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## **A Few Thoughts on Tackling the Issue of Diversity and Inclusiveness in Law Firms**

**By Cyrus Mehri and Danielle E. Davis<sup>1</sup>**

### **Introduction**

After almost a decade of steady growth, the percentage of diverse lawyers in major law firms is declining. Recent studies reveal that women and minority lawyers are leaving law firms at higher rates than non-diverse lawyers.<sup>2</sup> *The American Lawyer's* 2010 Diversity ScoreCard, which counts attorneys of color in the U.S. offices of approximately 200 big law firms, also revealed a drop in the number of minority lawyers

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<sup>2</sup> Press Release, NALP, *Law Firm Diversity Among Associates Erodes in 2010* (November 4, 2010), [available at http://www.nalp.org/uploads/PressReleases/10NALPWomenMinoritiesPressRel.pdf](http://www.nalp.org/uploads/PressReleases/10NALPWomenMinoritiesPressRel.pdf) [hereinafter *Diversity Erodes*]; see also Appendix, at 1,3.

working in law firms in 2009.<sup>3</sup> This decline in representation is not good news to the legal profession – a profession in which minority representation is about 9.7 percent, compared to 24.6 percent among physicians and surgeons, 20.8 percent among accountants and auditors, and 18.2 percent among college and university professors.<sup>4</sup> These trends are causing increasing alarm among leaders of the bar.

While the overall representation of female and minority lawyers at major law firms is disappointing, the number of African-American, Hispanic and Asian partners at major law firms is shockingly low. Current efforts to address the situation have fallen short of hopes and expectations.

We have been asked to share our experiences from other business settings that might advance reforms in the law firm environment. In this article we survey the data that shows the depth of the problem at major law firms, touch on some reforms that have been successful in other settings, and examine solutions that might be most promising in the law firm setting.

### **Women Associates and Associates of Color**

Minority representation in the legal profession is significantly lower than in most other professions. Recent studies reveal that women and minority lawyers are leaving law firms at higher rates than non-diverse lawyers. In November 2010, the National Association for Law Placement (“NALP”) reported that the overall representation of women and minority lawyers in law firms declined between 2009 and 2010, for the first time since NALP started compiling this information in the 1990s.<sup>5</sup> Every year, NALP collects diversity data from the 1,400 offices and law firms represented in its National Directory of Legal Employers (“NDLE”). In 2010, racial minorities accounted for 19.53 percent of associates in the nation’s major law firms, down from 19.67 percent in 2009.<sup>6</sup> Almost 16 percent of law firms have no minority associates, and about 25 percent of offices reported no minority women associates.<sup>7</sup>

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<sup>3</sup> Emily Barker, *Diversity Scorecard 2010: One Step Back*, The American Lawyer, March 2010, available at

<http://amlawdaily.typepad.com/amlawdaily/2010/03/onestepback.html>.

<sup>4</sup> 2000 U.S. Census.

<sup>5</sup> *Diversity Erodes*, *supra*, note 2.

<sup>6</sup> NALP, *A Closer Look at NALP Findings on Women and Minorities in Law Firms by Race and Ethnicity*, NALP Bulletin, January 2011, available at [http://www.nalp.org/jan2011wom\\_min?s=article](http://www.nalp.org/jan2011wom_min?s=article) [hereinafter *Closer Look*]; Press Release, NALP, Law Firm Diversity Demographics Show Little Change, Despite Economic Downturn: Representation in Some Markets Declines While Others Show Small Gains (October 21, 2009), available at <http://www.nalp.org/uploads/PressReleases/09NALPWomenMinoritiesRel.pdf>; see also Appendix, at 2-4.

<sup>7</sup> *Closer Look*, *supra*, note 6.

NALP's 2010 analysis of the 2010-2011 NDLE<sup>8</sup> reveals that the overall decline in minority representation occurred primarily among African-Americans,<sup>9</sup> and to a lesser extent, Hispanics.<sup>10</sup> The percentage of African-American associates declined from 4.66 percent in 2009 to 4.36 percent in 2010; for Hispanic associates, the percentages declined from 3.89 percent to 3.81 percent.<sup>11</sup> In contrast, the percentage of Asian associates increased from 9.28 percent to 9.39 percent.<sup>12</sup> Asians account for almost half of all minority associates at the national level.<sup>13</sup>

This problem was exacerbated by the massive lawyer layoffs during the 2008-2009 recession. While the nation's economic conditions have affected most firms, lawyers of color have been disproportionately impacted. Lawyers of color represented approximately 1,300 of the 5,834 layoffs between September 30, 2008, and September 30, 2009.<sup>14</sup> While lawyers of color accounted for only 13.9 percent of the lawyers in these firms, they accounted for 22 percent of the layoffs.<sup>15</sup> As a result of these lawyer layoffs, the percentage of African-American lawyers in the nation's major law firms dropped by 13 percent; Asian-American lawyers dropped by nine percent; and Hispanic lawyers dropped by nine percent.<sup>16</sup> Overall, this represents a 9 percent drop in minority lawyers in big law firms compared to a 6 percent drop overall of all lawyers.<sup>17</sup> The drop in minority lawyers continues due to reduced minority recruiting, fewer minority law school graduates, and continued layoffs.

In 2010, women made up 31 percent of all lawyers nationwide.<sup>18</sup> Recent findings from the NALP NDLE reveal that, just under one-third of lawyers at the nation's major law firms are women.<sup>19</sup> This number dropped from 32.97 percent in 2009 to 32.69

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<sup>8</sup> The 2010-2011 NDLE includes attorney race/ethnicity and gender information for just over 129,000 partners, associates, and other lawyers in 1,400 offices, and for over 5,400 summer associates in over 785 offices nationwide.

<sup>9</sup> For further discussion on the long-standing problem of very few African-Americans working in the nation's major law firms, see David B. Wilkins, *Why Are There So Few Black Lawyers in Corporate Law Firms?*, 84 Calif. L. Rev. 493 (1996).

<sup>10</sup> *Closer Look*, *supra*, note 6.

<sup>11</sup> *Closer Look*, *supra*, note 6.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Brent L. Henry and E. Macey Russell, *Developing Great Minority Lawyers for the Next Generation*, Association of Corporate Counsel Docket, at 27 (July/August 2010), available at [http://www.thebostonlawyersgroup.com/pdf/Developing\\_Great\\_Minority\\_Lawyers\\_for\\_the\\_next\\_Generation.pdf](http://www.thebostonlawyersgroup.com/pdf/Developing_Great_Minority_Lawyers_for_the_next_Generation.pdf).

<sup>15</sup> *Id.*

<sup>16</sup> Barker, *supra*, note 3.

<sup>17</sup> *Id.*

<sup>18</sup> American Bar Association, Commission on Women in the Profession, *A Current Glance at Women in the Law 2011*, January 2011, available at [http://www.americanbar.org/content/dam/aba/uncategorized/2011/cwp\\_current\\_glance\\_statistics\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/cwp_current_glance_statistics_2011.authcheckdam.pdf).

<sup>19</sup> *Diversity Erodes*, *supra*, note 2.

percent in 2010.<sup>20</sup> Women of color account for about 6 percent of lawyers at these firms – 6.20 percent in 2010, compared with 6.33 percent in 2009.<sup>21</sup> In 2010, women accounted for 45.41 percent of all associates in the nation’s major law firms.<sup>22</sup> However, women of color accounted for only 10.90 percent of all associates, down from 11.02 percent in 2009.<sup>23</sup> African-American women accounted for 2.75 percent of all associates, Hispanic women accounted for 1.94 percent, and Asian women accounted for 5.15 percent.<sup>24</sup>

The candidate pool – as reflected by the representation of law school graduates – substantially surpasses associate representation statistics. Over the past decade, the number of J.D. degrees awarded to women and students of color has increased. In 1999, American Bar Association (“ABA”) approved law schools awarded 39,072 J.D. degrees.<sup>25</sup> Women comprised 17,516 or 44.8 percent of all graduates.<sup>26</sup> Minorities comprised 7,532 or 19.3 percent of all graduates.<sup>27</sup> In 2009, ABA approved law schools awarded 44,004 J.D. degrees.<sup>28</sup> Women comprised 20,191 or 45.9 percent of all graduates, and minorities comprised 9,725 or 22.1 percent of all graduates.<sup>29</sup>

### **The Lack of Women Lawyers and Lawyers of Color at the Partner Level**

Recent findings from the NALP NDLE also reveal that, nationally, women and minorities continue to be underrepresented in the partnership ranks. NALP’s 2010 analysis of the 2010-2011 NDLE showed only marginal progress from 1993 to 2010 in the number of women and minority partners. In 1993, minorities accounted for 2.55 percent of partners in the nation’s major law firms and women accounted for 12.27 percent of partners in these firms. In 2010, minorities accounted for 6.16 percent of the partners in these firms and women accounted for 19.43 percent.<sup>30</sup>

However, the fact that just over 6 percent of partners in the nation’s major law firms are minorities does not mean that minorities make up 6 percent of partners at each of the 1,400 offices and firms represented in the 2010-2011 NDLE.<sup>31</sup> In fact, about

<sup>20</sup> *Diversity Erodes, supra*, note 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Closer Look, supra*, note 6.; Press Release, NALP, Law Firm Diversity Demographics Show Little Change, Despite Economic Downturn: Representation in Some Markets Declines While Others Show Small Gains (October 21, 2009), available at <http://www.nalp.org/uploads/PressReleases/09NALPWomenMinoritiesRel.pdf>.

<sup>24</sup> *Closer Look, supra*, note 6.

<sup>25</sup> American Bar Association, Legal Education Statistics from ABA-Approved Law Schools, available at [http://www.americanbar.org/groups/legal\\_education/resources/statistics.html](http://www.americanbar.org/groups/legal_education/resources/statistics.html).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> NALP, *Women and Minorities in Law Firms by Race and Ethnicity*, NALP Bulletin, January 2010, available at [http://www.nalp.org/race\\_ethn\\_jan2010](http://www.nalp.org/race_ethn_jan2010) [hereinafter *Women and Minorities*].

<sup>31</sup> *Closer Look, supra*, note 6.

30 percent of the firms reported no minority partners, and 57 percent reported no minority women partners.<sup>32</sup>

In 2010, African-Americans accounted for 1.70 percent of all partners in the nation's major law firms, Hispanics accounted for 1.70 percent, and Asians accounted for 2.30 percent.<sup>33</sup> NALP, however, does not collect data on equity partners versus non-equity partners. Therefore, the number of equity partners of color is likely to be dramatically lower. Although women make up nearly 1 out of every 2 law firm associates, they make up only 15 percent of equity partners.<sup>34</sup> This number is essentially unchanged in the past five years – despite the commitment expressed by law firms to advance women lawyers.<sup>35</sup>

Women of color continue to be the most dramatically underrepresented group at the partnership level, even more so than minority men, who accounted for just 4.21 percent of partners in 2010. In 2010, women of color represented just 1.95 percent of all partners in the nation's major law firms.<sup>36</sup> African-American women accounted for 0.56 percent of all partners, Hispanic women accounted for 0.44 percent, and Asian women accounted for 0.81 percent.<sup>37</sup> Women of color who are partners, let alone equity partners, are scarce.

### **The Effects of Subtle Discrimination in the Modern Workplace**

While considering this problem among law firms, it is critical for the reader to understand how discrimination operates in modern day workplaces. Social science reveals that modern-day forms of discrimination have taken a different, more subtle form. Traditional “first generation” overt discrimination took the form of name-calling, threats, overt exclusion proudly confessed by violators, and segregation.<sup>38</sup> As first generation discrimination has declined, subtler and more complex forms of discrimination (the “second generation”) remain.<sup>39</sup> One Circuit Court explained this phenomena particularly well:

<sup>32</sup> *Closer Look, supra, note 6.*

<sup>33</sup> *Id.*

<sup>34</sup> National Association of Women Lawyers and The NAWL Foundation, *Report of the Fifth Annual National Survey on Retention and Promotion of Women in Law Firms* (October 2010), available at

[http://nawl.timberlakepublishing.com/files/NAWL%202010%20Final\(1\).pdf](http://nawl.timberlakepublishing.com/files/NAWL%202010%20Final(1).pdf).

<sup>35</sup> *Id.*

<sup>36</sup> *Women and Minorities, supra, note 30.*

<sup>37</sup> *Closer Look, supra, note 6.*

<sup>38</sup> Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 478 (2001).

<sup>39</sup> Joseph M. Stauffer and Ronald Buckley, *The Existence and Nature of Racial Bias in Supervisory Ratings*, 90 Journal of Applied Psychology 3, 586–591 (2005); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 746-48 (2005); Sturm, *supra*, note 38, at 468; Ann C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 Cornell J.L. & Pub. Pol'y 415, 418 (2000); Pamela J. Hinds, et al., *Choosing Work Group Members: Balancing Similarity, Competence, and Familiarity*, 81 Organizational

Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior.<sup>40</sup>

Second generation bias frequently takes the form of favoritism or subtle racial aversion. Often these biases are unstated and unrecognized and operate outside of conscious awareness.<sup>41</sup> Although social scientists refer to them as hidden, cognitive, or automatic biases, they are nonetheless pervasive and powerful.<sup>42</sup> Research has shown that people remember more positive information about and behave more helpfully to in-group members.<sup>43</sup> These attitudes and beliefs affect people's judgments and behavior in ways that can intensify discriminatory effects. Partners at law firms are not immune from this phenomena.

One commentator explains that "even before having any interaction with a particular individual, background assumptions will influence how a decisionmaker perceives a job candidate. A white candidate may be viewed as more charismatic, thoughtful, collegial, or articulate than an African-American candidate, not because the white candidate in fact possesses those higher qualifications, but because of the decisionmaker's preexisting assumptions."<sup>44</sup> Stereotypes operate as cognitive shortcuts

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Behavior and Human Decision Processes 2, 226–251 (2000) (finding that when selecting future group members people are biased toward others of the same race); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1164 (1995) (unconscious bias is "today's most prevalent type of discrimination"); Kurt Kraiger and Kevin J. Ford, *A Meta-analysis of Rater Race Effects in Performance Ratings*, 70 Journal of Applied Psychology 1, 56-65 (1985).

<sup>40</sup> *Aman v. Cort Furniture Rental Co.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996).

<sup>41</sup> U.S. District Court Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 150, 152 (2010).

<sup>42</sup> *Id.*

<sup>43</sup> Samuel L. Gaertner, et al., *Aversive Racism: Bias without Intention*, in *Handbook of Employment Discrimination Research* 377, 386 (L.B. Nielsen and R.L. Nelson eds., 2005) (internal citations omitted); Alexandra Kalev, et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 Am. Soc. Rev. 593 (2006) (in group preference may contaminate managerial judgment).

<sup>44</sup> Hart, *supra*, note 39, at 746; see also Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 322-25 (1987); McGinley, *supra*, note 39, at 432-34.

that shape how information is perceived, processed, and retained.<sup>45</sup> They “influence how incoming information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from memory. In other words, stereotypes cause discrimination by biasing how we process information about other people.”<sup>46</sup> While sometimes hard to see, these more subtle forms of discrimination are nonetheless pernicious and have devastating consequences for highly talented and hard working women and minorities seeking advancement in the business world. Therefore, many legal scholars have thus urged the legal system to take better account of subtle forms of bias.<sup>47</sup> It is also a key topic in business schools.<sup>48</sup>

Research provides concrete examples of how stereotyping can result in employment disparities. For example, one study revealed that responses to thousands of resumes listing stereotypically white-sounding names, such as Emily, were substantially more positive (50 percent more callbacks) than to resumes with identical qualifications listing stereotypically African-American-sounding names, such as Latoya.<sup>49</sup> In a study of orchestra auditions, female success rates surprisingly jumped by nearly 50 percent when decisionmakers did not know the applicants’ gender.<sup>50</sup> The orchestra study provides one example of how focusing decisionmakers’ attention on relevant factors – which distracts them from irrelevant factors such as race or gender – can lead to superior outcomes for the employer and fairer outcomes for the applicant.<sup>51</sup>

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<sup>45</sup> See Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination*, 40 Harv. C.R.-C.L. L. Rev. 481, 482 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1188-89, 1202-04 (1995).

<sup>46</sup> Krieger, *supra*, note 45, at 1199.

<sup>47</sup> See, e.g., Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. Rev. 1241 (2002); McGinley, *supra*, note 39; Rebecca Haner White, *De Minimis Discrimination*, 47 Emory L. J. 1121 (1998); Krieger *supra*, note 45, at 1186-1209; David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. Pa. L. Rev. 899 (1993); Lawrence, *supra*, note 44.

<sup>48</sup> See, e.g., Max Bazerman, *Judgment And Managerial Decision Making* 7 (4th ed. 1997) (“[Managers] predict a person’s performance based on the category of persons that the focal individual represents from their pasts. . . . In some cases, the use of the heuristic is a good first-cut approximation. In other cases, it leads to behavior that many of us find irrational and morally reprehensible, like discrimination.”).

<sup>49</sup> Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Brendan More Employable than Latoya and Tyrone? Evidence on Racial Discrimination in the Labor Market from a Large Randomized Experiment*, 94 Am. Econ. Rev. 991 (2004).

<sup>50</sup> Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 Am. Econ. Rev. 715, 716 (2000).

<sup>51</sup> For additional social science research on implicit bias, see generally Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees* (Nat’l Bureau of Econ. Research, Working Paper No. 13206, 2007), available at <http://www.nber.org/papers/w13206.pdf>.; Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. Econ. Rev. 991 (2004); *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. Gen. Internal Med. 1231 (2007).

These studies have caused one U.S. District Court Judge to issue jury instructions to specifically reduce unconscious bias.<sup>52</sup>

The 1988 amicus curiae brief submitted by the American Psychological Association (“APA”) to the U.S. Supreme Court in *Price Waterhouse v. Hopkins* introduced prescriptive stereotyping as a cause of gender bias that is especially harmful to women aspiring to higher status positions in male-dominated organizations (e.g., large law firms). An extensive body of research finds that male-dominated organizations expect women to conform to widely shared normative beliefs regarding how women ought to behave.<sup>53</sup> To the extent that a woman does not conform, and instead engages in behaviors that are of a traditionally masculine nature, she will be punished, often in the form of social distancing, exclusion from social networks, personal derogation and other forms of mistreatment. Consequently, women face a double-bind: They are judged ill-suited for the demands of traditionally-male jobs if they behave in a stereotypically feminine manner, but are not liked if they behave in a stereotypically masculine manner.

When company structures allow favoritism and personal preferences to override merit in hiring, pay and promotion decisions, protected classes can end up with fewer opportunities, smaller paychecks, and little to no chance of advancement.<sup>54</sup> This type of racially-biased or gender-biased decision-making, whether objective or subjective, is prohibited by Title VII of the Civil Rights Act of 1964.<sup>55</sup> Indeed, the U.S. Supreme Court has repeatedly concluded that Title VII prohibits discriminatory employment practices whether they are objective, subjective, or a mix of both.<sup>56</sup> Additionally, law firms are not

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<sup>52</sup> Bennett, *supra*, note 41, at 152.

<sup>53</sup> Michael J. Gill, *When Information Does Not Deter Stereotyping: Prescriptive Stereotyping Can Foster Bias Under Conditions that Deter Descriptive Stereotyping*, 40 *Journal of Experimental Social Psychology* 5, 619-632 (2004); Madeline E. Heilman, *Description and prescription: How Gender Stereotypes Prevent Women’s Ascent Up the Organizational Ladder*, 57 *Journal of Social Issues* 4, 657-674 (2001); Laurie A. Rudman and Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 *Journal of Social Issues* 4, 743-762 (2001); Diana Burgess and Eugene Borgida, *Who Women are, Who Women should be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 *Psych. Pub. Pol. and L.* 665, 665-692 (1999); Susan Fiske, et al., *Social Science Research on Trial: The Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 *American Psychologist* 10, 1049–1060 (1991).

<sup>54</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236-37 (1989) (open-ended evaluation process for partnership decisions allowed gender-based stereotypes to influence outcome); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 276-77 (5th Cir. 2008) (African-Americans systematically denied promotion opportunities where managers had discretion to bypass objective seniority requirements and choose the “candidate they favored”).

<sup>55</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (recognizing that sex stereotyping, including expectations that a female employee would not be aggressive, is sex discrimination).

<sup>56</sup> See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (policies that are both objective and subjective are treated as subjective for the purposes of Title VII). The actionability of excessive subjectivity was briefed and argued in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 795 (Dec. 6, 2010) (No. 10-277) (oral argument held on March 29, 2011).



immune from Title VII enforcement. The Supreme Court has concluded that law firm partnership is a term, condition, or privilege of employment that is protected by Title VII.<sup>57</sup>

The legal profession continues to face many of the diversity challenges faced by corporate America. Despite the legal profession's attempt to boost diversity hiring and retention, subtle discrimination, in the form of favoritism or subtle racial aversion appears to pervade. As a result, women lawyers and lawyers of color continue to face significant obstacles to full and equal participation in the profession. One factor that has hampered diversity efforts in law firms is the failure to recognize that even a little bias can have a long lasting cascading effect.<sup>58</sup> This is especially true in competitive environments in which there are more candidates than available positions and in situations where group-based disadvantage accumulates over time. In other words, even a small variation can have a cumulative effect on women lawyers and lawyers of color. Studies reveal that law firms, in particular, have policies, practices, procedures, cultures, and organizational structures that are exclusive of diverse lawyers in practice, not inclusive.<sup>59</sup> The result is that diverse lawyers are far more likely to feel marginalized and isolated in their firms and, consequently, leave sooner than non-diverse lawyers.<sup>60</sup>

NALP's 2009 Associate Retention Study shows that by the fifth year of private practice, 87 percent of racially and ethnically diverse associates have left their law firms compared to 78 percent of non-diverse associates. The following hidden barriers have been identified as contributing to the attrition of attorneys of color and the lack of minority partners:

- Exclusion from key work assignments that lead to critical skills development
- Inadequate mentoring and coaching, including sponsorship by a champion in the firm
- Diminished access to formal networking contacts in the business community
- Less access to informal networks where key information is shared within the firm
- Fewer client contacts and development opportunities – both formal and informal

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<sup>57</sup> *Hishon v. King & Spalding*, 467 U.S. 69, 76 (U.S. 1984) (holding that advancement to partnership qualifies as a term, condition, or privilege of employment for purposes of Title VII).

<sup>58</sup> James F. Robison-Cox, et al., *Simulating Gender Stratification*, 10 *Journal of Artificial Societies and Social Simulation* 3, 1-8 (2007); Mark D. Agars, *Reconsidering the Impact of Gender Stereotypes on the Advancement of Women in Organization*, 28 *Psychology of Women Quarterly* 2, 103-111 (2004); Richard F. Martell, et al., *Male-Female differences: A computer simulation*, 51 *American Psychologist* 2, 157-158 (1996).

<sup>59</sup> Kathleen Nalty, *Inclusiveness in the Legal Profession-Retaining Lawyers of Color*, 39 *A.B.A. Lab. & Emp. L.* 1, 8 (2011).

<sup>60</sup> *Id.*

- Fewer invitations to social events where opportunities may begin to be developed
- More instances of “soft” evaluations which keep mistakes hidden from the diverse attorney
- Higher incidents of reports that mistakes are held against diverse attorneys while overlooked when committed by non-diverse attorneys
- Fewer opportunities for inclusion on committees and among leadership<sup>61</sup>

In order to increase retention, law firms must create an atmosphere that fosters diversity, even during hard economic times. According to American Lawyer’s *Minority Experience Study 2010: By the Numbers*,<sup>62</sup> compared to those of their white colleagues, the workloads of African-American, Asian-American, and Hispanic lawyers are lighter, and their billable hours are lower.<sup>63</sup> African-American mid-level associates are more likely to actively seek other jobs and are more downbeat about the chances that they would be at their current firm in two years – citing “lack of work” as their main reason for moving on.<sup>64</sup> Getting enough good work opportunities is often tied in to building key mentor and partner relationships – a chronic challenge for diverse lawyers.<sup>65</sup> American Lawyer’s *Minority Experience Study* consistently has confirmed that African-American lawyers in particular report a disparity in both the quality and quantity of the matters they are assigned.<sup>66</sup> African-American mid-levels are more likely to view distribution of work assignments as far less fair than their white colleagues.<sup>67</sup> African-American mid-levels also report less client contact along with lower levels of responsibility, and as a group they are less satisfied with the work feedback and the training and guidance they receive as well as with their relationships with partners.

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<sup>61</sup> Nalty, *supra* at note 59, at 8; see also D.M. Osborne, *Why Are Minority Female Associates Leaving Law Firms?*, Law.com, November 2007, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005558326>.

<sup>62</sup> The *Minority Experience Study* is drawn from data gathered by The American Lawyer’s Midlevel Associates Survey. The survey, conducted in spring 2009, covered 6,101 third-, fourth-, and fifth-year associates at 165 law firms and included 4,592 whites, 556 Asian Americans, 211 Hispanics, and 169 African-Americans.

<sup>63</sup> Susan Hansen, *Can They Still See the Forest?*, *American Lawyer*, October 1, 2009, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202434265982>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

## A “Toolbox” For Increasing the Hiring and Retention of Diverse Lawyers<sup>68</sup>

While the situation may appear bleak or even futile, it is important to note that solutions have been found in other industries. While most law firms recognize the benefits of diversity and inclusion, many struggle with how to develop and retain women lawyers and lawyers of color. Professional standards for women and lawyers of color should not be lowered. Rather, the selection process should be tailored to be both more directly linked to business needs, and to increase diversity.

Over the years, Mehri & Skalet has developed a “toolbox” for addressing diversity issues in the workplace. Some of the tools used in the employment discrimination settlement context are worthy of consideration in the law firm context. These tools include, for example: (1) enhancing the company’s internal and external reporting mechanisms; (2) use of an independent diversity monitor; (3) use of an independent ombudsperson, who reports to the management, to address internal complaints; (4) use of a highly qualified industrial psychologist to revise and revamp certain company policies; (5) requiring hiring managers to conduct in-person interviews with a diverse slate of candidates for all open positions; (6) structured interviews; (7) creation of company sponsored affinity groups for minority lawyers; (8) use of an external task force; (9) mentoring programs and (10) linking management compensation to the recruitment, retention, and development of diverse employees. Among these useful tools developed for major corporations, we consider numbers 1, 3, 5, 6, 7, 9, and 10 below. We also set forth other ideas for possible solutions.

### A. What Gets Measured Gets Done

It is axiomatic in business literature that “what gets measured gets done.”<sup>69</sup> Managing Partners at major law firms should develop and implement equal opportunity

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<sup>68</sup> In addition to these tools, other helpful resources include: W. Randy Eaddy and Marion A. Cowell, Jr., *Diversity, in Successful Partnering Between Inside and Outside Counsel*, 39 (R. Haig, ed., 2010); NALP, 2009 Diversity Best Practices Guide [hereinafter Best Practices Guide], April 2009, available at <http://www.nalp.org/uploads/DiversityBPGuide09.pdf>; David B. Wilkins, *Legal Ethics: Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. Inst. Stud, Leg. Eth. 15 (1999); ABA, *Visible Invisibility: Women of Color in Law Firms* (2006), available at [http://www.americanbar.org/groups/women/initiatives\\_awards/women\\_of\\_color\\_research\\_initiative.html](http://www.americanbar.org/groups/women/initiatives_awards/women_of_color_research_initiative.html); ABA, *From Visible Invisibility to Visibly Successful: Success Strategies for Law Firms and Women of Color in Law Firms* (2008), available at [http://www.americanbar.org/groups/women/initiatives\\_awards/women\\_of\\_color\\_research\\_initiative.html](http://www.americanbar.org/groups/women/initiatives_awards/women_of_color_research_initiative.html); The Bar Association of San Francisco Bottom Line Partnership Task Report: *Proven Formulas for Success: Confronting the Underrepresentation of Partners of Color in Law Firms* (2010) [hereinafter San Francisco Task Report]; New York County Lawyers Association, Report of the Task Force to Increase Diversity in the Legal Profession (2002).

<sup>69</sup> Susan Black, *What Gets Measured Gets Done: Using Metrics to Support Diversity*, 15 Canadian HR Reporter 22, (2002); James R. Larson and Christine Callahan, *Performance monitoring: How it affects work productivity*, 75 Journal of Applied Psychology 5, 530-538 (1990) (finding that monitored tasks were seen as more important and thus attended to more carefully

and diversity metrics that are routinely collected and analyzed. This data should focus on a range of issues including, hiring, retention, workplace climate, merit pay and bonuses, and partnership decisions. Data on recruitment should include offers made and offers accepted. This data should be broken down by race, gender and ethnicity. Data on retention should also be maintained and broken down by race, gender and ethnicity. Workplace climate can be ascertained through climate surveys or carefully crafted focus group audits.<sup>70</sup>

Prior to making final decisions regarding merit pay increases and bonuses, data should be analyzed for disparate impact on race, gender and ethnicity. Data analysis on partnership decisions should be examined over a multi-year period, such as five years or more. This partnership data should be analyzed by race, gender and ethnicity.

B. Use of an Ombudsperson or Independent Counsel for Workplace Concerns and Complaints

In the corporate context, we have championed the use of independent ombudspersons who report to the CEO or another high level executive. When trusted by both employees and management, the ombuds program reduces EEOC charges and complaints. We used this approach to documented success in *Roberts v. Texaco Inc.*

The need for this type of independent mechanism is even more acute for law firms. The skills of being a first rate lawyer do not necessarily translate into good management skills. Indeed, many view lawyers as poor managers. One way our profession falls short is frequently failing to provide an internal mechanism for confidential workplace complaints to be addressed. For example, if an associate is subject to racial or sexual harassment many, if not most, law firms do not have a confidential outlet for these concerns to be addressed – often resulting in EEOC charges or discrimination lawsuits that could readily be avoided.

Rather than using an in-house ombuds person used by many major companies, we recommend that law firms retain an outside lawyer with extensive experience in equal opportunity to serve as an outlet for EEO complaints with full investigative

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than tasks that were not monitored); Frank Dobbin, et al., *Someone to Watch over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity*, 34-49 (2009), available at [http://www.wjh.harvard.edu/~dobbin/cv/workingpapers/Someone\\_to\\_Watch\\_Over\\_Me.pdf](http://www.wjh.harvard.edu/~dobbin/cv/workingpapers/Someone_to_Watch_Over_Me.pdf); Steven Kerr, *On the folly of rewarding A, while hoping for B*, 18 *The Academy of Management Executive* 4, 769-783 (1995).

<sup>70</sup> Ellen R. Peirce, *Breaking the Silence: Creating User-Friendly Sexual Harassment Policies*, 10 *Employee Responsibilities and Rights Journal* 3, 225-242 (1997); Sara Rynes and Benson Rosen, *A Field Survey of Factors Affecting the Adoption and Perceived Success of Diversity Training*, 48 *Personnel Psychology* 2, 247-270 (1995); Clayton Alderfer, *Changing Race Relations Embedded in Organizations: Report on a Long-Term Project with the XYZ Corporation*, Diversity in the workplace: Human resource initiatives, (S.E. Jackson ed., New York: Guilford Press), 138-166 (1992).

powers. This outlet should be made readily known to law firm employees, e.g. included in the firm's employee handbook. Since employment issues at law firms are almost invariably intertwined with protecting client confidences it is essential that such an outlet exist at law firms. An independent counsel can confidentially examine an issue, and resolve it in a fair manner for both the employee and the law firm.

### C. Diverse Candidate Slates

The social science literature on favoritism plays out vividly in the corporate context when it comes to promotions and advancement. When we investigate cases of discrimination involving major companies, we find a strong correlation between the "glass ceiling" and positions eligible for stock options and special forms of compensation. We also find "glass walls" were the few female or minority employees who make it to the higher echelons are in positions that are away from the profit and loss centers of the company. One reason that favoritism is rampant is that important positions are often filled without fair and inclusive competition. All too frequently the hiring manager picks who he knows best through a "tap on the shoulder system" overlooking stronger candidates altogether. Generally, job posting systems are limited to lower level to mid-level positions, and are often flawed by ineffective posting mechanisms, limited duration, and all too frequent exceptions. Too often gender and racially homogenous organizations or departments replicate the sex and race composition of current employees.<sup>71</sup> In short, the "good old boy" system is alive and well in many big companies.

We have tried to respond to "good old boy systems" with fair competition reforms. Fair competition allows for the best to rise to the top and increases minority representation at the top levels of a company. Requiring companies to have serious in-person interviews with a diverse slate of candidates allows for fair competition for coveted positions.

We first developed this tool in the *Ingram v. The Coca-Cola Company* settlement. Requiring management to conduct in-person interviews with a diverse slate of candidates for open positions at all levels of the organization resulted in significant progress in representation of African-American managers executives. Since 2001, Coca-Cola has become one of the nation's top companies in terms of diversity and inclusion, due to the hard work done by an outside Task Force, company human resource officials, and in-house counsel leaders who carried out the settlement in exemplary fashion.

This mechanism has been most celebrated in the National Football League, where the so called "Rooney Rule" has resulted in a tremendous increase in African-

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<sup>71</sup> Barbara F. Reskin & Debra B. McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 Am. Soc. Rev. 210 (2000) (adoption of formal sourcing practices, including job postings, leads to more women in management).

American head coaches and front office executives.<sup>72</sup> The Rooney Rule, which requires NFL teams to interview minority candidates for head coaching and senior football operations opportunities, has opened doors to minority coaches that have been closed for most of the NFL's history.<sup>73</sup> The Rooney Rule was adopted in 2002, after our firm released the report, *Black Coaches in the National Football League: Superior Performance, Inferior Opportunities*. Now there are a record number of minority Head Coaches (eight) and General Managers (five). Demonstrating the caliber of those minority coaches and front office executives, during the last 5 years, 7 out of the last 10 Super Bowl teams have had either an African-American head coach or General Manager. Three have won Super Bowls -- Coaches Tony Dungy and Mike Tomlin for the Indianapolis Colts and Pittsburgh Steelers, respectively, and Jerry Reese, General Manager of the New York Giants.

Despite the Rooney Rule's success in the NFL, we believe it would be difficult to replicate in law firms because of most firms' organizational structure and emphasis on progression up the hierarchy. However, by requiring hiring committees to conduct in-person interviews with a diverse slate of candidates for all summer associate positions, associate positions, and when appropriate, lateral hires law firms can further diversify.

#### D. Structured Interviews

In addition to requiring diverse candidate slates, we suggest requiring hiring partners to conduct structured interviews of all candidates. A structured interview is a fixed format interview in which key questions are prepared beforehand and are put in the same order to each interviewee. This style of interviewing provides precision and reliability, and reduces bias.

Research supports the use of structured interviews as an effective tool for decreasing the adverse effects of gender and race. For example, one study's meta-analysis of the findings of thirty-one previously published studies found that the use of structured interviews significantly reduced race bias effects associated with unstructured interviews.<sup>74</sup>

#### E. Exit Interviews

Another tool that should be used in conjunction with structured interviews is exit interviews. Use of exit interviews of diverse employees can help law firms assess employees' perceptions of employment opportunities within the firm, and their reasons

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<sup>72</sup> See N. Jeremi Duru, *Advancing the Ball: Race, Reformation, and the Quest for Equal Coaching Opportunity in the NFL*, (Oxford University Press, 2011); Brian W. Collins, *Note: Tackling Unconscious Bias In Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. Rev. 870, 904 (2007).

<sup>73</sup> Mark Maske, *Supporters of NFL's 'Rooney Rule' say it is working*, Washington Post (January 12, 2010).

<sup>74</sup> Allen Huffcutt and Philip Roth, *Racial Group Differences in Employment Interview Evaluations*, 83 Journal of Applied Psychology, 2, 179-189 (1998).

for leaving. Exit interviews should be confidential and handled with care. These interviews should also be conducted by someone with whom diverse employees can speak freely.

F. The Creation of Law Firm Sponsored Affinity Groups for Women Lawyers and Lawyers of Color

One way to empower diverse lawyers and enhance mentoring and development is the creation of law firm sponsored affinity groups for diverse lawyers. As discussed above, these lawyers often face unique challenges in the workplace. An Affinity Group allows workers to crystalize issues to bring to management's attention, allows workers an opportunity for mentoring, and can partner with management to expand recruiting and retention efforts.<sup>75</sup> The ABA could also consider sponsoring cross- or multi-firm affinity groups in various cities and locations. We suggest targeting three to five cities to create models that could be rolled out nationwide. We further suggest that there be one affinity group for female lawyers and one for minority lawyers in each law firm and in each of these cities.

Mr. Mehri founded and serves as counsel for the Fritz Pollard Alliance, an affinity group for minority National Football League coaches, front office and scouting personnel. The Fritz Pollard Alliance works in partnership with the League to advance a "ready list" of viable candidates for open positions and to create new policies and practices to further level the playing field.<sup>76</sup> Use of affinity groups within law firms and across law firms can help advance the recruitment and retention of diverse lawyers. Specifically, female lawyer or minority lawyer affinity groups can: (1) identify best practices for law firms to consider; (2) create networking and skill development opportunities; and (3) create better communication between the female and minority lawyer talent pools and law firms.

G. Mentoring Programs

A mentoring program is integral to the success of any diversity program. To be successful, the mentoring program must be conceived within the context of the firm's culture, managed properly.<sup>77</sup> Pairings must also be made in a judicious manner.<sup>78</sup> It is important for mentors to be trained in appropriate techniques and rewarded for

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<sup>75</sup> See Deborah Rhode, *The Subtle Side of Sexism*, 16 Colum. J. Gender & L. 613, 638 (2007) ("Affinity groups ... can be especially critical in reducing participants' sense of isolation and providing concrete strategies for dealing with subtle biases.").

<sup>76</sup> See Duru, *supra* note 72, at 117-130; Cyrus Mehri, *The Critical Role of the Fritz Pollard Alliance*, in *Reversing Field: Examining Commercialization, Labor, Gender and Race in 21<sup>st</sup>-Century Sports Law*, 363-85 (2010); Kenneth Shropshire, *Minority Issues in Contemporary Sports*, 15 Stan. L. & Pol'y Rev 189, 206 (2004).

<sup>77</sup> Best Practices Guide, *supra*, note 68.

<sup>78</sup> *Id.*

success.<sup>79</sup> Additionally, mentors and mentees must set mutual expectations and be provided specific and regular opportunities to meet.<sup>80</sup>

When assigning mentors to female associates and associates of color, law firms should consider the following:

- Self-guided mentoring, which allows the employee to identify a senior leader as a mentor.
- Pairing diverse lawyers with other diverse lawyers.
- Pairing each associate with both an associate and a partner to allow a variety of resources to address individual needs and goals.
- Establishing a supplemental mentoring program during the third or fourth year to assist associates during this crucial period of career development.
- Pairing members of the senior management team with diverse lawyers to allow information to flow between these two important groups.<sup>81</sup>

A successful diversity program is not only about improving the demographics of the law firm. It is also about improving the attitudes and atmosphere within the workplace. A well thought out mentoring program will no doubt improve law firm attitudes and atmosphere.

#### H. Linking Law Firm Partner Compensation to the Hiring and Retention of Diverse Lawyers

Our experience has shown that the most effective way to advance equal opportunity in the workplace is to use genuine accountability measures.<sup>82</sup> Perhaps the most effective way to ensure the advancement of diverse lawyers is to link a portion of law firm partners' compensation to recruitment, retention, development and cultivation of women associates and associates of color.<sup>83</sup> Social scientists and management experts agree that genuine and visible commitment to the organization's diversity efforts by its most senior officer is critical to the success of those efforts; "diversity programs" without substantial commitment from the highest levels are insufficient to effect change.<sup>84</sup> Additionally, diversity efforts that are seen as equitable are more likely to be

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<sup>79</sup> Best Practices Guide, *supra*, note 68.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 Harv. J.L. & Gender 279, 280 (2007); Frank Dobbin, et al., *Diversity Management in Corporate America*, 6 Contexts 21 (2007), available at [http://www.wjh.harvard.edu/~dobbin/cv/articles/2007\\_Contexts\\_Dobbin\\_Kalev\\_Kelly.pdf](http://www.wjh.harvard.edu/~dobbin/cv/articles/2007_Contexts_Dobbin_Kalev_Kelly.pdf).

<sup>83</sup> See Kalev, *supra*, note 43, at 589-617. (finding that racial diversity increased significantly among companies that had established a responsibility structure (i.e., a high level organizational entity) directly responsible for diversity).

<sup>84</sup> Robert L. Dipboye & Adrienne Colella, *The Dilemmas of Workplace Discrimination, in Discrimination at Work: the Psychological and Organizational Bases* 424, 425-62 (R.L. Dipboye



accepted throughout the organization. According to social scientists, “[c]ommunicating that [diversity programs] do not simply confer preferential treatment .... and adhere to the principles of fairness will increase acceptance of both the programs and those who benefit from them.”<sup>85</sup> Top leaders can discourage discrimination by establishing systems of accountability that make rewards contingent upon meeting diversity goals.<sup>86</sup>

In the *Roberts v. Texaco Inc.* and *Ingram v. The Coca-Cola Company* settlements, this accountability tool made diversity and equal opportunity a top priority for management and helped both companies make substantial progress. In *Coca-Cola*, a portion of senior managers’ collective incentive compensation was tied to the achievement of the company’s diversity goals. At the conclusion of the reporting period, the company met all four of its diversity goals tied to incentives.<sup>87</sup> If law firms reward partners who mentor, develop and promote diverse attorneys, more partners will mentor, develop and promote diverse attorneys, which will in turn help law firms recruit and retain those attorneys.<sup>88</sup>

It is our understanding that major law firms typically formally or informally determine end-of-year compensation by allocating points based on items such as creating and retaining business (sometimes referred to as “finding”) and service to existing clients (sometimes referred to as “minding”). Imagine if 10 percent of the points were allocated based on performance advancing the law firms diversity and equal opportunity aspirations. Law firm behavior would likely change dramatically. It is important that this approach be handled with due care and achievable benchmarks of success. Each major law firm should tailor this approach to fit its needs and should develop a baseline of data to use as a starting point to measure success.

#### I. Linking Equal Opportunity and Diversity to the Business Success of Law Firms

Several years ago, the General Counsels of major corporations, led by DuPont, put major law firms on notice that law firm diversity would be a factor in the selection of law firms hired by the General Counsels. We understand that after some early success these efforts have generally lost momentum. It is unfortunate that even after the General Counsels of major corporations are on record that diversity is a priority item

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& A. Colella eds., 2005); Ruth G. Shaeffer & Edith F. Lynton, *Corporate Experience in Improving Women’s Job Opportunities*, Report No. 755, The Conference Board (1979).

<sup>85</sup> Madeline E. Heilman, et al., *Type of affirmative action policy: A determinant of reactions to sex-based preferential selection*, 83 *Journal of Applied Psychology* 2, 190–205 (1998).

<sup>86</sup> Marta M. Elvira & Mary E. Graham, *Not Just a Formality: Pay System Formalization and Sex Related Earnings Effects*, 13 *Org. Sci.* 601, 614 (2002); Michele J. Gelfand, et al., *Discrimination in Organizations: An Organizational-Level Systems Perspective*, in *Discrimination at Work: The Psychological and Organizational Bases* 89-116 (R.L. Dipboye & A. Colella eds., 2005).

<sup>87</sup> See 2006 Coca-Cola Task Force Report at 40, 44.

<sup>88</sup> San Francisco Task Report, *supra*, note 73, at 3.

that major law firms have responded with little more than token efforts. General Counsels should redouble their effort to make this successful.

More importantly, entrepreneurial law firms should see diversity as a business opportunity.<sup>89</sup> We cannot overstate the benefits of diversity in law firms. Steven S. Reinemund, now Dean of the Wake Forest University School of Business and formerly Chairman and Chief Executive Officer of PepsiCo., where he spearheaded PepsiCo's high-profile diversity initiatives in the early 2000s, recently expressed it well:

The benefits of a diverse workforce are almost endless. . . they enable companies to increase innovation, recruit top-notch talent and better connect with customers, to name a few. I saw this day in and day out during my 23 years at PepsiCo and we have incorporated this key principle in business education at Wake Forest [University] today.<sup>90</sup>

Major law firms should make bold, consistent, and sustainable efforts to have a critical mass of female and minority lawyers, who in turn would help the firm recruit and retain other female and minority lawyers. Law firms should strategically weave diversity into their business success models, including obtaining new business attracted by their diversity. It is far past time to see diversity as an opportunity not a burden, and fair competition and diversity as a path for success, including greater fee generation for the firm.

### **A Call to Arms for the ABA and Law Schools to Expand the Pipeline of Talent**

This paper has focused on the lack of diversity among the major law firms; however, a key area that should not be overlooked is the entry point into our profession. In addition to encouraging the use of the tools outlined above, the ABA and law schools must conduct a "cradle to grave" review of the problem and address hidden barriers all the way from the law school selection process to the law firm promotion process. Social science research confirms that diversity task forces and senior managers charged with finding ways to increase diverse employees' advancement opportunities can be

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<sup>89</sup> Other reasons have been (and continue to be) advanced in support of diversity, including that it is a moral, ethical, or social imperative. See David B. Wilkins, *From "Separate in Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments in the Fate of Black Corporate Bar*, 117 Harv. L. Rev. 1548 (2004); Patricia M. Arredondo, *Successful Diversity Management Initiatives: A Blue Print for Planning and Implementation* 59 (1996) (recognizing that some individuals advocate for diversity based on moral reasons, but encouraging businesses to base diversity efforts on the "values fundamental to [the business's] operations").

<sup>90</sup> Press Release, National Survey Reveals Diversity in the Workplace is Critical in Attracting and Retaining Talent, Centre for High Performance Development (a division of Capital H Group) & Wake Forest University School of Business, September 17, 2009.

effective when they identify problems, develop remedies, and require accountability.<sup>91</sup> Our experience has shown that advancing legitimate business needs and reducing bias in selection processes go hand in hand.<sup>92</sup>

Many law firms rely heavily on the so-called “box credentials,” i.e. law school rank, class rank, law review membership, and clerkships. When making initial employment decisions, law firms also tend to be quicker to question diverse candidates’ academic credentials. As a result, minority law students tend to have to hail from elite law schools to be selected. The traditional indicators of high academic performance, such as law review credentials, Order of the Coif, federal clerkship, or graduation with honors, are not prerequisites for success in large law firms.<sup>93</sup> This conclusion is supported by the fact that of 1,833 partners surveyed by the Minority Corporate Counsel Association in 2003, 48.2 percent went to a Top 10 law school, 20.2 percent had law review experience, 25.9 percent graduated with honors (magna cum laude, summa cum laude, or cum laude), 13.9 percent did a clerkship, and 8.7 percent were inducted into the Order of the Coif.<sup>94</sup>

Law Schools in turn also use “box data,” relying almost exclusively on grade point averages and LSATs scores. Due in large part to the undue influence of the U.S. *News & World Report* rankings, most law schools base admissions decisions significantly on students’ LSAT scores; despite the fact that the LSAT is only a weak predictor of law school grades after first year and is wholly unrelated to professional success as a lawyer.<sup>95</sup> Even more troubling is the fact that many law schools are shifting scholarship money from need-based scholarships to merit based scholarships in

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<sup>91</sup> See Kalev, *supra*, note 43; Katherine C. Naff & J. Edward Kellough, *Ensuring Employment Equity: Are Federal Diversity Programs Making a Difference?*, 26 Int’l J. Pub. Admin. 1307, 1327 (2003) (case study of federal agencies successful in promoting and retaining women and African American employees).

<sup>92</sup> One additional way of achieving diversity in the legal profession is to encourage and support the growth and success of minority and women-owned law firms. Diversity efforts at majority-owned law firms are necessary, but they are not the only way of increasing diversity in the legal profession. However, like the Jewish-owned law firms of decades past, women and minority-owned law firms face significant challenges. See Anthony Lin, *Can the “Jewish Law Firm” Success Story Be Duplicated?*, New York Law Journal, May 10, 2006. By encouraging women and minority students to start their own law firms, and providing them with the necessary training and tools, law school (particularly Historically black law schools) can play a critical role in this effort.

<sup>93</sup> Minority Corporate Counsel Association, *The Myth of the Meritocracy: A Report on the Bridges and Barriers to Success in Large Law Firms* (2003), available at <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=614>.

<sup>94</sup> *Id.*

<sup>95</sup> Marjorie M. Shultz and Sheldon Zedeck, *Predicting Lawyer Effectiveness: A New Assessment for Use in Law School Admission Decisions* (September 2008), available at <http://ssrn.com/abstract=1442118>.

order to increase their “box data” scores and U.S. News and World Report ranking.<sup>96</sup> These “box data” scores account for 22 percent of a law school’s U.S. News and World Report ranking.<sup>97</sup> By focusing on a diverse applicant’s entire application and potential contributions, law schools can increase the number of diverse law students and in turn increase the number of diverse law school graduates. Specifically, law schools, much like business schools, should incorporate in-person interviews into the admission process to be sure that the best talent is selected for elite law schools. These in-person interviews should be well thought out and conducted by a diverse interview team. Our profession is remiss to exclude interviews from the selection process when interpersonal skills and sound judgment are essential for lawyers’ success. Particularly because these attributes are not captured by the LSAT or reflected in one’s grade point average.

Many law schools base law review membership on first-year grades only. This overlooks a necessary skill set for law review – strong research and writing skills. By allowing students to compete for law review membership via a write-on competition, law schools can level the playing field and provide diverse law students a greater opportunity to gain law review membership.

Judicial clerkships in state and federal courts and with the U.S. Supreme Court are some of the most prestigious positions in the legal profession. Often, employers recruit former judicial clerks for positions as law professors, associates in major law firms, and judicial appointees.<sup>98</sup> When selecting judicial clerks, judges often consider whether the applicant served on law review, the reputation of the law school the applicant attended, and the applicant’s personality.<sup>99</sup> Despite recent attention to the issue of lack of diversity among federal and state court law clerks, women and minority law clerks continue to be underrepresented.<sup>100</sup>

## Conclusion

The challenge of diverse attorney hiring and retention presents an opportunity for the legal profession. In order to increase substantially the number of diverse lawyers at all levels of the nation’s major law firms, law firms must think of diversity as vital to their success. By utilizing the tools outlined above, focusing on the barriers to diverse attorney retention, and implementing creative solutions, law firms can reduce the

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<sup>96</sup> David Segal, *Behind the Curve: How Law Students Lose the Grant Game, and How Their Schools Win*, *The New York Times*, May 1, 2011, at BU1 (noting that the number of need-based scholarships has shrunk in the last five years, from 20,000 to 18,000).

<sup>97</sup> *Id.*

<sup>98</sup> Floyd Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 *Miss. L. J.* 259, 274-276 (2010).

<sup>99</sup> *Id.*

<sup>100</sup> NALP, *Courting Clerkships: The NALP Judicial Clerkship Study* (October 2000), *available at* <http://www.nalp.org/courtingclerkships> (indicating that minorities still remain underrepresented as judicial clerks).

number women and minority lawyers leaving their practices, and ensure their firm's competitiveness in the global market.<sup>101</sup>

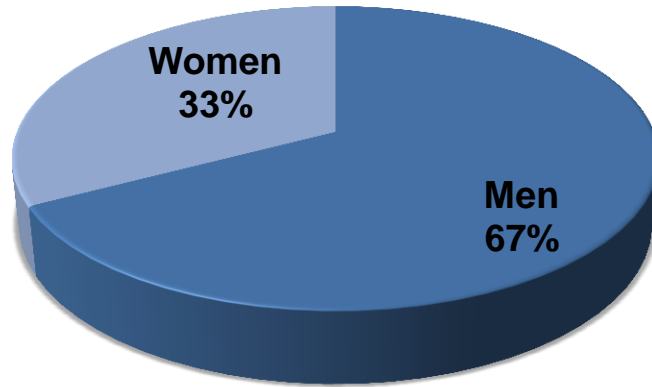
Our profession is at a crossroads on diversity. By using and applying successful tools from other contexts, we can move our profession forward in terms of equal opportunity and diversity. In so doing, we will come one step closer to achieving America's dreams and ideals.

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<sup>101</sup> We view this paper as the beginning of further dialogue. We welcome feedback and comments from readers and hope to revise and refine this paper in the coming months.

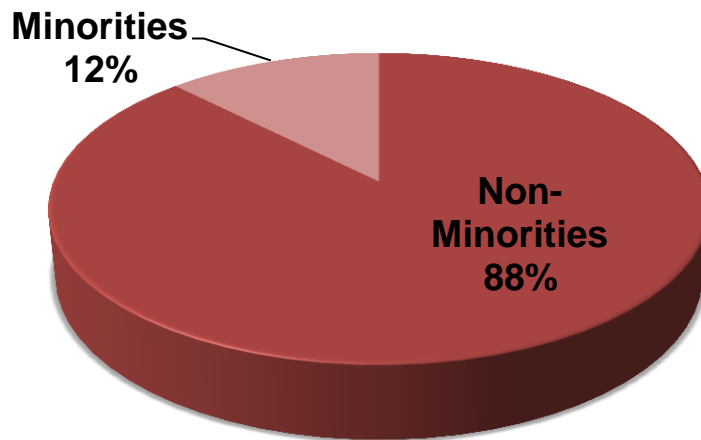
Appendix

**Women at Law Firms - Total Lawyers**



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**Racial Minorities at Law Firms - Total Lawyers**

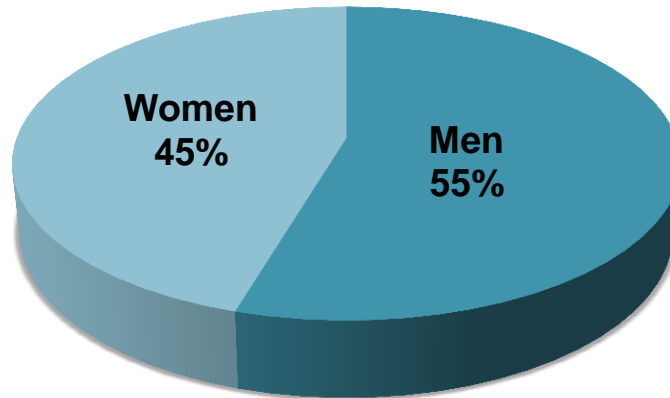


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<sup>102</sup> *Diversity Erodes, supra*, note 2.

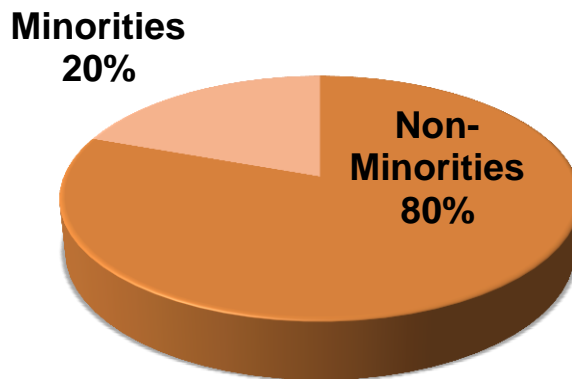
<sup>103</sup> *Id.*

### Women at Law Firms - Total Associates



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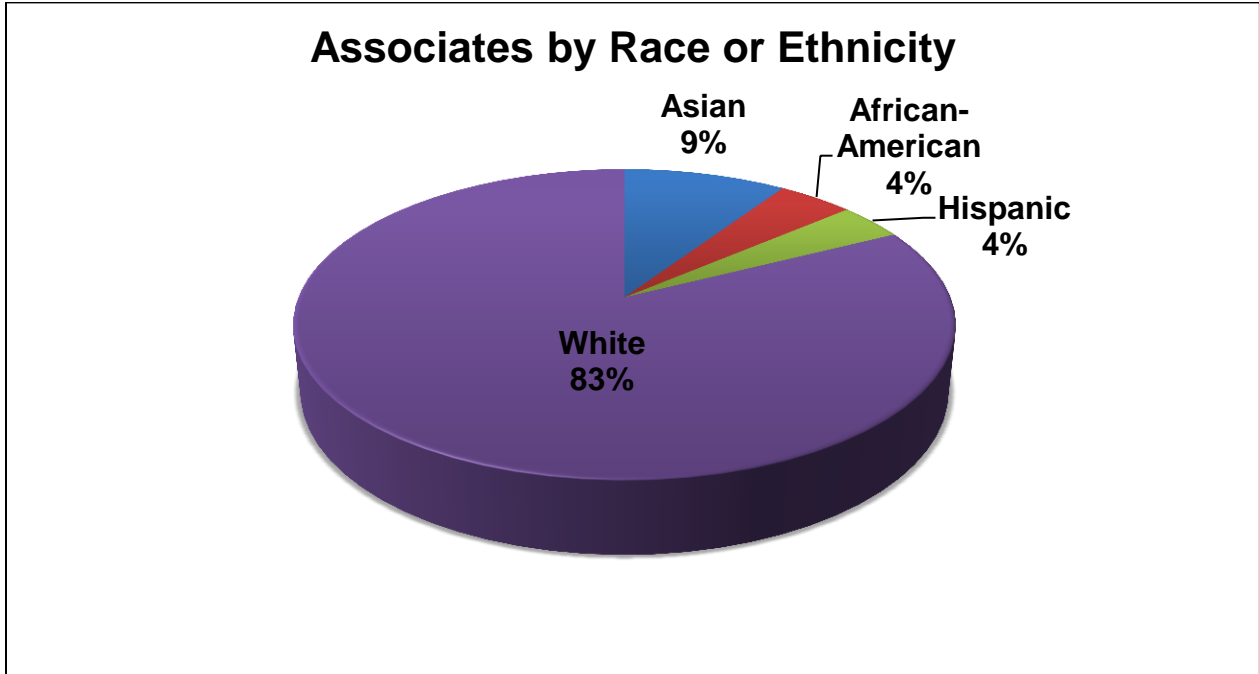
### Racial Minorities at Law Firms - Total Associates



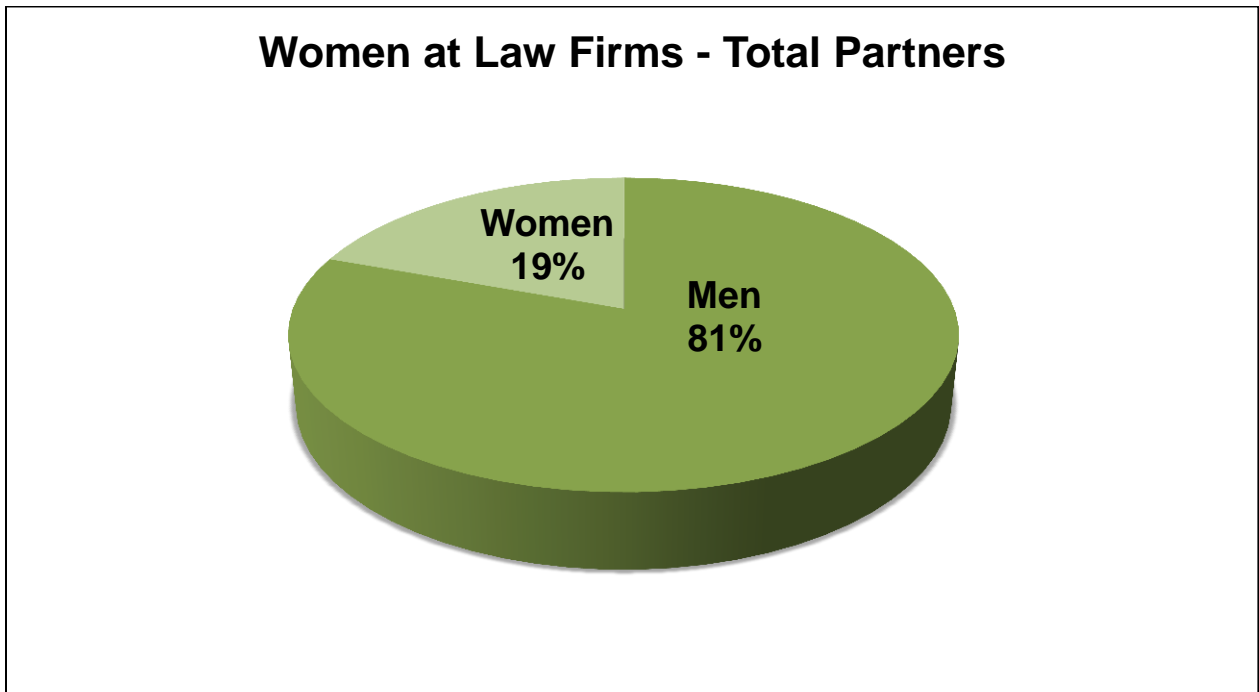
105

<sup>104</sup> *Closer Look, supra, note 6.*

<sup>105</sup> *Id.*



106



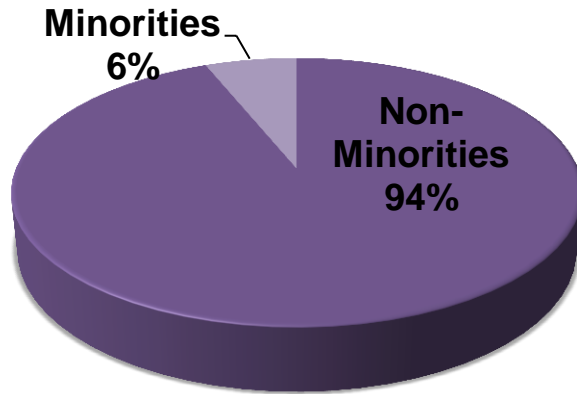
107

<sup>106</sup> *Diversity Erodes, supra, note 2.*

<sup>107</sup> *Closer Look, supra, note 6.*

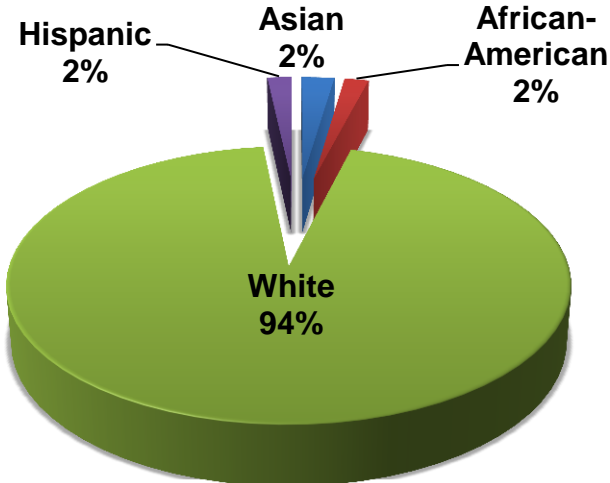


### Racial Minorities at Law Firms - Total Partners



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### Partners by Race or Ethnicity



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<sup>108</sup> *Closer Look, supra, note 6.*

<sup>109</sup> *Id.*