the diversity audit will be discoverable in an EEOC action or litigation. Thus, law firms seeking to protect internal diversity planning efforts or audits may be most successful if they conduct the analysis in a way that will permit them to assert the attorney-client privilege under the Supreme Court's decision in *Upjohn Co. v. United States*.⁵⁴

Upjohn was a pharmaceutical company. One of its foreign subsidiaries made some suspicious payments to foreign government officials to secure business.⁵⁵ When the company's general counsel learned of the payments, he and some outside lawyers investigated the payments by sending a questionnaire to employees, seeking mostly factual information, and also interviewing those employees.⁵⁶ After *Upjohn* voluntarily reported the suspicious payments, the Internal Revenue Service launched an investigation and sought production of the questionnaires and the attorneys' interview notes.⁵⁷ *Upjohn* claimed the documents were privileged and refused to produce them, prompting the litigation. The Sixth Circuit ruled against *Upjohn*, following the then-majority rule that only the communications between lawyers and the "control group"—a small number of senior leaders responsible for directing the company's actions in response to legal advice—were privileged.⁵⁸

The case made its way to the United

States Supreme Court. In an opinion drafted by Justice William Rehnquist, the Court rejected the control group test and instead adopted a more functional test that turned on the purpose of the communications between a corporation's lawyer and the corporation's employees.⁵⁹ The Court noted that people from whom a corporation's lawyer must gather the necessary information to give legal advice will be outside the control group.⁶⁰ The Court also noted that lawyers need to have full and frank discussions with the other employees to do their jobs and represent their client.⁶¹

Thus, under *Upjohn*, a communication will be covered under the attorney-client privilege when it is made for the purposes of obtaining legal advice, even when the communication is made by an employee outside of the directors or officers comprising a corporation's so called control group. Therefore, when conducting a diversity audit, it should be made clear that the gathering of diversity-related information is being provided to counsel for the purpose of obtaining legal advice, and the attorney-client privilege should be asserted over such communications.

Conclusion

The laudable goal of increasing diversity in a law firm should not be used against the law firm.⁶² However, implementing diversity initiatives may entail significant risk if not managed properly. Thus, managing risks around diversity is paramount for law firms to avoid legal liability, especially in light of the increased scrutiny by the EEOC and other federal agencies. Therefore, law firms must ensure they utilize a properly certified diversity trainer with professional references and conduct diversity audits using outside counsel in order to reap the benefits of diversity without unwittingly creating legal problems for the firm. ☪

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Endnotes

1. D. Thomas, M. Diamond, A. Yauch, E. O'Conner, A. Horowitz A. (2004). *Beastie Boys, Open Letter to New York*, Capitol Records. An *Open Letter to NY* was written as a "tribute to the city following the 9/11/2001 terrorist attacks, and is written as a love letter of sorts to the melting pot of cultures that came together to defend the city the Beastie Boys call home." Ryan Randazzo, *New York Series: The Beastie Boys 'An Open Letter to NYC'*, at <https://nysmusic.com/2018/05/04/new-york-series-the-beastie-boys-an-open-letter-to-nyc/> (last visited June 6, 2018).
2. See David A. Thomas, *Diversity as Strategy*, *Harvard Business Review*, Sept. 2004 at 1, ("Rather than attempt to eliminate discrimination by deliberately ignoring differences among employees, IBM created eight task forces, each focused on a different group, such as Asians, gays and lesbians, and women.)
3. See Jon Terry, *Why diversity and inclusion is a real business risk*, Feb. 21, 2017, <http://pwc.blogs.com/fsrr/2017/02/why-diversity-and-inclusion-is-a-real-business-risk.html>.
4. Tessa L. Dover, Brenda Major, and Cheryl R. Kaiser, *Diversity Policies Rarely Make Companies Fairer, and They Feel Threatening to White Men*, *Harvard Business Review*, Jan. 4, 2016, <https://hbr.org/2016/01/diversity-policies-dont-help-women-or-minorities-and-they->

make-white-men-feel-threatened. (The most commonly used diversity programs do little to increase representation of minorities and women. A longitudinal study of over 700 U.S. companies found that implementing diversity training programs has little positive effect and may even decrease representation of black women.”).

5. See Karla Turner Anderson, *Mitigating Employment Litigation Landmines With Workplace Diversity and Inclusion Efforts*, *Our Insights*, (Nov. 17, 2017) <https://ogletree.com/shared-content/content/blog/2017/november/mitigating-employment-litigation-landmines-with-workplace-diversity-and-inclusion-efforts>.

6. See Nancy B. Rapoport, *Nudging Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms*, 4 *St. Mary's J. Legal Mal. & Ethics* 42 at fn. 188 (2014), quoting Lee G. Bolman and Terrence E. Deal, *Reframing Organizations: Artistry, Choice and Leadership*, 299-300 (John Wiley & Sons, Inc.) (6th ed. 2017) as follows:

I hope that law firm efforts in this regard aren't just window-dressing.

It is easier to appoint a diversity officer [to comply with affirmative action requirements] than to change hiring practices deeply embedded in both individual and institutional beliefs and practices. Since the presence of a diversity officer is more visible than revisions in hiring priorities, the addition of a new role may signal to external constituencies that there has been improvement, even if, in reality, the appointment is a formality and no real change has occurred.

7. See, eg. *United States v. City of N.Y.*, 308 F.R.D. 53, 60 (E.D.N.Y. 2015)(an intent stipulation, through

prospective injunctive relief, resolved plaintiff-intervenors' claims of intentional discrimination brought pursuant to Title VII, 42 U.S.C. §§ 1981 and 1983, and the state and city human rights laws. In the intent stipulation, the city of New York agreed “to create two new appointed positions that are intended to facilitate an environment of diversity and inclusion at the FDNY. Specifically, ‘[t]he FDNY will create an executive staff position of Chief Diversity and Inclusion Officer (‘CDIO’).’ The CDIO will report directly to the Fire Commissioner, and will be responsible for ‘promoting diversity in the FDNY and expanding awareness of the value of full inclusion of firefighters from all racial and ethnic groups.’” (*Internal citations omitted*).

8. See generally, Steven A. Ramirez, *Diversity and the Boardroom*, 6 *Stan. J. L. Bus. & Fin.* 85 (2000) (providing in-depth analysis of cultural diversity initiatives within “leading elements” of corporate America and positing that such initiatives are facially neutral, merit-driven, and culture-conscious initiatives).

9. See <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm> (last visited April 13, 2018).

10. Executive Summary, U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan Fiscal Years 2017 – 2021 at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>. See also Barry A. Hartstein, *EEOC's New Strategic Enforcement Plan Takes Aim at Gig Economy, Other Emerging Workforce Issues*, Oct. 18, 2016, at <https://www.littler.com/publication-press/publication/eeocs-new-strategic-enforcement-plan-takes-aim-gig-economy-other>.

11. *Id.*

12. Susan K. Lessack, *The EEOC Takes Aim at Systemic Discrimination*, Aug. 3, 2011, <http://www.pepperlaw.com/publications/the-eeoc-takes-aim-at-systemic-discrimination-2011-08-03/>.

13. Alice S. Fisher, Barry M. Sabin, Jonathn Su, William R. Baker, III, Timothy H. McCarten, and Michael P. McCarthy, *How to Protect Attorney-client Privilege in Internal Investigations*, *Latham & Watkins White Collar Defense & Investigations Practice*, Number 1774 (Dec. 11, 2014).

14. *Recruiting Specialist, Making Diversity Work: Auditing Your Workplace*.

15. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, §342, 124 Stat. 1376 (2010), <https://www.sec.gov/about/laws/wallstreet-reform-cpa.pdf>.

16. Vladimir Bien-Aime, *Implementing Section 342 of the Dodd-Frank Act: Adoption is Still Slow*, *Mortgage Compliance Magazine*, Nov. 1, 2016, at <http://www.mortgagecompliancemagazine.com/regulatory/implementing-section-342-dodd-frank-act-adoption-still-slow/>.

17. Stephanie Wilson, *Section 342 of Dodd-Frank Intersects With Employment Law*, *Reed Smith Client Alert* (Oct. 9, 2012) (“Section 342 was proposed by U.S.

Representative Maxine Waters (D-Calif.), who argued that diversity regulators in the federal agencies were necessary to help correct racial and gender imbalances at Wall Street firms, as well as imbalances in the subcontracting process.”).

18. See Kristin Johnson, Steven A. Ramirez and Cary Martin Shelby, *Diversifying to Mitigate Risk: Can Dodd-Frank Section 342 Help Stabilize the Financial Sector?*, 73 *Wash & Lee L. Rev.* 1795, citing *Dodd-Frank Act*, Pub. L. No. 111-203, § 342, 124 Stat. 1376, 1541-45

- (2010) (codified at 12 U.S.C. § 5452 (2012)) (listing the relevant agencies expected to comply with Section 342).
19. See 12 U.S.C. § 5452(b)(2)-(3).
 20. See Federal Financial Regulators Proposing Joint Standards for Assessing Diversity Policies and Practices of Regulated Entities Pursuant to Section 342 of the Dodd-Frank Act, <https://www.consumerfinance.gov/about-us/newsroom/federal-financial-regulators-proposing-joint-standards-for-assessing-diversity-policies-and-practices-of-regulated-entities-pursuant-to-section-342-of-the-dodd-frank-act/> (last visited April 20, 2018).
 21. See *Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies*, <https://www.regulations.gov/document?D=FDIC-2015-0065-0001> (“These proposed standards reflected the leading policies and practices for advancing workforce and supplier diversity.”)(last visited April 22, 2018).
 22. See generally Jessica L. Mazzeo, Time Has Been Up: Why Your Firm Shouldn’t Just Be ‘Talking’ About Diversity and Inclusion, Feb. 22, 2018 (Determining that “conversations” around workplace diversity and inclusion aren’t enough, they need to be backed up with action.) at <https://www.law.com/thelegalintelligencer/2018/02/22/time-has-been-up-why-your-firm-shouldnt-just-be-talking-about-diversity-and-inclusion/?sreturn=20180327133807> (last visited April 18, 2018).
 23. See Diversity & Inclusion/Dodd-Frank Compliance, at <https://www.ebglaw.com/diversity-inclusion-dodd-frank-compliance/>.
 24. *Id.*
 25. See generally Carisa Crawford-Chappell, The Power of Diversity Consultants: Helping to Achieve an Inclusive Workforce, *Diversity & The Bar*, (Sept./Oct. 2004)(“ Diversity is an essential part of doing business in the legal field. According to diversity consultants, more firms are looking for diversity training and understand the connection between diversity and business development.”), at <http://nextions.com/wp-content/uploads/2017/05/the-power-of-diversity-consultants-helping-to-achieve-an-inclusive-workforce-mccas-diversity--the-bar.pdf> (last visited June 5, 2018).
 26. David B. Wilkins and G. Mitu Gulati, Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis, 84 *Calif. L. Rev.* 493, 592 (1996).
 27. See Diversity Training Backfires, <https://cei.org/blog/diversity-training-backfires> (last visited April 18, 2018).
 28. See Glenn Llopis, 5 Reasons Diversity And Inclusion Fails, <https://www.forbes.com/sites/glennllopis/2017/01/16/5-reasons-diversity-and-inclusion-fails/#2ba1957550df> (last visited April 13, 2018).
 29. Edward T. Ellis, Evidentiary and Discovery Issues in Employment Cases, CV001 ALI-ABA729 (July 2013) (The Fifth Circuit allows stray remarks to be used as circumstantial evidence if “the remarks demonstrate: (1) discriminatory animus (2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker.”).
 30. The Associated Press, Male Employees Accuses FAA of Sex Harassment at Workshops, *New York Times*, Sept. 9, 1994, at <https://www.nytimes.com/1994/09/08/us/male-employees-accuse-faa-of-sex-harassment-at-workshops.html>. The FAA had to pay out a settlement to the white male employee who sued.
 31. *Hartman v. Pena*, 914 F. Supp. 225 (N.D. Ill. 1995).
 32. *Id.* at 227.
 33. *Id.*
 34. *Hartman*, 914 F. Supp. at 230.
 35. *Stender, v. Lucky Stores*, 803 F. Supp. 259, 266 (N.D. Cal. 1992).
 36. *Id.* at 292-93.
 37. *Stender v. Lucky Stores, Inc.*, No. 88-cv-1467 (N.D. Cal. April 20, 1994) (\$107 million settlement; fees and costs consumed 12.8% of recovery) (reported in 18 Class Action Reports 338 (May-June 1995)).
 38. 68 F.3d 1257, 1262-63 (10th Cir. 1995).
 39. *Id.* at 1265.
 40. Cf. *Barrons v. J. H. Findorff & Sons, Inc.*, 278 N.W.2d 827, 831 (Wis. 1979) (“One party may indemnify another against liability for the indemnitor’s acts and those of his employees, agents and subcontractors as well as against liability for the indemnitee’s own acts. The agreement will be broadly construed where indemnity is sought for liability based on the indemnitor’s negligence but will be strictly construed where the indemnitee is the negligent party.”) and *Joslyn Mfg. Co. v. Koppers*, 40 F.3d 750, 754 (5th Cir. 1994) (finding that broad language in indemnification agreements indicated that the agreements were intended to cover all forms of liability, including liability under CERCLA, even though environmental liability under CERCLA was not contemplated at the time of contracting).
 41. See 1-1 LexisNexis Practice Guide: New Jersey Construction Litigation

- § 1.16 (2017) (“An indemnity clause involves a promise by one party (the indemnitor) to reimburse another party (the indemnitee) for the indemnitee’s loss, damage, or liability. An indemnification clause shifts the risk of loss from one party to a different party. A contract will not be construed to indemnify an indemnitee against losses resulting from the indemnitee’s own negligence unless such an intention is expressed in unequivocal terms.”)
42. See Daniel R. Avery, *Enforcing Environmental Indemnification Against A Settling Party Under CERCLA*, 23 *Seton Hall L. Rev.* 872, 889 (1993) (“Indemnification generally arises either from an express contractual arrangement or by virtue of a special relationship between the parties.”).
43. “The obligation resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit, or a right which inures to a person who has discharged a duty which is owed to him but which, as between himself and another, should have been discharged by the other.” 42 C.J.S. *Indemnity* § 2 (1991).
44. 9 *New Jersey Transaction Guide* § 162.301 (2018).
45. *Mantilla v. NC Mall Assocs.*, 167 N.J. 262, 268-69 (2001).
46. *Gulf Oil Corp. v. Acf Indus.*, 221 N.J. Super. 420, 425 (App. Div. 1987).
47. *Azurak v. Corp. Prop. Inv’rs*, 175 N.J. 110, 111 (2003).
48. See, e.g., Victoria Chapa, *Diversity and the Workplace*, Experience by Simplicity at <https://www.experience.com/advice/professional-development/diversity-and-the-workplace/> (“The challenge that diversity poses, therefore, is enabling your managers to capitalize on the mixture of genders, cultural backgrounds, ages and lifestyles to respond to business opportunities more rapidly and creatively.”) (last visited April 27, 2018).
49. See, e.g. Simran Oberoi, *How do you Conduct a Diversity Audit and Survey?*, March 14, 2017, <https://blog.shrm.org/sasia/blog/how-do-you-conduct-a-diversity-audit-and-survey-0> (last visited April 13, 2018).
50. See *Diversity and Inclusion Case Studies: Large Firms*, <http://www.lawsociety.org.uk/support-services/practice-management/diversity-inclusion/diversity-and-inclusion-case-studies-large-firms/> (last visited April 1, 2018).
51. See *Getting it Right: Understanding and Managing Diversity in the Workplace*, <http://www.peoplescout.com/getting-right-understanding-managing-diversity-in-workplace/> (noting that “Managing diversity in the workplace presents a set of unique challenges for HR professionals. These challenges can be mitigated if an organization makes a concerted effort to encourage a more heterogeneous environment through promoting a culture of tolerance, open communication and creating conflict management strategies to address issues that may arise.”).
52. See Eli 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, 1081 (Fall 2011) (“The range of approaches to diversity employed by various legal actors and institutions shows the complexity and richness of the notion, highlighting the need to further explore its meaning and examine the justifications for it. It also reflects, however, the profession’s deep sense of confusion and ambivalence about the meaning of diversity, and helps explain disagreement regarding means of pursuing it and responsibility for doing so.”).
53. *Id.*
54. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
55. *Id.* at 386.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 399.
60. *Id.* at 392. “The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney’s advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation’s policy.”
61. The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”
62. Taylor Cox Jr. and Ruby L. Beale, *Developing Competency to Manage Diversity* 17 (Berrett-Koehler Publishers, 1997) (“Managing diversity, by contrast, is driven primarily by business trends and the quest of organizations to