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Chapter 39

Diversity & Inclusion

*by Shannon Thyme Klinger and Teresa T. Bonder**

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SUCCESSFUL PARTNERING

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§ 39:1 Scope note

*Inclusion is not a sprint. It is a long and hilly marathon. It is a journey. It is a challenge. There are steep hills, rocks, uneven surfaces, and fierce weather. It is not easy.*¹

We believe this refrain—and its guidance—continues to ring true. This Chapter, Diversity & Inclusion, provides pragmatic information to both in-house legal departments and law firms, irrespective of size, that can help them not only stay in the Diversity and Inclusion (D&I) marathon, but be competitive. As any experienced long-distance runner can attest, there are time-tested methods for avoiding burnout, injury, or dashed race-day expectations. In the same fashion, in the pages that follow, we identify the challenges that face anyone venturing into the D&I arena, while identifying practices for robust, sustained, and successful di-

[Section 39:1]

¹That was the refrain that E.I. du Pont de Nemours and Company (“DuPont”) used to report on the progress made by the members of its then-decades long Minority Counsel Network. *See* “DuPont’s Legal Network Makes Strides, 2012 Survey Full Report,” *Diversity & The Bar*, January/February 2012.

iversity programs that lift and include talented professionals within and outside the legal profession.

The D&I “landscape appears disturbingly familiar.”² While the business case for D&I in the legal profession is self-evident, the necessity of promoting D&I remains as strong as ever. Against this backdrop, this Chapter is organized around the following concepts: (1) the primary objectives and considerations for D&I programs,³ (2) the primary challenges and opportunities that D&I programs present,⁴ (3) approaches and practices for successful partnering between in-house and outside counsel,⁵ (4) the response to the Call to Action,⁶ (5) a practice checklist,⁷ and (6) illustrative forms for D&I programs.⁸

We are mindful that “diversity” remains an amorphous concept that means different things to different people; for that reason, diversity programs can be difficult to target, implement, monitor, measure, and sustain. This Chapter seeks to address the challenge by identifying different approaches for creating and implementing D&I programs and

²*See, e.g.*, John Lewis, Jr., *The Times, They Aren’t A-Changing*, InsideCounsel, Nov. 28, 2012, *available at* www.insidecounsel.com (“In my 20-plus years as part of the legal profession diversity dialogue, I have seen a lot of zigzagging. In big companies, law firms and law departments, diversity progress has been pyrrhic, erratic, fleeting and seasonal.”); *and* Sherry Williams, *Lawyer’s Lantern—To a Young Woman Lawyer . . .*, *Diversity & the Bar*, July/Aug. 2012 (“As I embark on my 18th year of practicing law, I marvel at how the legal profession has changed, and yet stayed the same”). *See also* Paul Hodkinson, *How Law Firms Overlook Diversity of Thought in Inclusion Efforts*, *American Lawyer* (Sept. 2019) (“Though great progress may be made regarding race, gender and sexual orientation, law firms are seemingly blind to a variety of diversity issues. . . . It is relatively easy to focus on specific quotas, but diversity is actually a far broader topic than race, gender and sexual orientation, and tackling those three areas should not be seen as a panacea to the problem.”), which may be found at <https://www.law.com/americanlawyer/2019/09/10/how-law-firms-overlook-diversity-of-thought-in-inclusion-effort/>.

³*See* §§ 39:5, 39:9 to 39:12, and 39:22 to 39:34.

⁴*See* §§ 39:8, 39:13 to 39:16.

⁵*See* §§ 39:31 and 39:40 to 39:44.

⁶*See* § 39:45.

⁷*See* § 39:46.

⁸*See* §§ 39:47 to 39:50.

providing insights into D&I from the perspective of a multinational corporation like Novartis.

The Sections that follow discuss workplace D&I in both tangible and intangible dimensions, offering a functional conception of D&I and what D&I should mean for in-house legal departments and outside law firms.⁹ We discuss the fundamental beliefs and values that should underpin any commitment to D&I;¹⁰ the basic components for any successful D&I program, regardless of whether the legal organization is in-house or external law firm; and how those respective organizations can partner to learn from and support each other.¹¹ We also elaborate on inclusion,¹² upon which the functional conception of D&I is based, and reaffirm the reality that there is not a single prescription—a single D&I program—that can be implemented across the board. Rather, the authors have identified relevant data points and provided pragmatic content that can assist any legal professional or D&I administrator to customize a program that best suits a specific legal organization's needs and challenges.

§ 39:2 Using this chapter and other resources

Each Section in this Chapter addresses specific aspects of the overall D&I topic and is intended to be self-contained. To avoid repetition, we cross-reference Sections so the reader may easily access content; we have also provided definitions for key terms in Section 39:3. In addition, we identify available sources and resources that supplement the information presented.

⁹At the level of conception and commitment, the components of a successful D&I program are the same for in-house legal departments and outside law firms. At the level of implementation, however, D&I can present some challenges, risks, and opportunities that differ between in-house legal departments and outside law firms, reflecting the fundamentally different positions of in-house and outside counsel vis-à-vis their respective clientele.

¹⁰See § 39:5.

¹¹See §§ 39:22 to 39:34 and 39:40 to 39:44.

¹²See § 39:5.

For those who may be uncomfortable that any focus on numbers is constitutionally problematic *per se*, both *Grutter* and *Gratz* should provide a considerable measure of relief. The Court made clear, even in striking down the undergraduate school's program in *Gratz*, that numerical "goals" are not inherently inconsistent with the Equal Protection Clause, even in the public sector and state-action contexts.

§ 39:7 The case for creating an organized D&I program

A successful D&I program requires intentionality and purpose. To optimize the likelihood that a legal organization will indeed cross the finish line of the D&I marathon, we have collected practical and proven techniques for the creation and implementation of a strategic D&I program. To that end, Sections 39:8 to 39:12 set forth the case for creating an organized D&I program. We address the benefits of D&I,¹ why D&I are best achieved with a strategy,² and how to achieve D&I³ both internally⁴ and externally.⁵

§ 39:8 The case for creating an organized D&I program—The benefits of D&I

We believe that driving D&I within the legal ecosystem is the right thing to do and a responsibility for each member of the legal profession. It also makes good business sense and contributes to consistently better outcomes for our clients. Promoting and maintaining D&I gives employees at all levels the confidence to be open about their experiences, their perspectives, and ultimately, who they are as people. This inclusive atmosphere furthers innovation, enhances business relationships, improves engagement and productivity,¹ and guarantees greater sustainability by attracting talent. Such

[Section 39:7]

¹See § 39:8.

²See § 39:9.

³See § 39:10.

⁴See § 39:11.

⁵See § 39:12.

[Section 39:8]

¹In 2015, MSCI Research published a frequently-cited study that

of the Me Too movement in late 2017. Commentators⁶ have described these suits as women's attempts to assert themselves as equals in the workplace after enduring decades of sexual discrimination and harassment.⁷

§ 39:17 The business case for diversity

No discussion of D&I in the legal profession is complete without setting forth the business case for diversity. In the Sections that follow we discuss the opportunities that successful D&I programs can provide to a legal organization,¹ the evolution and acceptance of D&I within the business community,² and the importance of management “buy-in” of the business case for D&I.³ Finally, we also acknowledge and discuss differing perspectives among diversity proponents regarding the value of the “business case.”⁴ Although the business case for D&I is (or should be) self-evident, the authors believe that a detailed discussion of the business case is imperative to arm D&I professionals with empirical data and current—not just historical—examples of varied initiatives by multinational corporations that recognize the strategic value of a diverse workforce.

⁶See Lauren Stiller Rikleen, *Gender-Discrimination Suits Against Law Firms Offer Plaintiffs a Voice* (The American Lawyer June 2019), which may be found at <https://www.law.com/americanlawyer/2019/06/12/gender-discrimination-suits-against-law-firms-offer-plaintiffs-a-voice/>. For additional commentary on the discrimination suits against Jones Day, Ogletree, and Dentons, See Law360's coverage at <https://www.law360.com/cases/5ca509a178da8946ed9e6928> (Jones Day); <https://www.law360.com/cases/5a5c944875e53b552a000002> (Ogletree); and <https://www.law360.com/cases/5ae7529b29ae536203000001> (Morrison & Foerster).

⁷See Lauren Stiller Rikleen, *Gender-Discrimination Suits Against Law Firms Offer Plaintiffs a Voice* (The American Lawyer June 2019), which may be found at <https://www.law.com/americanlawyer/2019/06/12/gender-discrimination-suits-against-law-firms-offer-plaintiffs-a-voice/>. For additional commentary on the discrimination suits against Jones Day, Ogletree, and Dentons, See Law360's coverage at <https://www.law360.com/cases/5ca509a178da8946ed9e6928> (Jones Day); <https://www.law360.com/cases/5a5c944875e53b552a000002> (Ogletree); and <https://www.law360.com/cases/5ae7529b29ae536203000001> (Morrison & Foerster).

[Section 39:17]

¹See § 39:18.

²See § 39:19.

³See § 39:20.

⁴See § 39:21.

§ 39:18 The business case for diversity—What opportunities does an emphasis on D&I provide?

Sections 39:13 to 39:16 of this Chapter discussed some of the challenges facing legal organizations as they embark on their D&I marathons. Despite the challenges, an emphasis on D&I provides legal organizations with certain opportunities, namely better talent and better outcomes.¹

Better talent. We believe that diverse firms are better able to recruit and retain top talent. (And we are not alone.)² Specifically, a focus on D&I allows law firms and in-house legal departments to tap into a wider and more diverse talent pool in the context of recruitment. And a genuine focus on D&I allows those firms and departments to retain the talent drawn from that wider pool.

Better outcomes. Research on large organizations shows that social diversity can positively impact a firm's bottom line. But why? Research on social diversity in small groups helps explain this phenomenon.³

Decades of social scientific research show that socially diverse groups are more adept at solving complex problems than homogeneous groups.⁴ This enhanced creativity stems from the fact that hearing a different perspective provokes more thoughtful discussion and problem-solving.⁵ And people work harder in a diverse group because they anticipate dif-

[Section 39:18]

¹See § 39:8.

²Numerous corporations now prominently announce their commitment to D&I, and often reference the business case for D&I, *e.g.* Sandoz (<https://www.sandoz.com/careers/diversity-inclusion>); Johnson & Johnson (<https://www.jnj.com/about-jnj/diversity>); McKinsey & Company (<https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>); Home Depot (<https://corporate.homedepot.com/responsibility/people/diversity-and-inclusion>); Walmart (<https://careers.walmart.com/diversity-inclusion>); and Apple (<https://www.apple.com/diversity/>), to name a few.

³See Scientific American, *How Diversity Makes us Smarter*, available at <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/> (discussing various studies on large, innovative organizations showing that those firms with diversity among its leadership correlates positively with financial performance).

⁴See Scientific American, *How Diversity Makes us Smarter*.

⁵See Scientific American, *How Diversity Makes us Smarter*.

the preparation of the legal work product, but also in the law firm's management."

On the other hand, Harvard Law School Professor David B. Wilkins, whose scholarly treatments of diversity in the legal profession have highlighted the awkward status of many minority partners in large corporate law firms,² has resisted the primacy that we ascribe to the business case. Professor Wilkins has been more interested in the broader social justice rationale for diversity, and he has been concerned that business case analyses may detract from that rationale. Even so, much of Professor Wilkins' observations resonate on multiple levels and implicate many of the issues we discuss in other Sections, such as the requisite context and baseline³ and the necessary constituent elements for implementing a robust and sustainable D&I program.⁴

§ 39:22 Aspects of a successful D&I program

As we've stated previously, there is no universal or "one size fits all" D&I strategy.¹ The best program and set of initiatives for *any particular legal organization* must reflect its personnel, its unique history and attributes, and its location on the spectrum of diversity awareness—*i.e.*, its diversity baseline.² One professional diversity commentator expressed this point quite well:

*People need to know how diversity affects their particular organization (and themselves as individuals) to be motivated to take action. * * * Fortunately, most companies have some core values and business needs already in place that help to lay a foundation upon which to build a successful diversity effort. * * * Your diversity effort will have maximum impact if you determine what specific diversity issues apply in your organiza-*

²*E.g.*, David B. Wilkins, From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar, 117 Harv. L. Rev. 1548 (2004); and David B. Wilkins, Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms, 2 J. Inst. for Study of Legal Ethics 15 (1999).

³See § 39:4.

⁴See, *e.g.*, §§ 39:22 to 39:34.

[Section 39:22]

¹See generally § 39:1.

²See § 39:4.

*tion's situation, and focus the effort on those issues and the related benefits. The more precisely you can identify your organization's specific needs and issues, and the more closely you can link your organization's goal with the diversity effort, the more likely you are to generate commitment and enthusiasm.*³

Accordingly, unless an organization has substantial internal D&I expertise, we strongly recommend that it consider engaging an experienced professional diversity consultant that can provide useful relevant exemplars and other materials that can be effective starting points for analysis and other planning for a program that is tailored for the organization.⁴

That said, certain D&I values are fundamental and relevant for virtually all legal organizations. In Sections 39:23 to 39:29 of this Chapter, we address specific components of a D&I program and specific elements of the implementation process that should serve as a helpful guide to key components of a successful D&I program.⁵

§ 39:23 Aspects of a successful D&I program—Obtain the commitment of senior leadership

D&I must be established and perceived as a value driven from the top levels of management, with the express intent that it permeates the entire organization. Without express authorization and manifest commitment by senior management, it is difficult (if not impossible) to introduce any significant change into an institutional culture. Senior management (whether it be the General Counsel or Chief Legal Officer of an in-house legal department or the managing attorney, executive committee, and practice group leaders of an outside law firm) must openly support and promote the organization's D&I commitment and make clear that all

³Tina Rasmussen, *The ASTD Trainers Source Book: Diversity* 9 (1996).

⁴See § 39:51 for a listing of well-regarded D&I consultants.

⁵These elements have been condensed into the included Checklist; see § 39:46.

§ 39:35 Technology

Sections 39:36 to 39:39 discuss the use of technology¹ for organizing a D&I program. Our coverage includes the intersection of technology and a successful D&I program,² using technology to balance legal sourcing and to assess the progress of a D&I program,³ and Big Data, Artificial Intelligence (AI), and Machine Learning (ML) risk and benefits in employment decisions.⁴

We believe that the use of technology in D&I programs, as in legal organizations themselves, will only become more prevalent with time. At the present, machine-decision making through AI a useful tool that can help to reduce unconscious bias from important hiring and promotion decisions. However, technology is just that—“a tool,” albeit an important one. Just as there is no single D&I program that can be implemented across the board, there is no single technology application that can guarantee the success of D&I initiative.

§ 39:36 Technology—The intersection of technology and a successful D&I program

Technology¹ can be used to assist in implementing D&I in several ways. Computerized databases and telecommunications technology greatly facilitate both gathering information about diversity issues from a variety of sources and communicating diversity messages to varied audiences, both within and outside the organization.

Within the organization, for example, special interest articles could be published on the intranet site (which can serve as a means of surveying issues of concern for various groups), and e-mail and other electronic tools can be used to communicate simultaneously with multiple office locations and obtain quick responses. Video conferencing can be used to create a greater feeling of connection among members of a

[Section 39:35]

¹*See generally* Chapter 28 “Technology” (§§ 28:1 et seq.).

²*See* § 39:36.

³*See* § 39:37.

⁴*See* § 39:38.

[Section 39:36]

¹*See generally* Chapter 28 “Technology” (§§ 28:1 et seq.).

data used to train a particular program has a large impact on the way the system operates in the future.⁸ Thus, if the training data contains some sort of bias to begin with, or if the computer scientist who created the system carried some form of unconscious bias, an AI system then incorporates that bias and can perpetuate the harmful effects of past prejudice.⁹ This problem is furthered by the fact that an AI system is usually a “black box,” meaning that people can see the outcome of the decision but not the reasoning that took place.¹⁰ One solution is to invest more in diversifying the AI field itself. A more diverse AI community would be better equipped to anticipate, review, and address potential bias and engage communities affected.

If an organization chooses to use AI and ML as part of its D&I initiative, it should safeguard against inadvertently undermining the organization’s diversity goals by ensuring transparency, providing explanations, and guaranteeing, to the extent possible, that the models being used were designed with diversity and fairness in mind.¹¹ Even if the organization uses AI in ways that seem irrelevant to employment and diversity, it is crucial to evaluate the potential effects that any use could have on D&I.

§ 39:40 Partnering

D&I applies equally to in-house and outside counsel organizations. At any particular point in time, in-house and outside counsel may be engaged in identical initiatives to implement their respective programs, while facing similar obstacles and challenges. As a result, there are opportunities to share experiences and strategies and to participate in a

⁸Shlomit Yanisky-Ravid and Sean K. Hallisey, “Equality and Privacy by Design”: A New Model of Artificial Intelligence Data Transparency Via Auditing, Certification, and Safe Harbor Regimes, 46 Fordham Urb. L.J. 428 (April 2019).

⁹Shlomit Yanisky-Ravid and Sean K. Hallisey, “Equality and Privacy by Design”: A New Model of Artificial Intelligence Data Transparency Via Auditing, Certification, and Safe Harbor Regimes.

¹⁰Shlomit Yanisky-Ravid and Sean K. Hallisey, “Equality and Privacy by Design”: A New Model of Artificial Intelligence Data Transparency Via Auditing, Certification, and Safe Harbor Regimes.

¹¹Shlomit Yanisky-Ravid and Sean K. Hallisey, “Equality and Privacy by Design”: A New Model of Artificial Intelligence Data Transparency Via Auditing, Certification, and Safe Harbor Regimes.

formal benchmarking process.¹ Such collaboration inures to the institutional benefit of each respective legal organization and ultimately benefits members of both organizations.

We believe, and discuss more directly in Sections 39:17 to 39:21, that the best way for in-house and outside counsel to partner to promote D&I objectives is through the business case for diversity. In fact, we believe that, particularly for large law firms, the most effective business case for diversity is *derivative* from the commitments to D&I manifested by in-house counsel and other executives who decide which outside counsel to engage.

We turn first in Section 39:41 to the importance of the business case for diversity within outside law firms.

§ 39:41 Partnering—Driving the business case with outside counsel

The achievement of real D&I within large law firms should mean a significant number of diverse partners at such firms, with a fair number of them engaged in firm leadership and management and participating at the highest levels in the rewards systems at the firms. But very few diverse lawyers advance to become partners in firms, and it is the rare diverse partner who ascends to the highest levels of responsibility, compensation, or prominence within most large firms.¹

The fundamental difficulty and problem, we believe, is the perceived absence of tangible business incentives for large law firms to make diversity real. Adopting a D&I policy or values statement is relatively easy for a law firm to do, similar to hiring larger numbers of young diverse lawyers. At the end of the day, however, most large firms make the crit-

[Section 39:40]

¹See §§ 39:4 and 39:32. See generally Chapter 30 “Benchmarking” (§§ 30:1 et seq.).

[Section 39:41]

¹Corporate law departments have done notably better, by comparison to law firms, although the former’s results still leave much to be desired. See generally Catalyst, Catalyst Quick Take: Women in Law in the U.S. (2013), available at www.catalyst.org; Minority Corporate Counsel Association, 2013 Fortune 1000 Minority General Counsel Survey, Diversity & the Bar, Sept./Dec. 2013, available at www.mcca.com; Elisabeth Frater, A Call to Action Continues: General Counsel Still Leading the Way, Diversity & the Bar 42 (2007) (Special Commemorative Issue).

tion, national origin, religion, and without regard to disability.”¹⁰

In their 2019 D&I Statement, 65 General Counsel of major European companies signed a commitment to promote D&I in their workplaces and in the legal industry as a whole. And law departments are taking serious steps to honor these commitments.¹¹

In our humble opinion, these statements and developments confirm that the conversation around diverse attorneys—as it reflects the reality of a connected-world—has become broader and is no longer limited exclusively to discussions regarding race and gender. At the same time, however, they also confirm that a lot of work remains to be done in the D&I landscape among legal organizations. At its core, the call to action timeline confirms what we said at the outset—a guiding principle that has steered the observations and lessons herein:

*Inclusion is not a sprint. It is a long and hilly marathon. It is a journey. It is a challenge. There are steep hills, rocks, uneven surfaces, and fierce weather. It is not easy.*¹²

§ 39:46 Practice checklist

1. ***Informed and Committed Leadership:*** Understand and be able to explain the legal organization’s reasons for its D&I commitment. (See §§ 39:4 and 39:7) Senior management must be fully and manifestly on-board with the D&I initiatives. (See § 39:20) At a minimum, management must have accepted the business case for diversity. (See §§ 39:17 to 39:20)
2. ***Understand Your Values & Goals:*** The organization should define the D&I values it wants to support (for which our definition of D&I can provide the starting point) and the level of goals the organization will pursue with respect to those values. (See §§ 39:4, 39:5 and 39:7)
3. ***Create a Diversity Lead/Team:*** Senior management

¹⁰GCs for Law Firm Diversity’s Open Letter (2019).

¹¹See § 39:12 for discussion of Novartis’ commitment to D&I in selecting outside counsel.

¹²See “DuPont’s Legal Network Makes Strides, 2012 Survey Full Report” *Diversity & The Bar*, January/February 2012 and § 39:1.

should carefully select the individuals who will comprise the “D&I Team” to lead and manage the organization’s D&I efforts. D&I Team members should be representative of diverse groups within the organization. The members of the D&I Team should be (and should be perceived as being) influential and respected within the organization, and capable of influencing change. (See § 39:24)

4. **Know Your Starting Point:** The D&I Team should assess the “diversity baseline” of the organization as a basis for developing the overall D&I program as well as for measuring progress within the workplace. (See §§ 39:3 and 39:4)
5. **Integrate D&I Objectives with Business Plan:** The legal organization should create an integrated plan for commencing, coordinating and promoting D&I initiatives that support and enhance the organization’s bottom line and business objectives. (See §§ 39:4, 39:7 and 39:9)
6. **Measure & Evaluate:** Benchmarking provides a thorough process for developing and adopting best practices, which entails gathering, analyzing, and leveraging data to establish a basis by which to define meaningful D&I goals and measure their attainment. (See §§ 39:31 to 39:33)
7. **Communicate & Celebrate:** Frequent communications from the D&I Team to the organization at large is necessary to sustain organization-wide “ownership” of the D&I program. We encourage D&I leaders to communicate D&I accomplishments, the impact of D&I efforts and return on investment (See §§ 39:7 and 39:34)
8. **Increase Awareness & Education:** Diversity training and education within legal organizations are critical components of any successful D&I program. (See §§ 39:4 and 39:25)
9. **Develop a Talent Retention Strategy:** Training, mentoring, and promotion are crucial to attracting and retaining diverse professionals. (See §§ 39:7, 39:8 and 39:26 to 39:30) In-house counsel and outside counsel should, indeed must, develop meaningful opportunities to assist and support each other. (See §§ 39:40 to 39:44)

10. ***Expect the Unexpected:*** It is not a cliché to recognize that pursuing meaningful and sustainable D&I is a marathon, not a sprint. (See §§ 39:1, 39:4, 39:9 and 39:33) Any successful D&I program should be flexible and nimble enough to address new challenges and new opportunities. (See §§ 39:8, 39:9, and 39:33) Achieving meaningful D&I results is a process that evolves over time, not a single, intractable goal. (See §§ 39:1, 39:4, 39:9, and 39:22)

§ 39:47 Illustrative forms

A compilation of practical and useful information, including mission statements,¹ benchmarking surveys,² and planning session talking points³ are provided in the next Sections to facilitate discussion and implementation of D&I initiatives within legal organizations of any size. These forms are provided as examples of what has worked for and is currently being used by D&I professionals. They should be amended and tailored to fit the needs of each particular legal organization.

We also include a listing of professional diversity consultants⁴ that may be invaluable resources to legal organizations in the D&I context. This non-exhaustive list of sources is provided as a convenience and for informational purposes only; it does not constitute an endorsement or an approval by the authors.

§ 39:48 Illustrative forms—D&I mission, values, and policy statements

The approaches taken by legal organizations to express their respective commitments to D&I in formal written statements or communications (intended for public consumption) have evolved and proliferated over the years. There are almost as many approaches as there are such organizations. As a result, there is no universal best form or approach to crafting statements, as we discuss in Section 39:1.

[Section 39:47]

¹See § 39:48.

²See § 39:49.

³See § 39:50.

⁴See § 39:51.