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# “We Have Met the Enemy and He Is Us”\*: Why the Legal Profession Must Commit Itself to Health Equity

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**Thomas N. Shorter**, Husch Blackwell LLP | **Eduardo Castro**, Pines Bach LLP |

**Carrie Noonan**, Husch Blackwell LLP

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## Introduction

The COVID-19 pandemic has been a harrowing reminder of the stark health disparities that exist in the United States. Marginalized groups, such as Indigenous and Native American, Black, and Latino populations, are two to three times more likely to experience infection, hospitalization, and death due to COVID-19 compared to White populations.<sup>1</sup> The principle of health equity—and making it a reality—calls on our society to remedy the ill of these kinds of health disparities. Simply put, health equity is the aspiration that everyone should have “a fair and just opportunity to be as healthy as possible.”<sup>2</sup>

This begs the question: what does health equity have to do with lawyers? Certainly, worse outcomes due to COVID-19 for marginalized groups can be traced to inequitable distribution of health care resources, like increased barriers to testing and treatment and already existing higher rates of poor health.<sup>3</sup> But focusing solely on our health care system as the sole cause of unequal health outcomes misses the forest for the tree.

Members of more vulnerable socioeconomic groups also face a higher likelihood of exposure to COVID-19 due to working, living, and transportation situations.<sup>4</sup> One study found that individuals who worried about making ends meet were three times more likely to report the need to go to work, even if they were sick with COVID, which in turn, further spread the virus within workplace settings.<sup>5</sup>

What makes people sick cannot always be treated in a patient room. Health equity is informed by this understanding and recognizes that reducing, and ultimately eliminating, disparities in health outcomes requires “removing obstacles to health such as poverty, discrimination, and their consequences,

including powerlessness and lack of access to good jobs with fair pay, quality education and housing, safe environments, and health care.”<sup>6</sup> In fact, addressing these “social determinants of health” has come within the purview of health care delivery.<sup>7</sup>

Looking more closely at these societal factors reveals a more uncomfortable truth: it is attorneys who have enabled many of the social, economic, and/or environmental disadvantages that led to the unequal impact of the COVID-19 pandemic. It is the legal profession that permitted—and in some instances, *directly enabled*—marginalized communities to experience worse health outcomes.<sup>8</sup>

A reckoning is long overdue for how we, in our role as legal counsel, have contributed to the disparities in health outcomes that have plagued marginalized and underserved populations. With the COVID-19 pandemic, confronting and remedying the role of the legal profession in health inequities has become that much more urgent. The time is now for us, as attorneys, to accept our role in the current state of health inequities and commit ourselves to making health equity a reality for all.

While the numerous examples cannot be encapsulated in just one article, the role attorneys and policymakers played in creating and permitting racial residential segregation illustrates how attorneys have contributed to the societal factors that keep people sick. But attorneys can also be a force for good health. Indeed, law and public policy, which attorneys directly shape in their day-to-day practice, can also provide a pathway to good health for many. Whether in public or private spheres, in large firms or as solo practitioners, we can and must incorporate health equity work into our practices to ensure that everyone has a fair and just opportunity to be as healthy as possible.<sup>9</sup>

## The Law Has Perpetuated Health Inequalities in the United States

From codifying harmful stereotypes that contribute to discrimination, erecting barriers to employment and education, and limiting access to critical resources like health care and transportation, the legal community must confront how our own profession has enabled, perpetuated, and failed to address existing health inequities stemming from law and public policy.

### The Law, Public Policy, and Racial Segregation

As the COVID-19 pandemic demonstrates, location is a strong predictor of experience with the virus. Where one lives determines their access to the resources necessary to be healthy, such as quality health care, safe housing, living wage jobs, transportation, nutritious food, and green spaces to play and exercise.<sup>10</sup> Yet, for too many Black Americans, their communities have been deprived of these resources due to racial segregation, which has been driven by law and public policy.

Consider racial covenants. To ensure racial exclusivity in certain neighborhoods, attorneys drafted racially restrictive deed covenants that prohibited the conveyance of property to Blacks and other marginalized groups.<sup>11</sup> Racial covenants were held to be constitutional and enforced by courts until 1948. While this practice was eventually found unconstitutional in *Shelley v. Kraemer*,<sup>12</sup> the lasting consequences of racial covenants were hard to unravel and the racial boundaries of neighborhoods would be enforced through other means.<sup>13</sup> As the practice of racial covenants shows, the power and authority attorneys wield as practitioners of the law can create and exacerbate health inequity.

Residential segregation through private, legal methods was compounded by decisions made by lawmakers. During the New Deal in the 1930s, and with the creation of the Federal Housing Administration (FHA), the federal government began to insure private mortgages for homebuyers and lowered interest rates, which resulted in smaller down payments needed to purchase a house. <sup>14</sup> However, this opportunity was not available to everyone. The FHA "rated" neighborhoods based upon how many Black people lived in those areas and refused to back mortgages in those communities. <sup>15</sup> Additionally, the federal government-led expansion of the suburbs was often conditioned on preventing developers from selling new homes to Black people. Consequently, the Black community was locked out of one of the largest expansions of wealth in this country's history and barred from living in certain well-resourced neighborhoods, <sup>16</sup> all of which was directly and deliberately enabled by lawmakers.

It is important to acknowledge too, that the law and public policy often perpetuated and reinforced harmful stereotypes that lay at the root of discrimination against marginalized communities. <sup>17</sup> The FHA ranked neighborhoods and its willingness to insure mortgages based on perceived "stability," driven by the false belief that the presence of Black residents drove down property values. <sup>18</sup> Private lenders similarly refused to provide mortgages to Black homebuyers based upon this faulty premise. <sup>19</sup> As a result, the deterioration of these communities became self-fulfilling prophecies. Starved of affordable lending or FHA-backed mortgages, property value quickly dropped for the homes in these neighborhoods. <sup>20</sup>

Through "legal" means, such as enforcing racial covenants and policy decisions made by those in the halls of government and business, Black residents in these communities faced lower housing quality, higher concentrations of poverty, and less access to living wage jobs and education. Attorneys have often further worsened these conditions, protecting unscrupulous landlords or lead-paint manufacturers from improving housing conditions or escaping accountability. <sup>21</sup> Hiding behind the veil of ethical obligations to our clients or changing social mores is no excuse.

Now is the time to acknowledge the problems created by those actions and to balance the scales. Attorneys can do so through application of the same legal talents that were utilized in the past, but with an eye towards the need to undo the conditions that are causes of health inequities. <sup>22</sup> Health care lawyers are particularly well positioned to lead by example and highlight the path to address health inequities.

## How the Legal Community Can Commit Itself to Health Equity

As the history of racial segregation shows, the legal profession has been complicit in creating health inequity. Accordingly, we have a moral and ethical obligation to acknowledge and reverse the damage. <sup>23</sup> On this point, our health care counterparts provide a useful blueprint to begin accounting for the past. But the law is not simply a tool to remedy injustices of the past. The legal profession can create a healthier future for all individuals if it is willing to see the attainment of health equity as indispensable to what the law and attorneys should do.

## Medical–Legal Partnerships

Medical-legal partnerships (MLPs) are a shining example of how attorneys and medical professionals can work collaboratively to address social determinants of health. Too often, patients present in the health care setting with health-harming legal issues, like the patient with asthma dealing with a mold problem and negligent landlord, or the patient with diabetes who could afford to eat a healthier diet if his/her/their public assistance was not improperly denied. In the MLP model, health care providers are trained to detect and refer these patients to attorneys, often directly in the health care setting. <sup>24</sup> Attorneys are then able to address root causes of a patient's health problem with the proper legal intervention. Not surprisingly, MLPs have proven to be successful. There is strong evidence that MLPs improve health and well-being outcomes and move us closer to achieving health equity. <sup>25</sup>

More attorneys willing to offer their services to MLPs can greatly enhance the efficacy of this model. Most Rules of Professional Conduct encourage attorneys to commit to pro bono services. <sup>26</sup> However, "encouragement" is not enough; attorneys should see their pro bono practice as a duty inherent to the privilege of practicing law. <sup>27</sup> If attorneys are looking for ways to contribute to the movement for health equity, there are few better options than offering your services to a medical-legal partnership.

## Revise How We Pay for Health Care

Achieving health equity also requires a radical revisioning of how we pay for health care. Value-based payment models offer a unique opportunity to fund interventions aimed at addressing social determinants of health in the provision of care. <sup>28</sup> Here, we must abandon the stereotype that an attorney's job is to tell his/her/their clients what they cannot do and instead, advise them of the alternatives to achieving their goals through means that do not result in disadvantaging segments of society. Policymakers, with the assistance of creative counsel, must be innovative and bold in determining what should be considered "health care." For example, recent changes in Medicare Advantage allow for supplemental benefits to cover food, structural home modifications, and transportation. <sup>29</sup> Health care executives, working alongside attorneys who want to help our health care clients better serve their patient populations, must find creative ways to structure payment arrangements so that the health care system may begin to account for and, in turn, address social determinants of health. <sup>30</sup>

## Use Current Laws to Combat Discrimination

Similarly, attorneys and policymakers should aggressively wield the law to combat the kinds of discrimination that are the seeds of broader inequities. Often, these forms of discrimination result directly in marginalized groups being denied or receiving inadequate health care. One study found that racial and ethnic minorities received inferior health care, even when controlling for factors like insurance status, income, age, and severity of conditions. <sup>31</sup> In a more concrete and distressing example, people who are Black or Latino were more than twice as likely as non-Hispanic Whites to undergo amputations related to diabetes in California; the tragic consequence of diabetes taking hold in Black and Latino patients before they can access adequate care. <sup>32</sup>

Health care focused antidiscrimination laws and their enforcement by attorneys can be critical to combatting the harmful effects of discrimination. For example, the Affordable Care Act included Section 1557, which prohibits discrimination in health care on the basis of race, color, national origin, sex, age, or disability.<sup>33</sup> Many states also have enacted laws and regulations that require health care facilities to offer services for patients to overcome language barriers.<sup>34</sup> Antidiscrimination statutes, appropriately enforced by practicing attorneys, are an important tool to ensure that access is achieved by eliminating discriminatory conduct and practices. Further, volunteering at organizations that advocate for the disadvantaged and pursue health equity will help balance the scales.

## Increase Diversity, Equity, and Inclusion in the Legal Profession

Before attorneys can begin to address health equity, the profession must undertake a more fundamental transformation. Historically, marginalized groups have long been locked out of the legal ranks. The American Bar Association's (ABA) National Lawyer Population Survey found in 2017 that roughly 5 percent of active attorneys identify as Black or African American, and only 5 percent identified as Hispanic or Latino.<sup>35</sup> The legal profession must do more to increase diversity, equity, and inclusion.

Simply put, representation matters. On this front, it is useful to consider how our health care counterparts view increasing diversity in their executive leadership ranks. As one health care executive put it, "An institution that seeks to align [health care] leadership representation to the community they serve will be in a much better position to be successful in . . . engagement with population health management."<sup>36</sup>

The same is true in the legal context. It is hard to imagine how the problematic policies and legal advocacy that led to racial residential segregation and other societal inequities would have taken hold if members from those communities being harmed by these practices had been in the courtrooms and boardrooms. Increasing the diversity of the legal profession will not just make for a better legal profession<sup>37</sup>—it will also give voice to the lived experiences that too often are not accounted for when important policy and legal decisions are made.

In law schools and in all types of practice areas, the legal profession must do more to recruit and retain individuals from underrepresented groups. This requires each attorney and the organizations of which they are a part to dedicate time and resources towards 1) increasing funding for marginalized students so they can afford college and law school; 2) designating clerkships and programs for marginalized students; and 3) mentoring and advising those who are interested in becoming attorneys.<sup>38</sup> The legal profession cannot begin to address discrimination and bias if those most affected by these forces are not represented in the law.

Moreover, there have been admirable but incomplete efforts to incorporate antiracism work into the professional obligations required of attorneys. In 2018, the ABA modified Model Rule 8.4(g) of the Rules of Professional Conduct to define professional misconduct to include actions that discriminate or harass based on a protected status.<sup>39</sup> However, condemning discriminatory or prejudicial behavior is not enough. The roots of discrimination are already codified or entrenched in law and public policy; they can only be removed if both past and present discrimination are *affirmatively* addressed today and in the future.



Indeed, the health care profession has already committed itself to this kind of reckoning. In 2021, the American Medical Association (AMA), the nation's largest professional association of physicians, released its "Organizational Strategic Plan to Embed Racial Justice and Advance Health Equity."<sup>40</sup> There, the AMA explicitly stated that to achieve equity in the health care profession,

[Physicians] must excavate and re-examine our deep past so as not to make the same, or like, grave, tragic and deadly errors. This work is extensive, and [as physicians,] we remain committed to uncovering the harm done to marginalized groups . . . [W]e are working extensively to name and reconcile present day harms caused by AMA policies and actions.<sup>41</sup>

The legal profession must do the same. We as attorneys cannot move forward if we are not willing to confront the past harms that have been perpetuated in the past; we must ensure they are remedied and make certain they are not perpetrated again.

Accordingly, it is time for the ABA and local and state bar associations to commit to formally making diversity, inclusion, and anti-racism work part of our ethical and professional obligations.<sup>42</sup> If attorneys, their employers, and firms are unequivocally willing to address discrimination and create a more inclusive profession, the profession as a whole will be far more effective in addressing those forces in their fight for health equity. In its own efforts to create a more inclusive legal profession, the American Health Law Association<sup>43</sup> (AHLA) has and continues to offer content and resources that address the myriad issues related to health inequities. AHLA hosted a one-day virtual convener on April 12, 2021 where participants discussed all aspects of health disparities and equity in health care, social determinants of health, the impact of law on these issues, and what can be done to address these issues now and in the future.<sup>44</sup> In addition, since the summer of 2007, AHLA has hosted a law student of diverse background via a summer-long internship.

## Conclusion

As the history of racial segregation shows, the legal profession cannot escape the painful truth that attorneys own some of the blame for health inequities in the United States. We must nonetheless examine and acknowledge the role we have played and make sure it does not continue. The time is now for those in the legal profession to commit to ameliorating the consequences of these injustices. If we can bravely confront our past and look towards the future, members of the legal profession can ensure that every person has a fair and just opportunity to be as healthy as possible.

*\*A quotation by American naval officer Oliver Hazard Perry, popularized by cartoonist Walt Kelly in 1970.*

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## Author Profiles

**Thomas N. Shorter** is a partner with Husch Blackwell LLP, representing health care systems, hospitals, physicians' groups, and health care associations. Tom provides counsel on health care, corporate, labor and employment, and regulatory matters. Actively involved in numerous health care industry organizations, Tom has been called upon to serve as a member of the American Health Law Association Board of Directors and begins the term of President July 2022. Tom is a member, has earned the status

of Fellow, and is Past Chapter President and Regent with the American College of Healthcare Executives (ACHE). Tom is also a Board Member of the National Association of Latino Healthcare Executives (NALHE). In Tom's work for clients, he advocates for major health care organizations in sophisticated restructurings, mergers and acquisitions, affiliations, and joint ventures, among other corporate and employment matters. Tom also represents independent practitioners with establishing, maintaining, and growing their practices. Contact him via email at [tom.shorter@huschblackwell.com](mailto:tom.shorter@huschblackwell.com).

**Eduardo Castro** is an associate attorney at Pines Bach LLP in Madison, Wisconsin. As a member of the firm's Litigation Practice Group, Eduardo helps clients to successful outcomes in numerous areas, including health law, criminal defense, immigration law, civil and constitutional rights, environmental law, and political/election law. He represents and advises clients in state and federal litigation, arbitration and mediation, and in front of federal and state administrative bodies. Prior to becoming an attorney, Eduardo worked in a federally qualified community health center and for the Deputy Mayor of Health and Human Services for New York City. Contact him via email at [ecastro@pinesbach.com](mailto:ecastro@pinesbach.com).

**Carrie Noonan, MHA**, is Senior Healthcare Consultant for Husch Blackwell LLP. She has been instrumental in forming relationships with NAHSE and NALHE. In so doing, Carrie seeks out and cultivates programming and opportunities for HB-NAHSE and NALHE members to enhance their professional and client development. As AHLA liaison, Carrie's role has led to increased awareness and participation with the Association. Carrie also works closely with several initiatives within the Health, Life Sciences and Education Strategic Business Unit. Carrie guides these initiatives in strategic business development and fostering thought leadership. Carrie is passionate about health equity and proud of the work she and Husch Blackwell have done to address necessary improvements in our health care system. Contact her via email at [carrie.noonan@huschblackwell.com](mailto:carrie.noonan@huschblackwell.com).

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