

Diversity, Equity and Inclusion (DEI) for *Effective Lawyering*

Professor Abdi Aidid

University of Toronto Faculty of Law

DIVERSITY



of people and perspectives

EQUITY



in policy and practice

INCLUSION



of all voices and visions



A Helpful DEI Framework

- DEI for **personal development**
 - Recognizing opportunities to grow in how we relate to others; improving and nurturing interpersonal relationships; deepening empathy
- DEI for the **profession's development**
 - Recognizing and addressing barriers; honouring professional commitments; responding to market demands*
- DEI for **skills development**
 - Recognizing that clients have diverse needs that are bound up in equity and inclusion considerations
 - Anticipating and responding to these needs *without* putting clients at further disadvantage

Businessweek + Equality

Diversity at Elite Law Firms Is So Bad Clients Are Docking Fees

Facebook, HP, Novartis, and other big corporations have found a novel way to pressure outside counsel: threaten their paychecks.



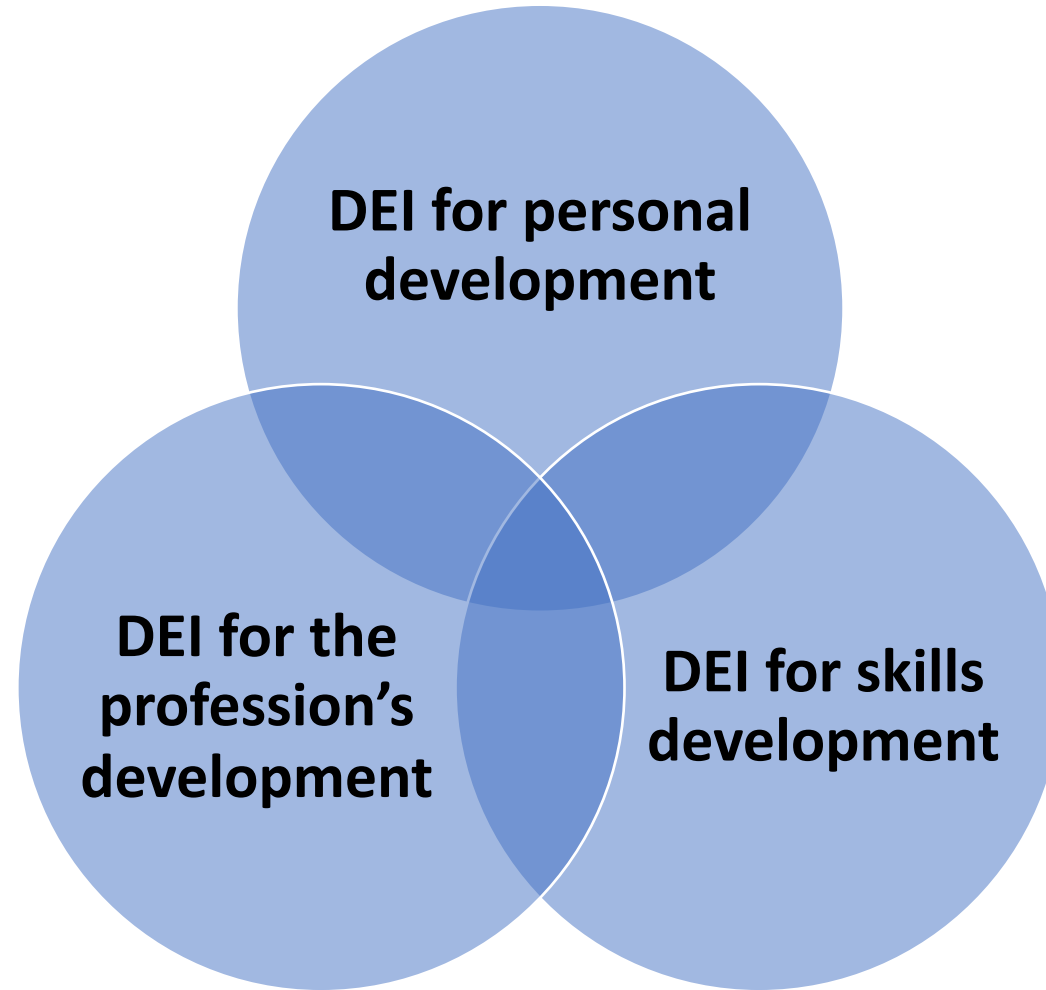
Shawn C. Carter v. Iconix Brand Group

In its attempt to find a suitable list of arbitrators to submit to the AAA, Petitioners' counsel reviewed more than 200 potential arbitrators in the New York area from the Large and Complex Cases roster. *Id.* ¶ 31. Of these 200 potential arbitrators, however, Petitioners' counsel were unable to identify a single African-American arbitrator with the necessary expertise. *Id.* After

to provide the names of “neutrals of color,” AAA responded by providing the names of six individuals it described as arbitrators “of color.” *Id.* ¶ 32. Of those six candidates, one appears to be Asian-American, another South Asian, and a third Latino. *Id.* Only three of the proposed neutrals appear to be African-American—two men, and one woman. *Id.* Worse yet, one of the African-American men suggested is a partner at the law firm that represents Iconix in the underlying Arbitration, Blank Rome, creating a blindingly obvious conflict of interest. *Id.* Presently, Petitioners cannot determine whether the only two proposed African-American candidates have conflicts that would similarly disqualify them. *Id.* Moreover, using the AAA’s search tips, Petitioners were unable to identify whether all of these individuals actually belong to AAA’s Large and Complex Cases Roster. *Id.*

A Helpful DEI Framework

- DEI for **personal development**
 - Recognizing opportunities to grow in how we relate to others; improving and nurturing interpersonal relationships; deepening empathy
- DEI for the **profession's development**
 - Recognizing and addressing barriers; honouring professional commitments; responding to market demands*
- DEI for **skills development**
 - Recognizing that clients have diverse needs that are bound up in equity and inclusion considerations
 - Anticipating and responding to these needs *without* putting clients at further disadvantage



DEI for more effective lawyering

- The Rules of Professional Conduct demand:
 - Competence (Rule 3.1)
 - Quality service (Rule 3.2)
 - Integrity (Rule 2.1)
- Being a good lawyer demands
 - Zealous advocacy / partisanship!
 - Strong communication
 - Good faith and fair dealing
 - Being an officer of the court and avoiding miscarriages of justice

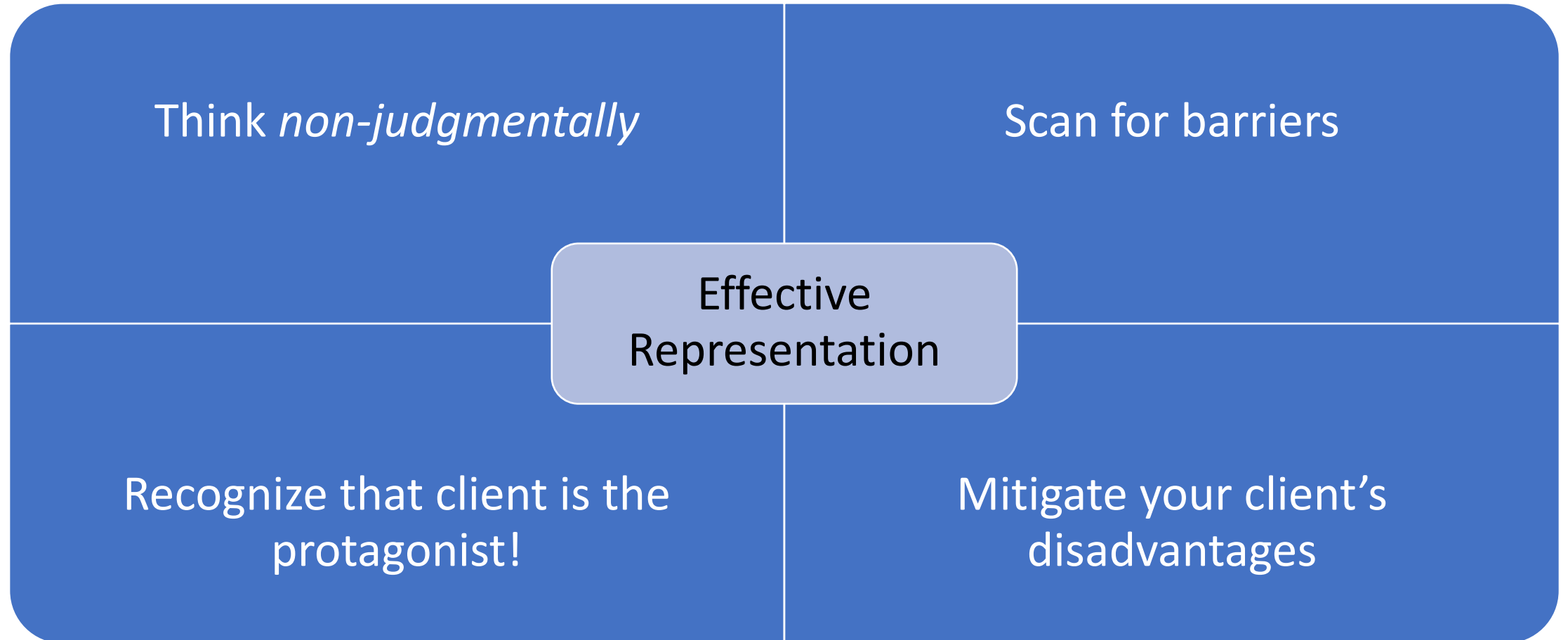
DEI and *lawyering*

- Lawyers will:
 - Operate in cross-cultural settings (e.g. community lawyers, lawyers representing global clients)
 - Often speaking on behalf of clients' most sensitive needs (e.g. able-bodied lawyers advocating for clients with disabilities)
 - Require their clients to supply vital information and strategic guidance on cases

Risks of ignoring DEI approaches in advocacy

- Missing important advocacy opportunities
 - More thorough understanding of client context makes more arguments available
- Delivering incomplete results and/or making bad law!
 - e.g. Tort law and compensation for lost wages
- Setting client back by underestimating personal and cultural costs of litigation
- Malpractice and discipline risk

Tips for effective client representation



Best practice: Thinking *non-judgmentally*

- This means recognizing that clients present differently!
- Avoid making assumptions about client behaviour
- Critique your own impressions
 - e.g. client refuses to make eye contact or has eyes darting around the room – what could be the reason?
 - e.g. client is frequently late for meetings with lawyers - what could be the reason?

Best practice: Scanning for barriers

- The lawyer-client relationship is often an extractive one
 - Clients bear significant responsibility for case preparation
 - Vital information rests with the client and client alone
 - Recognize the costs associated with the client's participation
- Develop a lawyer's version of the "first, do no harm" principle

Best practice: recognizing that client is the protagonist

- Lawyers (unfortunately) have a way of thinking advocacy is about lawyers
 - This is especially true in an increasingly “juridified” world
- Clients have the ultimate say in how they want to be represented
 - Honour clients’ dignity, voice and story
- This is especially important in contexts where sensitive information is at issue (e.g. characterizing someone’s identity, income, etc.)

Best practice: using your skills to mitigate client disadvantage

- To the extent your client faces barriers or disadvantages, effective advocacy *does not simply mean highlighting those disadvantages*
- Lawyers have skills that can offset these disadvantages, too
 - For example, lawyer can contextualize clients' barriers for relevant stakeholders
 - Lawyer can use strategic understanding of procedure to enable more favourable case presentation for client

Beyond client representation

- Being a lawyer means being an **engaged** and **interested** participant in law's epistemic community
- Today's lawyers are increasingly involved in:
 - Debates about law reform
 - Advising/consulting
 - Technological development
 - Professional regulation issues

Scenario #1

You are an employment lawyer in Toronto's west end. A man in his early 70s walks into your office and explains that he was unfairly fired from his job as a telemarketer at a call center and wants to sue. You hear his story and learn that he was frequently demeaned and his manner of speaking was often mimicked by his former manager. He also briefly mentioned being forced to work on most statutory and religious holidays, and states that he was fired because he refused to work on one of these days.

1. What questions do you ask for more information?

Scenario #2

- You are a lawyer representing a client from a tight-knit community. Community members frequently give each other cash loans without maintaining much documentation at all. Money is almost always repaid, but once in a while there are issues. Your client is a community member who sought to deposit one of these cash loans, but came under suspicion by the bank who placed a hold on the funds and is requesting documentation. How do you proceed?

Scenario #3

You are a commercial litigator representing a large insurance company. Your client is the insurer for Mrs. C, a well-to-do Torontonion who was at fault in a car accident that injured Ms. G, a recent immigrant from Latin America who speaks limited English.

Ms. G sued Mrs. C, and your client was brought into the case because it refuses to pay under the relevant policy. The case involves complicated facts, questions of contractual interpretation and likely expert evidence re: Ms. G's injuries.

Ms. G is self-represented. How, if at all, should your approach change?

Scenario #3 (ctd...)

- *Girao v. Cunningham* (ONCA 2020)

VI. DISPOSITION

[175] At trial, the appellant functioned as a legally-untrained, self-represented, non-English speaking litigant in testifying, examining and cross-examining through a Spanish interpreter. She was faced with a phalanx of defence counsel, two representing Ms. Cunningham, and two representing Allstate Insurance Company of Canada. The trial was 20 days long, involved many witnesses, and considered complex medical evidence.

[176] Ms. Girao was entitled to but did not get the active assistance of the trial judge whose responsibility it was to ensure the fairness of the proceeding. As a self-represented litigant, she was also entitled to, but did not get, basic fairness from trial defence counsel as officers of the court. The trial judge was also entitled to seek and to be provided with the assistance of counsel as officers of the court, in the ways discussed above. This did not happen.

Questions?