



SOCIETIES CONSORTIUM

ON SEXUAL HARASSMENT IN STEMM

An initiative to advance professional and ethical conduct, climate & culture

January 28, 2021 Hot Topics Webinar: Data Collection to Inform Priority Action for DEI— Considering Federal Nondiscrimination Law

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Importance of Data Collection & Evaluation to Advance DEI Aims

- Collecting and Evaluating Current, Backward-looking Data and Trends Are Excellent Practices
- Identify:
 - Composition/Demographics in Society Functions
 - Climate Experience for Different Identity Groups
 - Priority for Focus of Efforts & Investment
- **Federal Law Does Not Limit Such Data Collection**—Which is Positive Action from Policy and Legal Perspectives

Key Question: What Action to Take Based on Data, Experience & Mission?

- **Answer:** Involves Policy & Federal Nondiscrimination Law
 - **DEI Mission is the Driver** of Overarching DEI Aims
 - **Law is a Design Parameter** for Gender/Race-Conscious *Means* and Related *Aims*
- **1st Question:** Why Does the Society Seek DEI ? – Articulate Research-Backed Reasons Clearly, E.g.:
 - ✓ Include All Talent for Contributions
 - ✓ Advance Cognitive Function
 - ✓ Enable Creativity From Multiple Perspectives/Experiences for Problem Identification and Solving
 - ✓ Create More Productive Work Outcomes
 - ✓ Advance Excellence, Integrity, Public Trust, Credibility of Fields
 - ✓ Avoid Stagnation of Science
 - ✓ It's the Right Thing to Do
- See Research: <https://educationcounsel.com/?publication=bridging-research-practice-gap-achieving-mission-driven-diversity-inclusion-goals>; Also Dr. Kimberly Griffin/University of Maryland and Dr. NiCole Buchanan/Michigan State

Legal Principle #1: Means Can Trigger Federal Nondiscrimination Law

- **Societies May Have Any DEI Aims They Value**
 - **Federal Nondiscrimination Law Generally *Does Not* Regulate DEI Aims Alone**
- It is Only When the ***Means*** to Achieve DEI Aims—the Policies, Strategies, Practices—
 - Involve Consideration of an ***Individual's*** Gender, Race, Ethnicity When Conferring Opportunities and Benefits
 - That Federal Nondiscrimination Law's Design Parameters Governing Aims and Means May Apply to a Private Society—***If Triggered by Covered Society Activities***
- **Federal Nondiscrimination Law Generally Prohibits Differential Treatment of Individuals on the Basis of Gender, Race, Ethnicity—With Limited But Important Exceptions**

Legal Principle #2: *Top-Line Federal Nondiscrimination Law Thresholds*

- Key Triggers for Application of Federal Nondiscrimination Law to Private Societies:
 - ✓ Society Receives Federal Funding or Assistance, OR
 - ✓ Society Employs ≥ 15 Employees, OR
 - ✓ Society Considers Individuals' Race or Ethnicity in Contracting
 - ✓ **Scope of Coverage Depends on Which of These Triggers Apply**
- **Federal Nondiscrimination Law Likely Does NOT Apply to a Society if It:**
 - ✓ Does Not Receive Any Federal Funding or Assistance, AND
 - ✓ Does Not Have at Least 15 Employees, And
 - ✓ Does Not Consider Any Individual's Race/Ethnicity in Contracting

Legal Principle #3: *Societies CAN DO A LOT To Advance DEI Without Legal Complexity—Even If Federal Nondiscrimination Law May Apply*

- Private Societies May:
 - ✓ Establish and Articulate the DEI Mission and *Aims* They Value, **Without Individual Gender, Race, Ethnicity Conscious Means** to Achieve the Aims
 - ✓ Collect **Backward-looking and Current Compositional Data** and Evaluate Trends
 - ✓ Establish Programs and Events with an **Explicit Gender, Race, Ethnicity Subject Matter Focus**—Depending on Self-selection Rather Than **Identity-based Participation Criteria**
 - ✓ Pursue Court-labeled Neutral Criteria and Barrier Removal That Enhance Diversity
 - ✓ Pursue Gender, Race, Ethnicity Targeted Outreach to Build Diverse Applicant Pools, With Robust General Outreach—Without Conferring Material Benefits Based on Identity

Legal Principle #3 Continued: *Societies Can Pursue Neutral Strategies to Advance DEI Without Legal Complexity*

- While Not Really Neutral in Our Society, Court-labeled ***Neutral Criteria and Barrier Removal***
 - **Can Contribute to Enhancing Gender, Racial, Ethnic Diversity**—Even When They Are Not Alone Sufficient to Achieve All DEI Aspects or Aims
- When Conferring Opportunities and Benefits, Neutral Strategies, Policies and Barrier Removal:
 - ✓ Do Not Consider Any Individual's Gender, Racial, Ethnic Identity: Explicitly or In Practice
 - ✓ Serve Authentic Entity Interests Other Than Increasing Compositional Diversity
 - ✓ Nonetheless, Have the Known Effect of Increasing Compositional Diversity
 - ✓ Rely on and Favor Individuals':
 - ❖ Experience of Gender and Race in Society—Ability to Elevate Understanding
 - ❖ Individuals' Expertise on Gender and Race Issues
 - ❖ Commitment to Ameliorating Gender and Race Inequities
 - ❖ Identities that Overlap with Gender and Race (e.g., socio-economic)

Legal Principle #4: *Even if Nondiscrimination Laws May Apply, Exceptions May Allow Limited Identity-Conscious Action*

- Even When Federal Nondiscrimination Law May Apply to a Society's DEI Activities, Important Exceptions May Allow Limited Consideration of Individuals' Gender, Race, and Ethnicity When Conferring Some Benefits and Opportunities
- There Are Exacting Conditions That Must Be Met to Qualify for An Exception, Including:
 - Articulating Important DEI Aims to Achieve the Society's Mission and Excellent Contributions—*Specific Positive Impacts of Diversity on Science*
 - Using and Evaluating the Impact of Neutral Strategies and Barrier Removal and Targeted Outreach to Achieve a Sufficiently Diverse Setting to Realize Diversity's Impact
 - Collecting Data to Demonstrate the Need for Limited, Effective Identity Conscious Strategies As Well
- Key is Knowing When Law Applies—How to Avoid it When Possible; and How to Qualify for Exceptions or Meet the Law's Requirements When Unavoidable

Stay Tuned for a Virtual Brown Bag Gathering and Guidance

- We Are Planning a Follow-up Virtual Brown Bag to Explore:
 - ✓ What Societies Are and Can Be Doing to Use Data to Advance DEI
 - ✓ What Activities May Trigger Federal Nondiscrimination Law
 - ✓ Design Parameters and Strategies for Exceptions to Legal Limitations
 - ✓ How to Use Court-labeled Neutral Policies to At Least Contribute to DEI, While Avoiding Legal Complexities—High Reward, for Low Risk
- See the Overview in the Chat Box—Which Will Be Posted with This Session’s Recording

Thank You!

For Questions:

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