

DIVERSITY AND INCLUSION AND IN-HOUSE AND LAW FIRM MANAGEMENT

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This article provides an overview of the importance of law firms making the business case for diversity and inclusion to increase diversity of its attorney ranks as well as increase a law firm's profits.

Making the Case: How Diversity and Inclusion Can Improve Your Firm's Financial Outlook

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ABOUT THE COMMITTEES

The Diversity and Inclusion Committee is charged with actively increasing the involvement and participation of diverse attorneys in the organization through membership strategies and professional programming that recognizes the strength and benefits of inclusion and diversity in the practice of law. For these purposes, diverse attorneys include lawyers from groups of people who are underrepresented in the IADC's membership. Learn more about the Committee at www.iadclaw.org.

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The In-House and Law Firm Management Committee educates IADC members on the latest trends and developments pertaining to the “business of law,” so as to allow in-house legal departments and law firms to establish best practices for providing excellent legal service in a cost-efficient, effective, and responsive manner. They serve as a resource for IADC members, leadership, and staff on strategies for managing law firms and in-house legal departments in a manner that enhances client service and business relations; as well as improving economic value and profitability; marketing and business development; leadership succession and planning; and culture, diversity, and ethics. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The benefits of having a diverse workplace are well-established and it is agreed in the world of business that lack of diversity can have a negative effect on a company's bottom line, as well as negative social consequences for society's future. The legal profession, however, has not taken full advantage of the business benefits of diversity and inclusion. Law firm leaders are, among other things, focused on the financial health of the firm but also, the best leaders are constantly evolving to develop the best business models to serve the firm's clients, the firm's owners and the firm's employees. There is no doubt that increasing the representation of women and diverse lawyers in a law firm will enhance business as more clients factor in diversity when choosing outside counsel. The business case for diversity makes not only good business sense, but "Diversity . . . is essential to prosperity in the global economy."¹ This article will focus on the evolution of diversity and inclusion in the workplace as well as

explore the benefits of focusing on the business case for diversity and inclusion in law firms.

The paradigm of diversity initiatives has evolved over the past 40 years. In the 1960s, once a number of civil rights laws were passed, workplace diversity issues were driven by concerns about compliance with the new civil rights laws.² Indeed, these new laws forced employers to look at their hiring practices and consider whether opportunities existed for all members of society.³ After companies began complying with the various civil rights laws and regulations that focused on diversifying the workplace, the rationale behind diversity changed as corporations began implementing diversity initiatives. The reasoning was that attracting and maintaining a diverse workforce was simply the right thing to do for their employees and business from a moral standpoint.⁴ The more recent evolution of the diversity and

¹ David B. Wilkins, Symposium: Brown At Fifty: 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, 1553 (March 2004).
² See 42 U.S.C. 2000e, Title VII of the Civil Rights Act of 1964, as amended, ("Title VII"); 29 U.S.C. 621, The Age Discrimination in Employment Act.
³ See, e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) (holding that comparisons of an

employer's workforce to the racial and ethnic composition of the area population are admissible and probative of a pattern or practice of discrimination).
⁴ See Kelli A. Green, Mayra López, Allen Wysocki, and Karl Kepner, Diversity in the Workplace: Benefits Challenges, and the Required Managerial Tools, citing Richard Koonce, Redefining Diversity: It's Not Just The Right Thing To Do; It Also Makes Good Business Sense, Training and Development, December 2001).

inclusion paradigm has shifted from morality based to the business case. The business case suggests that diversity improves a law firm's financial performance, and that law firms that are not diverse suffer reputational damage and have higher employee turnover, both of which affect the bottom line of a law firm.⁵

Likewise, the conversation surrounding the business case for diversity in law firms is shifting. The shift is from discussing whether there are internal issues to implementing strategies to determine how to increase the number of women and diverse attorneys in law firms. This shift, essentially a switch from discussing past moral failings toward a discussion about revenue growth, without surprise, is often more palatable among a law firm's most entrepreneurial thinkers. But, regardless of the motivation for a law firm seeking to obtain a diverse and inclusive workforce, forward thinking firms today must have a strategic plan to make the

business case for successfully diversifying their ranks.

When addressing the business case for diversity and inclusion, law firms would do well to focus on the following three areas:

Talent

The business case for diversity in law firms requires an understanding of how to attract the best legal talent in the marketplace. The largest percentage of law school graduates is now female and a larger percentage of diverse students are graduating from law school.⁶ Further, our society is becoming more and more diverse on a daily basis. The business case for diversity thus means that law firms must hire and consider the strategic use of women and diverse attorneys in litigation. Indeed, there can be a clear strategic advantage to having a trial team that consists of diverse attorneys since jury pools are more diverse today than they have ever been.⁷ Thus, in a gender

⁵ See, e.g., Luis Diaz & Patrick Dunican, Ending the Revolving Door Syndrome in Law, 41 Seton Hall L. Rev. 947, 949 (2011) (stating that "recent empirical research showing that the racial and gender diversity of corporate clients is positively associated with increased sales revenue, more customers, greater market share, and higher relative profits."), citing Cedric Herring, Does Diversity Pay?: Race, Gender, and the Business Case for Diversity, 74 Am. Soc. Rev. 208, 208 (2009).

⁶ See A Current Glance at Women in the Law, American Bar Association Section of Legal Education and Admissions to the Bar at https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf (last visited October 27, 2017) (noting that 51.3 percent of law students are female).

⁷ See Erin Geiger Smith, The Job Market's So Bad, People Are Begging For Jury Duty, at <http://www.businessinsider.com/the-job-market-really-is-bad-people-are-begging-for-jury-duty-2009-11> (noting that a New

discrimination suit, there may be a distinct advantage in having a woman be the lead litigator defending a corporation as opposed to having a male lead counsel because doing so may make the corporation's position more relatable.⁸ Law firm management, however, must be aware that the use of women and diverse attorneys could be tantamount to exploitation depending on how these attorneys are used.⁹ Therefore, to the extent that there is a strategic purpose for using a woman or a diverse attorney in litigation, law firms must be careful to staff matters so that diverse attorneys are an integral part of the team rather than used solely because of their diverse background as "window dressing."¹⁰

Client Relationships

The business case for diversity and inclusion also relates directly to law firm marketing and business development. The legal profession is a relationship driven business.¹¹ Selection of counsel is often determined by how comfortable someone feels with another person, although some companies such as Yahoo are also using legal analytics to select outside counsel.¹² So, business developed by the relationship of one of the diverse lawyers within your law firm with clients can increase the number of business opportunities for the law firm. Therefore, when corporations are looking for outside counsel, having a diverse workforce is an advantage because two

⁸ York State Court judge recognized that "jury pools are more diverse right now." See Maria L.H. Lewis and DeMaris E., The Role of Diverse and Women Attorneys in Employment Law at

<http://www.law.com/thelegalintelligencer/almlID/1202659153246/?slreturn=20170928114639> (last visited October 25, 2017) (

explaining that "it is not uncommon for clients or firms to place a woman attorney on the defense team for a sexual harassment case with a female plaintiff.")

⁹ Steven A. Ramirez, The New Cultural Diversity And Title VII, 6 Mich. J. Race & L. 127, 128, fn. 3, quoting R. Roosevelt Thomas, From Affirmative Action to Affirming Diversity, Harv. Bus. Rev., Mar.-Apr. 1990, at 107, 112 ("Managing diversity ... means enabling every member of your workforce to perform to his or her potential. It means getting from your employees everything they have to give.").

¹⁰ Id. (noting that "pigeonholed attorneys likely will miss out on opportunities to

develop their practice and lawyering skills, as well as grow stronger relationships with the firm's clients.")

¹¹ The Business Case for Diversity 2011: Reality or Wishful Thinking?, published by the Institute for Inclusion in the Legal Profession, at

<http://www.theiilp.com/resources/Documents/IILPBusinessCaseforDiversity.pdf> (last

visited October 27, 2017) (explaining that major corporations have terminated their relationships with firms that showed a "lack of meaningful interest in being diverse.")

¹² See Owen Byrd and Kevin Kramer, Legal Analytics Transform Law Department Patent Activity, at

<https://lexmachina.com/wp-content/uploads/2013/10/ACC-Docket-Legal-Analytics-Article-March2015.pdf>

("Companies can use legal analytics, [such as litigation data, billing data, internal data and other third-party data] to select and manage outside counsel, craft successful case strategy and drive results.")

attorneys of similar backgrounds are able to network and communicate with each other.

¹³ This means that when law firms send out client pitch teams to obtain new business, the law firm will increase its chances of retaining business by having a diverse workforce because “in-house legal departments feature greater flexibility, diversity, and equality.”¹⁴

Further, corporate clients today are demanding that law firms have respectable diversity statistics in order to win business. Earlier this year, Hewlett Packard announced that it will “withhold up to 10 percent of bills from firms that do not meet or exceed HP’s diverse staffing requirements,”¹⁵ and Facebook’s legal department now requires that outside counsel teams working directly on a matter be 33 percent composed of women and ethnic minorities.¹⁶ The message is clear. Corporations are expecting law firms to make real efforts to diversify their workforce and as such, law firms will

need to ensure that they are taking steps to make sure their teams are diverse in order to remain competitive in the legal marketplace. Requests for business proposals from government agencies and private companies almost always include a section requesting diversity information about the firm, and often the request clearly states that firms without any diversity will not be highly considered.

Further, as noted above, corporations are expecting that women and diverse attorneys are actually doing the work and/or getting financial credit for business development. In the past, many law firms were doing a “bait and switch” and sending diverse attorneys on marketing pitches but not allowing those attorneys to actually work on the files. Therefore, law firms must also be cognizant that if they do obtain work from companies that expect certain diversity initiatives to be met, that they allow diverse attorneys to have a significant role working on the case.

¹³ See Thomas Threlkeld, Measuring The Progress Of Nation’s Legal Leaders, , DIVERSITY & THE BAR (September/October 2012) (recognizing the increase of women and diverse General Counsel at Fortune 500 and other companies).

¹⁴ Eli Wald, Symposium: The Changing Role And Nature Of In-House And General Counsel: In-House Myths, 2012 Wis. L. Rev. 407, 408 (2012).

¹⁵ See Legal Department (aka Clients) Efforts Designed to Drive Outside Counsel Diversity, at <http://www.diversitylab.com/knowledge->

[sharing/clients-push-for-diversity/](http://www.diversitylab.com/knowledge-sharing/clients-push-for-diversity/) (last visited October 27, 2017) “HP s that “to avoid this potential fee cut, firms must have at least one diverse firm relationship partner or at least one woman and one racially/ethnically diverse lawyer, each performing or managing at least 10% of the billable hours worked on HP matters.”

¹⁶ Id. (“As of 2017, Facebook requires outside counsel to field teams with at least 33% women and ethnic minorities *and* show they are actively creating “clear and measurable leadership opportunities for women and minorities.”)

Be Different

The business case for diversity also means that law firms can stand out as a leader from the pack of lawyers seeking work from corporations. In particular, law firms have to find a way to differentiate themselves from the global law firms that are seeking work from major corporations. One such way to create a distinction is to ensure that your firm is making tremendous efforts toward diversifying its workforce. By making and showing significant efforts toward obtaining a diverse workforce, law firms open themselves up to better opportunities to attract business and in turn, increase the profitability of the firm. As noted by Merck General Counsel Kenneth Frasier, “We are in the fortunate position of having many highly capable law firms lining up to work with us. And it was hard in some ways to differentiate among these firms. But we found that diversity was something that would allow us to make that differentiation.” It is clear therefore that having strong diversity and inclusion initiatives is a way for a law firm to stand out from other firms and attract more significant business in the long run.

Conclusion

Building a diverse and inclusive workplace continues to be a paramount priority for most law firms. To be successful, law firms must be very open and honest in their discussions about diversity and inclusion, and discuss these issues in a way that pushes

the ball forward.. Law firms must make diversity and inclusion a core value of the firm, and recognize that by not improving their diversity and inclusion initiatives, they are leaving dollars on the table and will be a much less profitable enterprise and quite obsolete in the future business landscape.

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