



SAME Small Business COI Webinar:
The Ultimate Challenge:
The 8(a) Program After the Presumption of
Disadvantage Strike Down

September 13, 2023
12:00 p.m. ET

HOUSEKEEPING NOTES & TIPS

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Submit a written question at any time via the “Q&A” tab. “Like” questions already asked to avoid duplication but indicate you also want an answer to that!

Click on the “Handouts” tab to download a copy of the presentation slides.

This webinar will be recorded for future viewing.

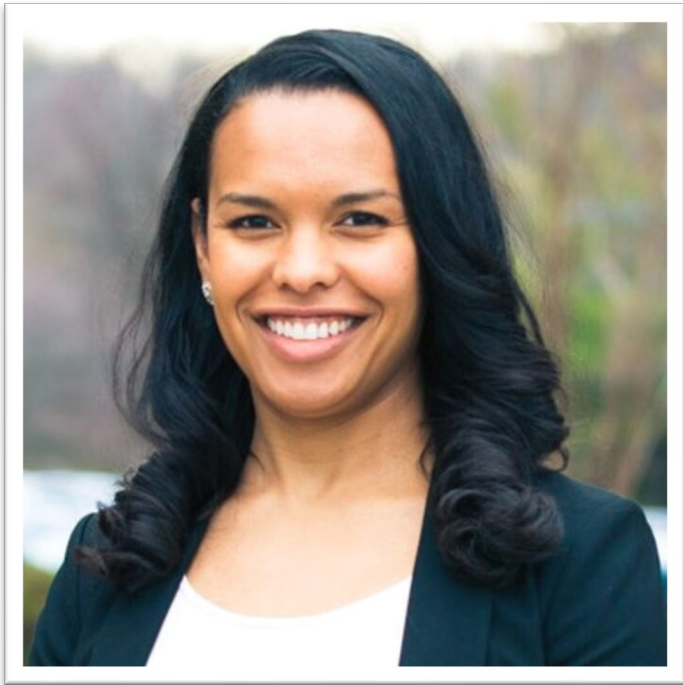
POLL QUESTION

Let's see who is on this webinar...who do you represent?

- a) Active-Duty Military
- b) Civilian at Government Agency
- c) Small Business (less than 100 emp.)
- d) Medium Business (101-2,000 emp.)
- e) Large Business (2,001 + emp.)
- f) Academic institution / Non-Profit
- g) Retired



Sally Clark, CPSM, SB COI Chair, Vice President, AFG Group, Inc.



- A classically trained violinist who started playing at age 5, and still gigs
- Fierce Scrabble and Duckpin Bowling competitor
- The biggest (and loudest) sports mom for my 6 & 8 year-old boys

Matthew Moriarty, Member, Schoonover & Moriarty



- Before becoming an attorney, Matt was a small-town newspaper reporter
- Matt's three pets are named Snoop, Bubbles, and Kima
- Matt's dream is to retire young and run an Irish pub that nobody comes to and loses money

Overview

- History of challenges to the 8(a) program
- The *Ultima* case
- The SBA response
- Crafting a Social Disadvantage Narrative

History of the 8(a) program



- 1958 – Section 8(a) of the Small Business Act gave the SBA authority to give subcontracts to small businesses
- 1978 – Congress amended the Small Business Act to allow SBA to subcontract to “socially and economically disadvantaged small business concerns”
 - Socially disadvantaged defined by statute: “Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”
 - Congressional findings led to the first presumed disadvantaged groups
 - Black Americans
 - Hispanic Americans
 - Native Americans
 - “Other minorities”

The Social Disadvantage Presumption

- SBA regulations provided a way for SBA to add individuals presumed to be disadvantaged by regulation
- Those initially presumed disadvantaged:
 - Black Americans
 - Hispanic Americans
 - Native Americans (including Eskimos, Aleuts, and Native Hawaiians)
 - Asian Pacific Americans
 - Subcontinent Asian Americans

The Social Disadvantage Presumption pre *Ultima*

- Had been the backbone of the 8(a) program
- 13 C.F.R. § 124.103(b)(1) provides that the following individuals are presumed disadvantaged:
 - Black Americans
 - Hispanic Americans
 - Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe)
 - Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru)
 - Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal)



Challenges to the 8(a) program

1999 – *Rothe Dev. Corp. v. U.S. Dept. of Defense*

Venue: Federal District Court in Texas

Argument: The statute was an unconstitutional violation of the Fifth Amendment
Ruling: “a thorough examination of the statutory scheme at issue and its application to the contract at issue reveals no illegitimate purpose, no racial prejudice, and no racial stereotyping. Rather, the program is designed to address a societal ill that has been identified by Congress on the basis of extensive evidence, and the program is narrowly tailored to that purpose.”



Equal Protection



- The Fifth Amendment – no person may be “deprived of life, liberty, or property, without due process of law.”
- This “due process” clause carries within it, the Fourteenth Amendment’s prohibition against denying anyone the “equal protection of the laws.”
- The Supreme Court has held that racial classifications are subject to “strict scrutiny”

Challenges to the 8(a) program – continued

- 2016 – *Rothe Dev. Inc. v. United States Department of Defense*
 - Venue: D.C. Circuit Court of Appeals
 - Argument: The challenger asserted the statute contained an unconstitutional racial classification
 - The court noted that the case did not challenge the regulations and therefore it could not rule on their constitutionality



Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.

- 2023 Supreme Court affirmative action decision
- 6-2 decision sort of – Justice Jackson recused herself from the Harvard part
- Students must be admitted based on their experiences as an individual – not on the basis of race
- Racially conscious government programs must have a “logical end point”



Ultima Servs. Corp. v. U.S. Department of Agriculture



- Question: Whether the 5th Amendment's guarantee of equal protection allows the SBA regulations to use a rebuttable presumption of disadvantage
- Plaintiff: Ultima Services Corp. – not entitled to presumption – owner is a white woman
- Venue: Tennessee Eastern District
- Argument: Ultima argued that use of the rebuttable presumption discriminated against it on the basis of race
- Standard: Strict Scrutiny applied
- Result: SBA enjoined from using the rebuttable presumption
- Next: SBA can appeal by Sept. 17

POLL QUESTION

Do you want the SBA to appeal?

- a) Yes, I think the case was wrongly decided
- b) Yes, I think the case was rightly decided but want the SBA to fight anyway
- c) No, I think the writing is on the wall
- d) No, I worry that an appeal might jeopardize the entire program



Ultima Fallout

- 8(a)s admitted based on presumption must affirmatively establish social disadvantage
 - Includes entities that are individually owned by Native Americans (including Alaska Natives, Native Hawaiians, or enrolled members of a federally or state-recognized Indian tribe) if they relied on the presumption
 - If the company can't establish social disadvantage, the SBA will tell the agency to give the work to another 8(a)
 - Does not include concerns owned by tribes, ANCs, and NHOs
 - Includes JVs
- Working on a revised process for establishing social disadvantage that will not rely on the rebuttable presumption of social disadvantage
- Until the new process is in place, SBA will use the old process for companies that did not use the presumption



Ultima Fallout – continued

- The SBA does not believe the injunction applies to 8(a) contracts awarded prior to July 19, 2023 so no new social disadvantage opinion required for
 - Options
 - In-scope modifications
- No new applications to the 8(a) program
 - Unless owned by Indian tribes, ANCs, NHOs, and CDCs.
- No final decision on pending applications relying on rebuttable presumption



Awards post-*Ultima*



- Sole source awards: SBA will verify disadvantage when accepting sole source award
- Competitive awards: the agency must ask SBA to verify social disadvantage
- If a previously awarded contract requires SBA acceptance, the SBA will verify disadvantage
 - 8(a) sole source order against 8(a) MAC or GWAC
 - Discretionary 8(a) task order competitively awarded in a non-8(a) MAC
 - Call orders placed against BPAs or Basic Ordering Agreements
- Entities only have to demonstrate social disadvantage once

Demonstrating Disadvantage

- Present evidence of a distinguishing feature (race or ethnic origin)
- Explain specific experiences of disadvantage
- Disadvantage must be
 - Chronic
 - Substantial
 - Occurred in American society
- Must have negatively impacted the person's entry into or advancement in business
 - Remember that this is a business development program
- Evidentiary standard: Preponderance



POLL QUESTION

Have you submitted a narrative of disadvantage?

- a) No, don't have to
- b) No, but do have to
- c) Yes, waiting on approval
- d) Yes, approved
- e) Yes, denied



How to write a Social Disadvantage Narrative, the SBA Way



- “Generally, narratives a sufficient at a length of 3 pages”
- Key elements
 1. What identity or identities are the basis of disadvantage
 2. Description of incidents of bias or discrimination

Descriptions of Incidents

What are they looking for?



Structure

- SBA says some broad types of experiences may be generally categorized as
 - Education
 - Employment
 - Business History

Detailing Specific Incidents

- When
 - Exact dates are preferred
 - Specific time period is enough
 - Can be from any time of life
 - Does not need to be ongoing
- Where – Must have occurred in “American society”
- Who
 - Individual
 - Group
 - Institution
 - Names are preferred but not necessary
 - Good: A vice president at Bank of America
 - Bad: A supervisor
- What – The conduct
- Why
 - The reason(s) that it was motivated by bias or discrimination
 - A mere assertion is not enough
- How
 - How incident impacted entry or advancement business
 - “Offensive comments or conduct, while reprehensible, will not support a claim of social disadvantage if there is no negative impact associated with the incident”



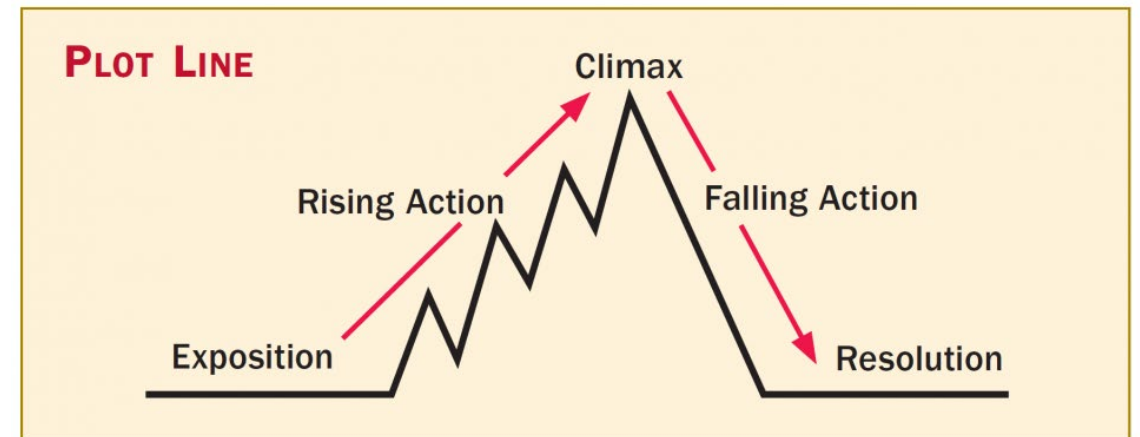
How to write a Social Disadvantage Narrative the Schoonover & Moriarty Way



- Three pages is not enough
- Narrative format
 - Autobiographical
 - The overall structure of education -> employment -> business history is chronological
- Tell a story!
 - Elements of a story
 - Characters
 - Chapters
 - Plot

Plot

- All social disadvantage narratives have the same plot:
- Your struggle to succeed in business given your disadvantage
 - Rising action: overcoming challenges to become a business owner
 - Falling action: challenges as a business owner
 - Resolution: admission into the 8(a) program
- This is how you show chronic and substantial disadvantage



Structure



- Three parts
 - SBA:
 - Education
 - Employment
 - Business History
 - Us:
 - Growing up
 - Learning your trade
 - Founding and growing your business
- Within each part, each incident is a chapter

Characters

- Protagonist: You!
- Antagonist: Anyone trying to stop you
- Possible characters per part
 - Education/growing up: parents, teachers, guidance counselors, college professors
 - Employment/learning trade: bosses, managers, co-workers, recruiters
 - Business history: bankers, trade groups, politicians



Details, Details, Details

- What time of year was it and how do you know?
 - Leaves on ground?
 - Snow?
 - Heatwave?
- Song on the radio?
- Wearing your favorite sweater?



The Biggest Mistake

- ✓ Remember to park the car.
- ✓ A narrative that fails to explain how the incident impacted business will not succeed.
- ✓ Keep your audience in mind.



Dig Deep

- This is not the time to be shy.
- This is not the time to spare feelings.
- Interrogate your past.



Last Thing: Ask for Help

- Get a lawyer.
- Work with a consultant.
- Lean on your support group:
 - Spouse
 - Partners
 - Mentors
 - Respected competitors.





Q&A AND FEEDBACK

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Final Reminders

- A copy of the webinar slides are available to download under the “Handouts” tab.
- A recording of this Webinar will be available on SAME’s Big Marker channel within 2 days.
<https://www.bigmarker.com/communities/same/conferences>
- A PDH certificate for this webinar will be emailed to attendees within 2 days.

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www.samesbc.org

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