

Chapter 4: The Pro-Diversity Position

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Part II: Diversity in the Legal Practice: What Law Firms Say and What They Do

My interest in human groups underlies my fascination with why some attorneys get the best jobs and others don't. In legal recruiting, I determine an attorney's traits and characteristics and try to match them up with firms that will benefit from that individual's unique strengths and abilities. I believe everyone has something to contribute if given a chance.

Yet, sometimes, no matter how loudly we sing the praises of a particular candidate, firms resist hiring that person. I wanted to know why. It seems legal hiring falls back on entrenched patterns, and those patterns are based on current business realities, which in turn are shaped by societal beliefs and values, which ultimately are influenced by the powerholders in society.

A diversity gap exists in law firms. What firms say about supporting diversity differs from what they do about diversity in practice. Yet, simply making observations about the diversity gap stirs controversy and inflames people on all sides. There are specific reasons people get so upset when we try to talk about racism, sexism, and other perceived unfair employment practices just as there are reasons why firms resist diversity efforts. I believe there is a way to reconcile the current realities of the legal business climate with diversity goals so that all attorneys can find jobs and law firms can realize the benefits of a diverse workforce.

Chapter 4: The Pro-Diversity Position

According to the *Washington Post*, diversity is good for business and good for the world: companies that emphasize diversity are worth more, earn higher returns, and have better financial outcomes; scientific research conducted by diverse teams is higher quality; and academic papers written by diverse group authors have higher impact and make greater contributions to science.^[1]

In their 2017 Business Performance Benchmark Study, Altify--the self-proclaimed "global leader in sales transformation"--found that diversity pays off: "70 percent of respondents believe that a diversity policy has impact on the business performance of their organization, and the results suggest that they are right. Companies with a positive track record in diversity have 50 percent better customer retention and 17 percent shorter sales cycles."^[2]

Diversity is one of the most popular and important issues in the current legal environment. You can scarcely pick up a legal periodical without seeing numerous articles related to diversity. When I go out and meet with law firms to discuss their hiring needs, just about every firm launches into a long discussion about how interested they are in diversity and how important it is to them.

I could be sitting in west Texas with a couple of white, overweight partners wearing cowboy hats, leather suit jackets, and hypnotic, shiny belt buckles and one will tell me: "Get me some diversity in here!" and another attorney will slam his hand on the table and exclaim "Yes, siree!"

It does not matter who you talk to. The demand for diversity is the same in rural Alabama as it is in New York City. Diversity is something that law firms take seriously and want more of.

It seems like diversity and inclusion managers and committees have popped up all over the place and are now part of the infrastructure of big law firms. These people understand the diversity gap in law firms and go to work each day to combat it. They may not have solved the problem yet, but they are working hard on it.

And for good reason.

Many corporate clients survey prospective law firms asking about the type of diversity program the firms have in place. These large companies, which are usually represented by in-house counsel, want to know how many women and minorities work in a firm that would represent them. If a company believes a law firm is diverse, the firm stands a better chance of getting hired. If the law firm is not diverse, it might not only lose out on a new client but also lose some of its existing clients.

Diversity in the law firm setting typically means differences in race, ethnicity, gender, and sexual orientation. It is often measured at the associate and partner levels. Diversity in this context does not refer to age differences or diversity within the staff ranks--people only seem concerned with diversity when it comes to attorneys.

There are two classes of arguments for diversity:

The social arguments for diversity focus on the fairness of diversity and that having more diversity can promote fairness and redress past discrimination. These arguments also focus on the fact that the employee population in businesses should reflect the composition of the overall population.[3]

The business arguments for diversity focus on the business sense of diversity and the idea that having more diversity increases the amount of business firms are qualified for, assists with recruiting, increases the amount of business that law firms get, and assists law firms in reaching better business decisions.[4]

The Social Arguments for Diversity

Diversity is the right thing to do. Many tenets of moral behavior support this assertion.

Diversity is beneficial from a moral perspective. Originally, in the U.S. Constitution, "we the people" did not refer to Native Americans, white women, and certainly not African Americans. Many people believe the negative aspects and legacies of American history need to be redressed. Although white males in power have extended equality to women, black people, LGBTQ people, and other people of color, vestiges of past wrongs linger. Many proponents of diversity believe we should be leveling the playing field to redress past acts of discrimination.[5] For hundreds of years, many groups were denied employment in corporations, law firms, and other establishments.[6] The United States has a legacy of racial, economic, political, and social division.

During what is called the "golden age" of law firms, in the 1950s and 1960s, the top law firms screened applicants on the basis of their race, religion, gender, and socioeconomic background. One 1964 book, *Wall Street Lawyer*, noted, "They want lawyers who are Nordic, have pleasing personalities and 'clean-cut' appearances, are graduates of the 'right' schools, have the 'right' social background and experience in the affairs of the world, and are endowed with tremendous stamina." [7]

There is little doubt that law firms were formerly institutions that excluded women and minorities. The moral argument for including them now is that law firms should make up for past wrongs.[8]

Diversity improves the morale of staff and attorneys in a firm. If an attorney looks around and sees a lot of

diversity in the firm, that attorney can believe that the firm represents the public at large, and this improves how the attorney feels.^[9] Attorneys who are diverse want to see other diverse attorneys in their firms. Having a highly diverse staff working with diverse attorneys also is likely to improve morale because the cultural divide between attorneys and staff is diminished.^[10]

High morale leads to employee job satisfaction, which in turn motivates employees to put in more effort, become creative, take initiative, be "committed to the organization," and focus "on achieving organizational goals rather than personal goals."^[11] According to one journal:

The argument is that the overall morale of the organization will increase and improve the more diversity that there is. Increased morale will make an employee happier and more productive, and higher productivity will lead to higher performance and increased customer satisfaction. Customer satisfaction is important because it enhances customer retention and ultimately leads to profitability in a company.^[12]

Additionally, on the wish list of many associates is the opportunity to "identify with the compassionate values of the firm as demonstrated by pro bono commitments, training programs, employee diversity, reasonable billable hours, and part time and family leave policies."^[13] Thus, a law firm with employee diversity fulfills one of the wishes that increases associate satisfaction and thus improves morale.

Diversity promotes proportional representation of diverse attorneys. According to the U.S. Census Bureau, as of July 1, 2016, approximately 24 percent of Americans were people of color, and by 2044, it is projected that the majority of the U.S. population will be people of color.^[14] However, despite these numbers, only 15.3 percent of associates are attorneys of color, and only 8.8 percent of partners are attorneys of color inside major law firms.^[15] Many argue that law firms should include the same percentage of minority attorneys as there are minority attorneys in the population.

Major law firms have largely utilized the same basic business model for over fifty years, which initially explicitly discriminated against certain demographic groups (including attorneys of color) in favor of white attorneys. This overt practice began to wane in the 1970s.^[16] By 1980, 3.6 percent of associates were of a minority group, and by 1990, 6.5 percent of associates were of a minority group.^[17] In a 2016 report, the National Association for Law Placement (NALP) stated that minorities made up 22 percent of associates at law firms.^[18] However, despite the appearance of a sharp increase, because the percentage of Americans who are not white is 39.7 percent,^[19] a large discrepancy in representation in law firms as compared to in society continues.

The attorney labor pool is becoming far more diverse than it was when many partners graduated from law school.^[20] The percentage of diverse attorneys graduating from law schools is increasing. The number of minority students attending law school has more than tripled since the 1970s; however, at many top schools, such as Harvard and Columbia, the percentage of minority students is still below 9 percent.^[21] Given this, it makes sense that individuals who seek law firm services would rather see a firm-wide representation similar to what they see in their town or city as a whole. People want to see a variety of races and genders representative of their own lives.

Law firms do not yet approach the demographic outlook of the country.^[22] "A diverse law firm is a better reflection of the general population, which in turn helps make the firm more relatable to the public as an agent of the client. Working with relatable attorneys and staff could be the difference between winning and losing a case."^[23] Diversification of staff may lead to greater capability in areas of outreach, networking, and client retention.

Diversity helps rectify imbalances resulting from admissions policies in law schools. Countless barriers make it more difficult for people of color to succeed in the legal field. One is gaining admission to top law schools.^[24] Yet the selectivity of top-tier law schools does not preclude the fact that attorneys who attended lower-ranked law schools can and will succeed in the legal profession. Law firms can help remedy imbalances in law school admissions by hiring more diverse attorneys from lesser-ranked law schools. "If law firms care too much about recruiting at only the top 20 schools, they miss some highly qualified and exceptional candidates at the other 160 American Bar Association-accredited law schools."^[25]

Diversity alleviates institutional problems related to retention of women and minorities. Many argue that institutional problems make it difficult for women and minorities to succeed once they are hired at law firms. These problems stem mostly from preconceptions and negative stereotypes about diverse attorneys and their ability and loyalty. Acting on these preconceptions results in treatment of diverse attorneys that decreases their chances of staying long term, which reinforces the negative stereotypes about them and perpetuates an environment that seems unwelcoming to diverse attorneys. Hiring more diverse attorneys provides firms the opportunity to remove institutional barriers to their success.

The Business Arguments for Diversity

Many factors add up to the fact that diversity helps law firms improve their bottom line.

Large Clients Demand Diversity

Numerous large clients have made it a point to require the firms they work with diversify their staff.^[26] The last thing a law firm needs is to appear biased to large corporate clients that strive for equal company representation among their employees or wealthy individuals for whom diversity holds overwhelming social implications.

The "Diversity in the Workplace Statement of Principle," BellSouth-led project to encourage and support diversity in the workplace developed in the fall of 1998, established an expectation that law firms that represent large companies will promote diversity in-house. The Statement of Principle articulates the following: "We expect the law firms which represent our companies to work actively to promote diversity within their work-place. In making our respective decisions concerning selection of outside counsel, we will give significant weight to a firm's commitment and progress in the area."^[27]

In 2016, the chief legal officers at twenty-four *Fortune* 1000 companies emailed a letter to their in-house colleagues at other *Fortune* 1000 companies asking them to support ABA Resolution 113,^[28] which "urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys and urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys."^[29]

According to Diversity Lab, which creates and experiments with innovative ways to close the gender gap and boost diversity in law firms, some of the nation's top law firm clients such as Facebook, AT&T, Bank of America, and NBC Universal have made diversity requirements mandatory for any and all outside vendors these companies deal business with, including law firms.^[30]

Facebook, for instance, requires that any outside counsel have no less than 33 percent women and ethnic minorities on staff.^[31] Bristol-Myers Squibb established a year-long mentoring program between legal department lawyers and diverse lawyers from four of the company's outside law firms. When a firm attorney completes the mentorship, that attorney is provided with executive coaching and guaranteed work on at least one Bristol-Myers Squibb legal issue during the year.^[32]

Other large American companies have demanded their outside counsel become more diverse:

Coca-Cola: Beginning in 2007, the Coca-Cola Legal Division has bestowed the Living the Values Award on the law firm that best demonstrates its commitment to diversity with creative and innovative solutions that advance company goals. Solutions may include strides in hiring, retention, and promotion of diverse lawyers, initiatives that add value to internal efforts, creative partnering arrangements with minority- and women-owned firms, and pipeline/community outreach initiatives.

Engage Excellence: The legal departments of DuPont, General Mills, Verizon, and Walmartcofounded this program in 2014 in which a portion of their legal spending is afforded to hire ethnically diverse or LGBT lawyers to serve as lead counsel on select matters. Those companies also require that diverse teams work on their outside legal matters and that "the law firms...certify that the diverse lead lawyer hired receives financial credit as originator of the matter."

GE Capital Americas (GECA): Every two years, GECA general counsels recommend diverse outside counsel, mostly diverse non-equity partners and associates from GECA-approved firms, participate in their Project HOLA program. Chosen outside lawyers are paired with in-house lawyers who volunteer to participate. The outside counsel have the opportunity to gain an insider view of GE's businesses and its legal team.

Home Depot: In an annual RFP to outside firms, the company requests diversity information, including explanation of how firms put diversity first. It evaluates whether firms look at diverse slates when filling positions, whether firms ensure that Home Depot is introduced to diverse attorneys when deciding how to staff company matters, whether firms expose the company to the full range of their talent, whether firms promote diverse lawyers, and whether firms generally support the company's efforts to work with diverse suppliers. To the extent outside firms use local counsel, court reporters, and other vendors, Home Depot expects firms to be mindful of the need to look broadly to bring in the best talent.

HP Inc.: In February 2017, Kim Rivera, HP's chief legal officer and general counsel, articulated the company's decision to withhold legal fees from law firms that do not meet diversity staffing requirements. HP requires its outside law firms to retain at least one diverse relationship partner or at least one woman and one racially diverse attorney who each perform at least 10 percent of the billable hours worked on HP matters.

Macy's: The department store sets diversity objectives for each outside firm and reduces bonuses and opportunity for future work for failure to meet diversity goals.

Mansfield Rule: The Mansfield Rule, named after the first woman admitted to a U.S. Bar, "asks law firms to consider women and minority lawyers for at least 30% of their candidate pool for leadership and governance roles, equity partner promotions, and lateral hiring." The rule is supported by more than fifty legal departments.

MetLife: Outside counsel must "make sure that the junior diverse talent has sponsorship among the senior lawyers and that they get the best coaching and nurturing they can provide." MetLife also requires at least one lawyer on each of the company's outside legal teams is a minority or female lawyer. In support of these efforts, MetLife requires outside law firms to create formal plans for promoting and retaining diverse lawyers.

Microsoft: Microsoft offers 2 percent bonuses on the prior year's fees to its premier provider firms if they meet diversity goals. Additional bonuses are on the table for firms that hit other benchmarks, such as partner and management committee diversity, diversity of relationship partners, and diversity of partners who billed for Microsoft matters as reflected in the number of hours. Over the seven years since rolling out this program, Microsoft has increased the diversity of its outside counsel teams by more than 15 percent.

Morgan Stanley: Annually, Morgan Stanley bestows a leadership award for diversity and inclusion on one of its outside law firms to promote continuous growth in that area. In an April 2017 *New York Times* article, the company's chief legal officer, Eric Grossman, stated, "We put a lot of weight not just on the diverse and female attorneys who work on Morgan Stanley matters, but also on how many diverse lawyers they have in the firm and the depth of their sponsorship programs they have to promote overall diversity."^[33]

Walmart: In 2015, Walmart developed and launched Walmart Ready, an onboarding program designed to educate women and diverse outside counsel about Walmart's business, legal operations, and corporate culture, while affording them an opportunity to connect and network with in-house lawyers. Within a few months of its launch, more than 25 percent of the firms that participated had received a legal assignment. The company held the second Walmart Ready event in September 2016.

Xcel Energy: In 2017, the company began scoring and ranking its outside firms on factors such as demonstrated commitment to diversity and inclusion. Xcel Energy also assesses whether diverse lawyers at its firms have access to meaningful opportunities and allows the firms it employs or may employ access to these statistics. The company believes that being ranked against their peers motivates firms' lawyers to take the steps needed to progress toward diversity goals.

Diversity Is Monitored by External Publications and Observers

Publications such as the *American Lawyer* and *Vault* routinely publish lists