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ANNOUNCEMENTS

Diverse Speakers Directory; Upcoming Roundtable; Committee Cochair Judge Karen Wells Roby Profiled in Diversity Journal

The Section of Litigation Is Creating a Diverse Litigator Speaker’s Directory

The Section, through the Diversity and Inclusion Committee, seeks to develop a pool of diverse speakers who are (1) leaders recognized in various areas of practice; (2) help to build the business case for diversity; and (3) create a resource for all section members seeking to expand their speaking opportunities in their area of practice and for all section committees seeking to include diverse speakers.

The Directory will be available through the Leadership Portal for all section leaders. If you would like to volunteer to be considered as a speaker please sign up by completing the Speaker Information form. If you would like to volunteer to be considered as a speaker please sign up by completing the Speaker Information form.

Save the Date: Diversity Committee Roundtable

Navigating Leadership in the Section of Litigation: Becoming Involved in Leadership

Presented by the Diversity and Inclusion Committee and cosponsored by the Corporate Counsel, JIOP, LGBT Litigator, Minority Trial Lawyer, Solo and Small Firm, Woman Advocate, and Young Advocates Committees.

Tuesday, December 16, 2014 at 3–4:00 p.m. Eastern

Serving in the Section of Litigation leadership is a rewarding privilege. The stewardship of the organization is in the hands of its leaders. Members rely on leadership to provide consistently excellent value for their membership dollars. The organizational structure of leadership is complex and navigating it can often be a challenge for aspiring and new leaders. The experienced and distinguished leaders on this panel will share their different paths into and through Section leadership and the insights they have gained through many years of service. We'll demystify the Section's organizational structure, explore the opportunities available, and discuss the appointment process and the qualities of a successful leader.

Moderator: David Singh, member, Content Management Committee, Redwood Shores, CA
Speakers: Lucia Coyoca, member of Professional Development Committee and JIOP Committee and former cochair of the Woman Advocate Committee, Los Angeles, CA; Ron Marmer, past chair, Section of Litigation, Chicago, IL; Rob Simpson, council member and former division director, Hartford, CT
JIOP Selected as State Bar Diversity Award Recipient

Magistrate Judge Karen Wells Roby, cochair of the Diversity & Inclusion Committee was featured in the September/October 2014 edition of Profiles in Diversity Journal. She is profiled on page 148, as one of the Women Worth Watching. Congratulations to Judge Roby!
ARTICLES

The Top 10 Hiring and Interviewing Tips for Moving Diversity Forward
By Vernā Myers

1. **Select for the whole person.** Don’t rely solely or too much on traditional criteria such as GPA and school rankings. Some individuals who are exceptional in regard to traditional criteria may be missing some other important attributes, and vice-versa. To determine a more holistic set of criteria, analyze who is successful in your work environment. What are the qualities they possess? What kinds of people do you want to define your organization and help achieve the organization’s vision and goals? What are the competencies, skills, and qualifications actually needed for the position? Make sure that among those competencies is the willingness to work collaboratively and respectfully with people from diverse backgrounds.

2. **Design a hiring process that allows for diverse input.** Assemble a diverse group of people (in regard to gender, race, ethnicity, age, job status, role, tenure, geography, etc.) to offer input on what the attributes of an ideal candidate should be. Have this group help evaluate candidates.

3. **Don’t "over-hire."** Diversity and excellence go hand in hand. Be clear about and hold to your standards of excellence. Don’t hire women, people of color, LGBT candidates or others from historically excluded and underrepresented groups who do not satisfy the holistic set of qualifications solely because you want to increase diversity in your organization. To do so is to set up the individual you hire to fail and to contribute to the assumptions by some that the organization has lowered its standards for candidates from one-down groups—groups who have been treated as inferior historically in the United States and have experienced less privilege and power as a result. If there is a person who doesn’t meet all the criteria but shows great potential, only hire them if you are willing to inform them of, and shore up, the areas where they are deficient.

4. **Don’t "under-hire."** Don’t bypass talented candidates from one-down groups who meet your holistic criteria because of expressed or silent concerns about whether they can perform according to your standards. Some one-down group members are perceived as risks so evaluators unintentionally require additional proof that these individuals are capable despite the indicia they have provided of their accomplishments. Don’t let decision-makers default to assessing a candidate on traditional criteria rather than looking at what the candidate brings as a whole. Each person should be judged as an individual, not on their group’s record of success in the organization. If someone meets the established grade cutoff or has the level of education needed for the job, don’t raise the bar and ask that they demonstrate greater achievements than other candidates from more traditional backgrounds. And don’t yield to tokenism, where the organization is satisfied with and resigned to hiring only one or two exceptional candidates from a one-down group.
5. Engage in interviewing training. Getting the "right people onto the bus"—employing talented individuals who are aligned with the organization’s mission—is among the most imperative tasks of any successful organization. Everyone who interviews should participate in interview training that includes an emphasis on hiring candidates from one-down groups. Translate agreed-on criteria into questions that can be asked of candidates in the interview. Inform everyone involved in the hiring process of these criteria and questions.

6. Focus on job-related criteria in the interview. Don’t get personal in the interview conversation, especially when interviewing candidates from one-down groups. They often experience these types of questions and find them extremely off-putting. You can have an individualized, pleasant conversation without asking personal, invasive questions stemming from your curiosity or assumptions. There are some questions you have a right to ask only after the candidate is hired and you have made the effort to establish a mutually respectful relationship.

7. Don’t trust your gut! I know many of us think we know instinctively who would be "a good fit" for our organizations. But we have to watch out for our unconscious biases—those for and against individuals and groups. Neuroscience tells us that our minds are good but not perfect at quick judgments. Our guts can be contaminated with stereotypes and biases. Bias can cause us to offend, exclude, or “mis-hire.” Notice not only when a feeling of discomfort arises in an interaction with a candidate but also when one of unwarranted ease occurs—these are clues that you may be relying too heavily on your gut instincts. You want everyone who interviews with your organization to leave the interaction believing they had a fair and respectful exchange. Even if you don’t want to hire the candidate, he or she may have a friend whom you would love to hire. Word of mouth, positive or negative, can have a major impact on your recruiting efforts on school campuses and within your industry.

8. Don’t seek to replicate yourself. Even though we all suffer from in-group favoritism—we like and favor those in our own group—diversity demands we expand our understanding of who is valuable. Dig a little more deeply into the candidate’s experiences, especially if they are different from yours. If you don’t know about entries on a resume (associations, articles, group memberships, neighborhoods, countries, etc.), because they are unfamiliar to you, don’t ignore them—enquire about them. These questions may lead to some of the most valuable insights about what makes an interviewee unique and whether he or she is right for the position.

9. Don’t make assumptions about the interviewee. Assumptions about where and how someone grew up, what they experienced, and their likes and dislikes are usually stereotypes about groups. If you lead with questions that are rooted in stereotypes, you may offend the candidate and lose the opportunity to bring a talented person into your organization. Take your cue from interviewees. If they bring up concerns about gender issues or speak about their humble background, this is a signal that you could engage a conversation around these subjects. But even then, be careful to seek information rather than make generalizations or assumptions.
10. **Share your diversity commitment with all candidates.** Make sure you share information about your diversity commitment and policies with every candidate, not only those from one-down groups. You can’t tell what candidates are interested in, what they are sensitive to, or the topics or areas with which they hold an affinity. After all, your diversity program is about making the entire organization better, so everyone should hear about and plan to be a part of moving these values forward. If during an interview, however, the candidate identifies in some way their interests in a diversity-related subject, you can speak about the subject and perhaps also make it possible for them to speak to someone else in your organization who shares a similar identity or life experience. It is great to offer a promising candidate the opportunity to meet such a person. It can make a difference in their employment decisions. Make sure you follow up quickly with talented candidates from one-down groups and demonstrate your sincere interest so they know you care about them; there may be many other institutions pursuing them.

[Vernā Myers](#) is the principal of VMCG, a diversity and inclusion consulting firm in Baltimore, Maryland.
The Needle Moves When Leaders Push It

By Kenneth O. C. Imo

Microsoft Corporation published a report indicating that African Americans represent 4.2 percent of the legal profession, which is far fewer than their representation among accountants/auditors (9.8 percent), financial managers (8.5 percent) and physicians/surgeons (7.1 percent). The June 2014 edition of the American Lawyer painted an even bleaker picture for law firms in “The Diversity Crisis: Big Firms’ Continuing Failure.” In 2013, one in 54 (1.9 percent) of partners were African American and 0.5 percent (1 in 170) were black women. Equally concerning is that the general representation of black attorneys in big firms currently sits at 3 percent—the lowest level since 2000—which, if this is a trend, is indicative of a thin pipeline only getting thinner. These stats are particularly alarming when viewed in the context of the pressures facing all lawyers in a market undergoing rapid change: Clients are constantly looking for ways to reduce their legal spending; too many lawyers are chasing a shrinking amount of work; and all partners face a vicious cycle of simultaneously keeping existing clients while trying to acquire new business in a tightening legal market. While making partner has never been easy, it’s gotten more difficult for the reasons mentioned above, and because many firms are building practices through acquisition (i.e., lateral hiring), which means fewer opportunities for associates to get elected to the partnership.

What does all of this mean for law firm diversity efforts? It means that the work has gotten harder, and it’s time to redouble efforts by being honest and more deliberate in our initiatives. First, with respect to honesty, we must accept that unconscious bias is real, it’s pervasive, and it affects hiring, work assignment, performance evaluation and promotion decisions. Second, absent intentional measures to address the consequences of implicit bias, we will continue reading reports and articles about the minimal (and potentially dwindling) numbers of law firm partners of color. The legal profession should attempt to replicate steps taken by other industries that have also struggled with creating and sustaining a diverse workforce at all levels.

The U.S. military, the National Football League (NFL), and certain parts of corporate America—three very disparate employers—each have addressed one of their most significant diversity challenges: ensuring that minorities are afforded every opportunity to compete for top jobs. What these employers have in common is that their leaders played (and continue to play) a direct role in tackling unconscious bias. While none of these leaders specifically identified unconscious bias as an impediment to minorities competing for leadership positions, they knew something was not right; when they got involved, they did so in a way that directly addressed the consequences of unconscious bias.

We Know How to Make Generals—We’ve Been Doing It a Long Time

The U.S. military recognized that minority officers were not afforded the same opportunities for career advancement as white officers, and addressed this problem by taking deliberate and targeted measures. General Eric Shinseki, former Army chief of staff, ordered the service to conduct a study identifying the root cause of the lack of minority general officers. A report by
Col. Anthony D. Reyes, titled “Strategic Options for Managing Diversity in the U.S. Army,” found, in part, that minorities were significantly underrepresented in combat arms branches—the largest pipeline for promotion to general officer ranks. The Army then took steps to ensure that minority officers were at least being considered for this branch and began to aggressively recruit them for combat arms positions.

The American Forces Press Service reported that Admiral Mike Mullen, former chairman of the Joint Chiefs of Staff, took similar steps to ensure that minorities had the opportunity to compete for admiral, the Navy’s highest officer rank. Admiral Mullen once said: “We know how to make [general officers]…we’ve been doing it a long time… You put [people] in the right jobs, and if they do well they get promoted.” So, in 2005, when he became chief of naval operations, Admiral Mullen made increasing diversity a top priority and changed the assignment process to ensure that more minorities were being considered for positions that put them on the senior leadership track. To foster accountability, he required his direct reports (other senior officers) to provide him with regular diversity updates.

Over the past decade, the NFL also took deliberate steps to promote diversity that resulted in eight of the league’s 32 teams being led by minority head coaches at the beginning of the 2011 season. This is significant: by contrast, between 1920 and 2000, only six of 400 NFL head coaching positions were held by African Americans. The NFL received significant criticism for its hiring practices, and a renowned criminal defense attorney, the late Johnnie Cochran, threatened to file a race discrimination lawsuit against the league. The NFL responded by creating a diversity committee led by Dan Rooney, legendary owner of the Pittsburgh Steelers, to examine the league’s hiring practices and make recommendations.

Rooney’s diversity committee concluded that overt racism was not a factor but that the NFL was the consummate good old boys’ club, and owners and other top-level executives based hiring decisions partly on relationships. African Americans who sought coaching positions did not belong to the same social or professional circles as team owners; as a result, when an opening became available, they were often long shots for getting the job. Rooney’s group decided that the league had to create a way to force owners to interact with African American candidates. Their proposal required each team to consider at least one minority candidate for every head coaching vacancy and suggested that the league impose a fine on teams that did not comply. The NFL adopted this proposal, which later became known as the Rooney Rule.

The Rooney Rule does not guarantee a job. But it does guarantee that people who have otherwise been excluded from consideration have an opportunity to compete for a job. The rule benefits candidates and owners. If a minority head coach candidate is not hired for that particular job, the Rooney Rule gave him exposure to the process—better positioning him for future opportunities. Implementation of the rule provided owners with a broader candidate pool of qualified people from which to hire a coach. The Rooney Rule is a diversity success story: The Institute for Diversity and Ethics In Sport consistently gives the NFL an A grade for racial diversity; the NFL applies the rule to all executive-level positions in the league’s corporate office; six of the 32 NFL
general managers are racial minorities; six of the last eight Super Bowls have featured teams with an African American head coach or general manager; and in the 2013 offseason, when African Americans were not selected for head coaching vacancies, NFL Commissioner Roger Goodell proclaimed his disappointment publicly—further reiterating the importance of diverse leadership on NFL sidelines.

Your Eyes May Be Color Blind, but Your Mind Isn’t

Why did top military officials have to intervene to ensure that junior minority officers were considered for assignments that would place them on the path to becoming generals? And why did the NFL have to implement the Rooney Rule to ensure that minorities were considered for head coaching positions? Some would say racism is clearly the problem, but it’s more complicated than that. While racial prejudice still exists in 2014, most people are not overt racists and would not knowingly discriminate against anyone. However, in “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,” (registration required) Professor Charles R. Lawrence III of the William S. Richardson School of Law states that the persistence of racism and the role it has played in our society has shaped our attitudes and beliefs about race in ways that can (and often do) subconsciously influence our actions. So a better answer to the questions above is that unconscious bias has replaced overt bigotry as the problem.

Professor Linda Hamilton Krieger of the University of California–Berkeley School of Law describes unconscious bias as the way people’s normal cognitive processes related to categorization produce and perpetuate intergroup bias. Stereotyping is an example of a perfectly normal cognitive process that we use to quickly perceive, process, and retain information about people. While stereotyping is normal, it can result in snap judgments that reinforce negative preconceived notions about certain groups of people, exacerbating the impact of bias on our judgment and decision-making. Further, because we perform poorly in noticing and understanding our cognitive processes, we, as decision-makers, are often unaware of how stereotyping influences our actions.

Malcolm Gladwell, author of Blink, refers to stereotyping and other forms of rapid cognitive processes as “thin-slicing”: the way we quickly and unconsciously find patterns in situations and behavior, sometimes on the basis of our previous experiences. In some instances, these processes lead to the right conclusions. Thin-slicing is not foolproof, however, and can be problematic, particularly when it produces snap judgments about people based on how they look. To determine how our subconscious influences our attitudes about people of different races, genders and ages, a group of scientists from Harvard University, the University of Washington, and the University of Virginia created the Implicit Association Test (IAT).

The IAT measures the time it takes for users to make automatic associations with the traits mentioned above. The test suggests that it usually takes people longer to associate two items that they may subconsciously perceive as incompatible—e.g., a white or black face with a positive or negative word. Because the IAT is a computer-based test, responses are measurable down to milliseconds. The test requires rapid responses so as to inhibit the test-taker’s ability to be
introspective and to reduce the roles of conscious intention, self-reflection and deliberative processes. The goal is to tease out the impact of previous experiences on current performance. In some ways the test measures the real-time interactions between the two aspects of our thinking described by psychologists as System 1 and System 2.

Dr. Daniel Kahneman’s book *Thinking Fast and Slow* defines System 1 as the part of the mind that “operates automatically and quickly, with little or no effort and no sense of voluntary control.” For example, this system helps us detect hostility in a voice, read words on large billboards, or understand simple sentences—tasks that require very little, if any, attention. System 2 “allocates attention to the effortful mental activities that demand it.” This system becomes engaged when, for example, we distinguish voices in a crowded room, monitor the appropriateness of our behavior in social settings, or fill out tax forms—activities that require concentration.

Dr. Kahneman describes System 1 as “gullible and biased to believe,” while System 2 is more discerning and doubtful but is “sometimes busy and often lazy.” The explicit beliefs and deliberate choices of System 2 are influenced by the impressions, intuitions and feelings that System 1 constantly feeds it. If System 2 accepts what it’s given, impressions and intuitions become beliefs, and impulses become voluntary actions. The IAT seeks to demonstrate the interplay between the two systems and its impact on how the mind processes issues regarding age, gender, race, and sexual orientation.

The IAT has produced interesting findings, suggesting that 80 percent of those tested have a pro-white bias, including half of all African Americans. People are often unaware of their biases, which further suggests that even those who believe themselves to be color blind may well harbor unconscious attitudes toward certain groups of people—perhaps positive for some but negative for others. Also, while we like to think that we treat everyone fairly, implicit biases often influence behavior. For example, the higher your unconscious bias against a group, the more likely it is that you will discriminate against someone in that group. A particularly eye-opening aspect of the test is that it reveals ways in which our unconscious and stated conscious values may be at odds with each other. To say that these findings are unsettling is an understatement. They are disturbing because unconscious bias is quite pervasive. Consider the examples below:

- Until the 1970s, men represented an overwhelming majority of musicians in major symphony orchestras. Symphonies began hiring more women when they used screens during auditions to conceal the candidate’s gender.
- Researchers conducted a study in two major U.S. cities to examine the impact of race on hiring decisions. They found that resumes with “white” sounding names (e.g., Emily and Greg) received 50 percent more callbacks than resumes with “black” sounding names (e.g., Lakisha and Jamaal).
- Statistical data taken from NBA games over a 12-year period revealed that white referees called proportionately more fouls on black players than they called on whites, and black officials called proportionately more fouls on white players than they called on blacks.
Sixty partners agreed to participate in a study conducted by Nextions, a law firm diversity consultant and leadership coaching firm, that asked them to review the same hypothetical memo written by an associate containing several errors inserted intentionally. Half of the participants were told a black associate wrote the memo, and other were told the associate was white. On average, the white associate received a significantly higher score.

**Mentors Are Good, but Sponsors Are Better**

Many experts have observed that corporations outpace law firms when it comes to diversity, but they also struggle with bias and its impact on their ability to retain and promote minorities. In *Breaking Through: The Making of Minority Executives in Corporate America*, Dean David Thomas of Georgetown University’s McDonough School of Business states that minorities in corporate settings are often overlooked for promotions because people tend to view members of their own racial groups as more promotable and often give them higher performance ratings. Consequently, “high-performing minorities remain comparatively invisible in the selection process.” Organizations that seek to improve diversity in their senior ranks recognize this as a problem and are proactive about identifying promising minorities to be sponsored by an influential senior executive—usually a white man. Thomas’s research found that involving senior executives as sponsors boosted promising minorities’ careers by receiving high-visibility assignments, demonstrated leadership’s personal investment in promoting diversity to the entire organization, and helped convince minorities they had a real opportunity at attaining senior executive status because leadership didn’t just pay lip service to diversity.

Ursula Burns, who rose to become CEO of Xerox and the first female African-American head of a *Fortune* 100 company, presents an interesting case study for sponsorship. As told by Adam Bryant in a 2010 *New York Times* article, Burns distinguished herself early and, as a result, had several people—mostly white men—take an interest in ensuring she received opportunities for additional responsibility and high visibility within the corporation. Their efforts sent the message that influential executives at Xerox recognized her potential. They taught her how to navigate the company’s culture; the importance of polish, patience and perspective; and the need to foster buy-in from co-workers and superiors.

Law firms talk a lot about the importance of mentoring and how to make busy partners better at it, but they spend very little time discussing the importance of, and need for, sponsors. Many law firms have formal mentoring programs that pair associates with partners who are responsible, for example, for delivering evaluations and providing professional development suggestions. These mentors are important, but sponsors are absolutely essential. Mentors are counselors who give career advice and provide suggestions on how to navigate certain situations. Sponsors can do everything that mentors do but also have the stature and gravitas to help people become partners. They wield their influence to further a junior lawyer’s career by calling in favors, bringing attention to the associate’s successes, and helping them cultivate important relationships with other influential lawyers and clients—all of which are absolutely essential in law firms. Every sponsor can be a mentor, but not every mentor can be a sponsor.
Sponsorship is not a foreign concept for law firms. In fact, it is deeply rooted in the origins of a profession based on an apprenticeship model. For generations, junior lawyers learned the practice of law from senior attorneys who, over time, gave them more responsibility and eventually direct access and exposure to clients. These senior lawyers also sponsored their protégés during the partnership election process. Certain aspects of traditional legal practice are not feasible in today’s large law firm with hundreds if not thousands of lawyers, so many firms have created formal training and mentoring programs to fill the void. While these programs may be effective, there is no substitute for learning at the side of an experienced lawyer with the influence to position a lawyer for long-term success. This was true during the apprenticeship days of the profession and remains so today because associates who become partners have sponsors.

Sponsors may be more important now, because firms are so large and because the partnership election process is opaque and has the potential to be highly political. Viable candidates need someone who will vouch for their legal acumen and clearly articulate the lawyer’s business case for promotion—i.e., their potential to build a lucrative practice or support another partner in growing a practice that supports their law firm. The business case is determined by lawyers’ relationships with clients and senior lawyers willing to give them work. Professor David Wilkins of Harvard Law School and G. Mitu Gulati of Duke University, in their study titled, “Why Are There So Few Black Lawyers in Corporate Law Firms?” found that this system disadvantages minorities for two reasons: (1) they are less likely than whites to have relationships with in-house counsel who can give them business; and (2) the internal market is built on reciprocity, so other lawyers may be less inclined to give work to minorities who typically have less access to well-paying clients. An effective sponsor can start early to anticipate the business case and proactively look for ways to give a protégé access and exposure to the firm’s institutional clients and other influential partners.

Serious conversations about the business case for promotion occur when associates are within a year or two of partnership consideration. As a result, sponsorship relationships must develop much earlier. Because the lawyer evaluation process also serves as a ranking system, an early misstep can eliminate a junior lawyer—particularly a minority associate—from ever gaining an advocate to help his or her career advance within the firm. As previously noted, unconscious bias influences how we perceive people, so it may be harder for a minority lawyer to recover from a mistake because it may subconsciously confirm for some that minority lawyers are not as capable as whites. The converse of this “one-mistake rule” is the halo effect: A junior lawyer impresses a partner by consistently doing outstanding work; the partner tells his/her colleagues, and the junior lawyer becomes known as a superstar. Associates with the halo aren’t subject to the one-mistake rule because their missteps are seen as anomalies. They also have enough supporters in their corner to help overcome any potential obstacles that may arise from their mistake (obviously depending on its magnitude). Bias also affects who receives the halo, because cognitive associations reinforce positive associations—i.e., if someone is already perceived to be a star, then they must be. This is not to suggest that the halo is not deserved or earned, just that
unconscious bias may eliminate certain lawyers from being deemed worthy of a halo, which may also reduce their chances of receiving a sponsor naturally.

**Enlisting Influential Partners as Sponsors**

The examples in this article simply underscore the importance of the role that leaders play in advancing talented minorities. It is no accident that Dan Rooney led the NFL’s efforts to hire more African-American head coaches, or that the military’s top brass played a direct hand in increasing opportunities for promising minority officers. The leaders of corporations and other organizations who want to improve their diversity efforts have taken deliberate steps to push the needle, and law firms could do the same thing. The law firm that is committed to diversity and is growing frustrated with the slow pace of progress should enlist its most influential partners to serve as sponsors for minority lawyers.

How should that step take place? Here is one approach: In each practice group or office, the group’s leader meets periodically with a senior leader of the firm—preferably its chairman, but at least a member of its management committee—and the chair of the diversity committee. The goal is to assess the progress and prospects of the group’s minority lawyers, with an eye toward improving retention and advancement rates. The meetings address work assignments (what lawyers are working on and with whom), evaluations, and, if the firm has a formal mentoring program, the effectiveness of mentor-mentee pairings. Participants leave the discussion with a better sense of how their minority lawyers are progressing and of the concrete steps that need to be taken to improve their access to work, clients, and influential partners. And, perhaps most importantly, specific sponsors are identified and assigned to associates who have shown promise and whom the firm wants to retain and, if they eventually meet the standards for partnership, to promote. Sponsors are asked to commit to taking specific steps for their associates—though no more than what they have done for others they sponsored organically in the past. And they also are asked at subsequent meetings to report on the steps they have taken.

Such meetings directly engage decision-makers in bolstering the firm’s diversity retention and advancement efforts. The presence of law firm leaders sends the message that a diverse partnership is important to the firm’s leadership, and many of these senior lawyers are in the best position to serve as sponsors. If for some reason they are not the appropriate people to serve as sponsors—either because they are in a different practice group, or for some other reason—they are in the best position to act as ambassadors for the initiative. Specifically, they can enlist other influential lawyers to serve as sponsors and explain the importance of the role they are being asked to play. Sponsors can also be assigned, but active recruitment is a better approach; it gives the partner making the request (the ambassador) an opportunity to foster buy-in and promote the significance of this intentional approach to improving retention and advancement. Further, having a chairman or other firm leader reach out to another senior partner adds credibility to the effort.

As previously mentioned, sponsorship is not new to law firms, but mentoring has been the main focus. To avoid confusion with a mentoring program, potential sponsors should receive a clear
explanation of how this role differs from what they do as mentors. Sylvia Ann Hewlett, founding President of the Center for Talent Innovation (formerly Center for Work-Life Policy), describes in a 2011 *Harvard Business Review* article that a sponsor is someone who uses chips on behalf of protégés, advocates for promotions and does at least two of the following seven things for them:

1. Expands the protégés’ perception of what they can do.
2. Connects them to senior leaders.
3. Promotes their visibility.
4. Connects them to career advancement opportunities.
5. Advises them on how to look and act the part.
6. Facilitates external contacts.
7. Provides career advice.

Each of these steps is self-explanatory, but a practical example of how this approach would work in a law firm may be helpful. A minority fourth-year litigation associate (let’s call her Kim) in a large Am Law 100 firm has distinguished herself as having what it takes to be viable partnership candidate. Kim knows she is doing well because she consistently receives strong evaluations and partners with whom she works give her positive feedback. Because so few minority partners are in her firm—particularly minority female partners—she doesn’t think partnership is a realistic goal and has already begun to consider leaving the firm. The vice chair of the firm’s litigation department, a white man named John, attends a diversity meeting with the managing partner and other senior leaders in his department where Kim is mentioned as having real promise. The managing partner asks the group who would be the appropriate sponsor for Kim, and John volunteers. He has worked with her in the past and thinks she would be a great fit in his practice, which is quite successful.

John finds a way to give Kim a significant role on an important matter. She does a great job, so he encourages junior partners working on his matters to give her more work. To increase Kim’s exposure, John finds ways to get her on the radar of senior litigation partners in other offices across the firm and takes her to client meetings so she can cultivate relationships with in-house lawyers. With John’s help, the foundation for Kim’s business case is being laid: she gains several sponsors and informal mentors, develops relationships with key clients and carves out a niche that supports John’s and, as needed, other partners’ practices. John lets everyone know that he is her biggest supporter and doesn’t miss an opportunity to sing her praises to other lawyers in the firm.

In this example, John performs at least five of the nine functions associated with effective sponsors. John gives Kim high-level responsibilities on his matters that create career advancement opportunities. John increases Kim’s visibility by connecting her to senior and junior partners across the department and firm. He facilitates external contacts by taking Kim to client meetings, thus giving her opportunities to cultivate important external relationships. Throughout this process, without making any promises, John is letting Kim know that partnership is a realistic goal. These conversations expand Kim’s perception of what she can
accomplish in the firm; as a result, she becomes more invested in the organization and no longer looks for other opportunities. Without overtly calling in favors for Kim, John sends the message that he fully supports her by simply telling everyone how great she is; consequently, it is no secret that John will advocate for her election to the partnership when Kim is eligible.

**Conclusion**

Some people may consider a deliberate approach to improving diversity in the partnership ranks controversial because they think it (1) gives certain people an unfair advantage, or (2) it is remedial and therefore demeaning. It is neither. It simply acknowledges that the status quo is not working and, absent intentional measures, unconscious bias will continue to inhibit efforts to improve diversity in law firm partnerships. Recognition of this reality has influenced major corporations to intentionally create sponsorship relationships. American Express, for example, has a program designed to establish powerful alliances for women across the organization. Its goal is that, by 2015, women with long-term potential for success in the company will have two to three advocates to assist in their advancement. This approach would serve the same purpose in law firms: to ensure that partners with the ability to affect change play a direct role in helping talented lawyers advance. As Dean Thomas’s research indicates, minorities often remain invisible when promotion decisions are made. Real change occurs when intentional steps are taken to make talented minorities visible in their organizations. This approach has proved successful in other organizations, and law firms could have similar success if their leaders are also willing to push the needle.

Kenneth O. C. Imo is the director of diversity at WilmerHale in Washington, D.C.
Uninvited: Preferred Counsel Lists and How They Limit Minority- and Women-Owned Law Firms’ Access to Legal Work

By Emery Harlan, Joel Stern, Martin P. Greene, and Sheryl Axelrod

Preferred counsel lists—the result of a corporate process to actively limit the number of law firms on the law department’s approved list of firms—came into widespread use in the 1990s, when minorities and women were markedly underrepresented in the legal profession. Then, as now, preferred counsel lists allowed companies to obtain more favorable terms with outside counsel by forming consolidated networks. In recent years, corporate law departments started using national contracts for certain types of work. Prior to the rise of preferred counsel lists and national contracts, insurance companies used panel counsel lists. Companies retain these lists for years, often listing law firms of retained lawyers who have long left those firms. The continued use of law firms on these lists, and the creation of new such lists, has had the unfortunate consequence of perpetuating historic inequality and of causing the companies using them to miss out on the business advantages of having more diverse counsel, those firms owned by minorities or women.

More diverse viewpoints among a legal team increase the likelihood of it generating innovative ideas and solutions. Retaining minority- and women-owned law firms introduces a diversified pool of leading attorneys who are able to respond to legal matters with ingenuity and insight. This article proposes methods for companies to achieve the benefits associated with having a preferred network while, at the same time, increasing the benefits that minority- and women-owned law firms can offer these clients.

Preferred Counsel Lists

Preferred counsel lists have been in use for more than 20 years. Some credit DuPont as among the first large American companies to consolidate its list of outside counsel when, in the early 1990s, it lowered the number of law firms with whom it worked from 350 to 35. David B. Wilkins, Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship, 78 Fordham L. Rev. 2067, 2085 (2010).

Companies create preferred counsel lists not only to cut costs but also to build relationships with subject-matter experts relevant to their industries in their most important geographical areas. By consolidating work across fewer firms, companies deepen their counsel’s familiarity with their issues and get more consistency in their representation.

Prevalence. In a 2005 Martindale-Hubbell survey of in-house counsel, approximately 17 percent of surveyed companies maintained a formal procurement process for selecting law firms to place on their preferred counsel list, and approximately 63 percent reported having an informal “go to” list of approved lawyers. Martindale-Hubbell, State of the
Profession Report: How Corporations Identify, Evaluate and Select Outside Counsel, p. 9 (2005). This suggests that as many as 4 out of 5 companies maintain some sort of preferred network of outside counsel.

While most American companies develop their preferred counsel lists informally, a 2013 survey of in-house counsel across industries in Texas and Florida found that 27 percent of the companies surveyed use formal procedures. Texas Young Lawyers Association and the Florida Bar, Young Lawyers Division, From the Inside Out: In-House Counsel’s Advice for Young Lawyers, p. 4 (2013). Whatever process is used, all too often, minority- and women-owned law firms are not invited to submit proposals or credentials.

**Composition and convergence.** The law firms on most preferred counsel lists are typically identified from a corporation’s long-standing legal group. Because diversity has historically been poor within law firms, the law firms that compose these preferred networks are disproportionately (and many times exclusively) owned by white men—that is, they lack the business advantages of having more diverse representation within their ranks. The longer a company has maintained a preferred counsel list, the more likely that is to be the case. This effect is heightened by the “convergence” phenomenon—the process by which preferred counsel lists are made—that drove companies to consolidate their legal work and create preferred counsel lists in the first place.

This “convergence” phenomenon is becoming increasingly prevalent and exclusive. In a 2010 survey by legal consulting firm Altman Weil, 32 percent of corporate law departments reported that they planned to decrease the number of firms on their preferred counsel lists within a year. In that same survey, the majority of the corporate law departments that maintained preferred counsel lists reported having ten or fewer firms on their lists and spending a staggering 91 percent of their total legal fees on work performed by preferred counsel. Altman Weil, Chief Legal Officer Survey, pp. 6–7 (2010).

The procurement and convergence process has created a vicious cycle that has made it difficult, if not impossible, for minority- and women-owned firms to break into preferred networks, as companies often do not include diversity as a weighted factor in selecting outside counsel. The International Litigation Management Association reported in its May 2003 article “How to Overhaul Your Panel Counsel Network” that although 22 separate categories of information were sought from outside counsel in the selection process, neither diversity nor diversity initiatives were among them. Similarly, in the 2005 Martindale-Hubbell survey discussed earlier, only 4 to 5 percent of participants stated that diversity was an extremely important factor in selecting firms for their preferred counsel lists. Martindale-Hubbell, State of the Profession Report: How Corporations Identify, Evaluate and Select Outside Counsel, pp. 11 and 14 (2005). By effectively excluding diverse law firms from their preferred counsel lists, corporations are...
at the same time depriving themselves of outstanding legal representation and acting against their diversity and inclusion initiatives.

Preferred Networks Fuel the Underrepresentation of Minorities and Women

Preferred counsel lists are predominantly comprised of large, traditional, majority-owned firms (large law firms whose ownership is primarily white and male), where minorities and women have been traditionally underrepresented. Preferred counsel lists thus effectively maintain the status quo of excluding many of the top minority and women lawyers in minority- and women-owned law firms.

In selecting firms for preferred networks, companies commonly require a history of representation and demonstrated value to those companies, thereby excluding newcomers from the competitive process. The forged relationships between those companies and their preferred predominantly white male counsel become deeply entrenched. It is nearly impossible for minority- and women-owned firms to demonstrate their unique advantages to the law departments.

Some large companies reason that they need law firms with a substantial geographic presence to manage their legal needs. Because many minority- and women-owned law firms are local or regional, these firms are not even informed about the opportunities to make proposals. Oftentimes, minority- and women-owned law firms first learn about the existence of a preferred counsel program when they are told to transfer their work to a national and/or non-diverse firm.

Minority- and women-owned firms, which have been steadily growing in number and size over the past several decades, are virtually absent from preferred counsel lists. The lists operate as an unintended barrier to access for work from major corporations. Indeed, a common response from a corporate legal department to a request for work by a minority- or women-owned law firm is that the company has a policy of using only firms on its preferred counsel list. Firms outside the preferred network are excluded from participating in the request for proposal (RFP) process and thereby are unable to compete for business.

Preferred counsel lists thus tend to perpetuate the historical use of large, majority-owned law firms to handle most of a company’s legal work. They make minority- and women-owned law firms have to fight “built-in headwinds” to pursue large matters. The process is concerning as it operates to “freeze” or “lock” historical inequality. Corporations with preferred counsel lists would be well advised to use those lists in ways that do not freeze any groups out of opportunities. If such a freeze were to occur in the employment arena, as opposed to the market for outside counsel, the practice could be challenged. See Robinson v. Union Carbide Corp., 538 F.2d 652, 657 (5th Cir. 1976) (holding that under Title VII, an employer’s hiring procedures must be both fair in form and fair in operation). Indeed, on the topic of tradition with a discriminatory effect, Justice Posner in Baskin v. Bogan, recently stated: “[t]radition per se therefore cannot be a lawful ground for discrimination—regardless of the age of the tradition.” Baskin v. Bogan, 2014 U.S. App. LEXIS 17294 at *55 (7th Cir. 2014).

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In response to a recent survey of its members that was conducted by the National Association of Minority and Women Owned Law Firms (NAMWOLF), 50 percent of respondents indicated they experienced a reassignment of existing work to large traditional firms due to those firms’ “preferred” status. Over 50 percent of responding NAMWOLF firms reported that they were neither given new assignments nor allowed to bid on work due to their non-preferred status. Tellingly, less than 10 percent reported being advised they were denied work because of performance issues. (NAMWOLF members also reported numerous anecdotal situations in which they provided successful, efficient, and cost-effective representation to a client, only to, among other things: (1) have the work moved to a more expensive firm on a preferred list; (2) learn matters that were handled by senior lawyers at diverse firms are now being handled by junior associates at the preferred firms; and (3) have a new insurance carrier insist its panel counsel be used, despite successful work and vast corporate knowledge on the part of the diverse firm.)

As Alan Bryan, Walmart’s associate general counsel for legal administration and external relations and outside counsel management, put it,

Despite collaborative efforts of several companies through the Inclusion Initiative, minority and women-owned law firms are still often overlooked by corporate legal departments. That is surprising. There is a clear business benefit to utilizing women or minority owned law firms. These firms often offer the most cost-effective, highly-credentialled, and talented lawyers in a jurisdiction. Plus, they deliver extraordinary results. Women and minority owned law firms have been part of Walmart’s approved counsel list for several years and they will continue to perform work for the company in the foreseeable future.

The Business Case for Supplier Diversity Programs

**Business imperative.** Many corporations struggle to monetize the services of in-house counsel and view these legal departments as cost centers. Thus, to some corporations, investment in outside counsel supplier diversity programs seems unintuitive and wasteful of resources. However, there is a powerful business case for supplier diversity initiatives.

Satisfying supplier diversity objectives is not merely the right thing to do; it is a business imperative. Many corporations have already made the business case for diversity themselves and have developed comprehensive supplier diversity policies as cornerstones of their businesses. Moreover, the U.S. government and many other corporate customers require that corporations source from a diverse supplier group, including in their procurement of legal services.

**Profitability.** On the profit-generating side of the equation, a number of studies, taken together, show that both racial and gender diversity are associated with increased sales
revenue, more customers, greater market share, and high relative profits within companies. L. Diaz and P. Duncan, Jr., Ending the Revolving Door Syndrome in Law, 41 Seton Hall L. Rev. 947, 958–59 (2011). In a 2011 comparison study, Fortune 500 companies with the most women on their boards “outperformed those with the least by 66 percent in return on invested capital, 42 percent in return on sales, and 53 percent in return on equity.” Sheryl L. Axelrod, Disregard Diversity at Your Financial Peril: Diversity as a Financial Competitive Advantage, American Bar Association, GPSolo eReport, Vol. 3, No. 4 (November 2013) (citing Nancy M. Carter and Harvey M. Wagner, “The Bottom Line: Corporate Performance and Women’s Representation on Boards,” Catalyst, Inc. (2004–2008)). Another study revealed that, “on average, the most racially diverse companies bring in nearly 15 times more revenue than the least racially diverse.” Id. (citing Cedric Herring, “Does Diversity Pay?: Race, Gender, and the Business Case for Diversity,” American Sociological Review (2009)). That study shows that “for every percentage increase in racial or gender diversity up to that represented in the relevant population, sales revenues increase approximately 9 and 3 percent respectively.”

These benefits of diversity apply to law firms as well. In a survey of 200 law firms, highly diverse law firms were found to generate, on average, “more than $100,000 of additional profit per partner than their non-diverse counterparts.” Id. (citing Douglas E. Brayley and Eric S. Nguyen, “Good Business: A Market-Based Argument for Law Firm Diversity,” The Journal of the Legal Profession (2009)). Diverse law firms are more profitable because diverse groups perform better than non-diverse groups. Id. (citing Scott E. Page, The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies (2007)). Without representation by a robust number of minority- and women-owned law firms, companies retaining firms that have poor diversity records miss out on the enhanced performance more diverse counsel teams bring.

**Expertise.** Large corporations spend vast sums of money on legal services. Unfortunately, in-house departments often disproportionately tap their former majority-owned law firms to serve as outside counsel. Minority- and women-owned law firms are often specialists in a particular practice and highly regarded in their respective fields, but they are not invited to submit bids. Overlooking expertise in favor of the “tried and true,” although expedient in the short-term, can in the long term result in exorbitant legal fees and costly mistakes.

The criteria used to develop preferred counsel lists would likely lead to the hiring of diverse law firms, were they given the opportunity to be considered. For high-stakes matters, in-house counsel place paramount importance on subject-matter expertise and client service, to the exclusion of geography. This suggests that diverse firms with highly specialized practices, if offered the opportunity to apply, could be viable candidates for inclusion on a company’s preferred counsel list. For low-stakes matters, in-house counsel

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rank client service, lawyer expertise, and cost as about equally important, with geography playing a significant factor. Minority- and women-owned firms tend to be local or regional, making them strong contenders for local or regional work.

**Rewards of sustained diversity.** Minority and women-owned law firms have a competitive advantage when it comes to developing and retaining diverse senior attorneys. Evidence indicates that minority and women junior associates experience a higher attrition rate relative to their non-diverse counterparts. L. Diaz and P. Duncan, Jr., *supra*, at 948–49. Majority-owned law firms often do not retain their minority and women attorney hires; rather, “they simply change heads.” Elizabeth Chambliss, A.B.A Comm’n on Racial & Ethnic Diversity in the Prof., *Miles to Go 2000: Progress of Minorities in the Legal Profession*, 6 (2000). Retention disparities at majority-owned law firms result in the loss of human capital and institutional knowledge regarding the corporate client, which can detrimentally affect long-standing attorney-client relationships.

Supplier diversity programs focused on staffing requirements generally neither address the dearth of promotion and mentorship opportunities for minorities and women at majority-owned firms nor influence the diversity of these firms’ management teams. Thus, majority-owned firms endeavoring to meet a corporate client’s diversity requirements end up hiring from a less experienced pool of attorneys.

**Proposed Solutions**

When firms that are vying for corporate work provide comparable services, corporations should use diversity as the “qualitative differentiator” in retaining outside counsel. L. Diaz and P. Duncan, Jr., *supra* at 956. This will not only result in growth opportunities for minority and women-owned firms, but also instigate an important change in the diversity initiatives at majority owned firms competing for the same work.

Including diverse firms in preferred counsel lists offers experienced and pedigreed attorneys who are ready, willing, and able to do the work. Increased retention of diverse firms will ensure that legal departments realize all their performance expectations for outside counsel, including diversity and inclusion goals.

**Implement “Rooney Rule” supplier diversity policies.** In-house counsel and procurement professionals should employ a policy similar to the National Football League’s *Rooney Rule* in their solicitations for legal services, to ensure that minority and women-owned law firms that possess the requisite practice-area expertise are included in the competitive bidding process. The rule is named after the Pittsburgh Steelers’ chairman, Dan Rooney, who staunchly advocates that every NFL team interview at least one minority candidate for open coach and general manager positions. Since the rule’s introduction in 2003, 17 NFL teams have had either an African-American or Latino head coach or general manager. In the 80 years prior to the rule, only seven coaches of color

© 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
had ever been hired. Mike Freeman, The Bleacher Report, “The Rooney Rule 10 Years Later: It’s Worked . . . Usually, and We Still Need It” (Oct. 24, 2013), available at http://bleacherreport.com/articles/1822988-the-rooney-rule-10-years-later-its-worked-usually-and-we-still-need-it. Legal departments that maintain preferred counsel lists that exclude minority- and women-owned law firms would be forced to extend the bidding process beyond their “go-to” networks of traditional law firms, connect with previously overlooked diverse law firms, and revise their preferred counsel lists to include minority- and women-owned firms meeting the qualifying criteria.

A lack of qualified minority and women-owned firms should never be a reason for corporations not to diversify. Corporations should partner with diversity-advocacy organizations to solicit bids from diverse firms. This partnering takes the guesswork out of identifying talent. In addition, using minority- and women-owned law firms aligns with company supplier diversity initiatives.

Revise or establish supplier diversity goals. In-house legal departments must challenge themselves to establish supplier diversity goals that dedicate a percentage of their procurement budget for legal services to the retention of minority- and women-owned law firms. For instance, in 2011, Pacific Gas and Electric Company directed 22.4 percent of its outside counsel budget to minority-, women-, disabled-, and veteran-owned law firms. Pacific Gas also recognized 2011 as one of its most successful years in terms of favorable case resolutions. California Minority Counsel Program, “Diversity Business Matters: 2011 Corporate Programs Supporting Business for Diverse Outside Counsel,” (Mar. 2011) at 49. Pacific Gas demonstrates that corporations can direct a meaningful amount of work to diverse law firms and enhance the quality of the representation they receive.

Retaining minority- and women-owned firms should be a priority. It is imperative that in-house counsel’s hiring of minority- and women-owned law firms be tied to the in-house lawyers’ performance reviews and, ultimately, their compensation. In-house attorneys should be rated, in part, according to a “diversity performance factor,” which reflects satisfaction of the legal department’s supplier diversity goal. When greater inclusion of minority businesses is part of in-house counsel’s compensation package, it becomes a greater priority. Diversity MBA, “Supplier Diversity Programs and Practices Overview” (Oct. 12, 2009).

There are a number of ways for legal departments to enhance their supplier diversity efforts. For instance, in-house supplier diversity protocols should require that decisions to transfer work from a minority or woman owned firms to a majority-owned form first be substantiated according to an objective evaluation matrix. This will ensure that work is not being redirected from minority- or woman-owned firms simply to accommodate in-house counsel’s predisposition toward their former firms or personal network. Decisions to make first-time awards of work to majority-owned firms should be similarly evaluated.
Moreover, there must be some tangible consequences for law firms that choose to ignore their corporate clients’ diversity mandates. Legal departments must be prepared to terminate relationships with outside firms that fail to achieve diversity goals built into their outside counsel guidelines. Diaz and Duncan, Jr., supra, at 958–59 (stating that in 2011, the Institute for Inclusion in the Legal Profession conducted a survey and found that nearly 90 percent of surveyed in-house counsel respondents indicated that they had not changed any law firm relationships based on poor performance against their companies’ diversity objectives. Moreover, of the roughly 10 percent of in-house counsel who had changed their relationships with law firms based on poor diversity performance, only 16.6 percent terminated the attorney-client relationship with firms believed to be underperforming.)

**Unbundle large legal services contracts.** In-house departments should consider unbundling legal services into separate RFPs or other opportunities and qualifications. Unbundling of legal services can lead to (1) optimized service delivery, (2) retention of experienced specialists, and (3) cost savings. Unbundling means that corporate clients select one or several discrete lawyering tasks, which are traditionally contained in a full-service package, and direct the work to lawyers that have the most efficient service delivery structure and experience for the assigned task. Unbundling provides the greatest number of opportunities to the greatest number of firms to do work. Segmentation of legal services also makes more opportunities accessible to minority- and women-owned law firms, which are generally smaller than their larger, less diverse counterparts.

Unbundling work allows minority and women-owned law firms to bid on matters within their specialty areas and to focus on what they do best. It opens up opportunities for diverse firms to work together to form virtual firms in specific practice areas to respond to a client’s need for national contacts or to pair specialized diverse law firms with traditional full-service law firms to effectively resolve a matter. Unbundling services can also result in overall cost savings to corporations. Indeed, directing narrowly defined legal tasks to specialized firms not only optimizes service delivery but also eliminates the need for high retainers and increases a client’s control over the amount of work performed by retained firms.

**Conclusion**
Like an exclusive private club with arcane restrictions, preferred counsel lists that fail to include minority- and women-owned firms are poor for business and out of sync with modern times. The problem for diverse firms is that they are not invited to the club, which precludes them from being retained as outside counsel. Remediing the historical exclusion of diverse firms caused by the proliferation of preferred networks requires making diversity a priority in the procurement process.

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Law Firm Models: Improving Diversity and Performance
By Susan Letterman White

On average, women comprise less than 20 percent of equity partners at the 200 largest law firms, the large majority of which will not even report data about their compensation of men and women. The statistics for minority lawyers are much worse. The good news is that most lawyers in private practice, approximately 85 percent, are working in smaller firms. However, we can’t overlook additional problems with our legal system models, such as the surplus of law school graduates, the lack of employment opportunities for many, and the tremendous need for legal services by many in our country who cannot afford the high price of legal services. Indeed, this is the focus of an ABA Presidential initiative. Why is achieving career and compensation parity at the largest firms so slow, and where within the legal system are there opportunities for change?

Law Firm Business Models: Could They Be to Blame?
The traditional business development and compensation model may be a significant obstacle to change. Stephanie Scharf, founder of the NAWL Annual Survey on Retention and Promotion of Women in Law Firms and lead author of the 2014 Survey Report, notes that the “traditional model in law firms for rewarding business development follows the “first touch” rule—by designating one lawyer as the originating attorney. The lawyer who first brings in the client often remains the originating attorney as long as he or she is with the firm—sometimes for decades.” In almost all law firms, origination credit affects pay and promotion, often to a very substantial degree. If origination credit is not broadly allocated, then those partners who actually service the client and bring in new business might not receive credit for their contributions to the firm’s profitability.

Under newer business development models, “client credit is shared among several partners in a team approach.” Credit might be shared by the partner who first brings in the client, the partner who brings in a new matter from an existing client, the partners who work on the matter, and the partner who markets and does not actually work on the matter. “A shared credit approach allows firms to align their compensation system with the values of the firm—such as the value of advancing women and minority lawyers. Shared compensation fosters better succession planning, as well—with the recognition of younger, yet very active partners, who are more likely to be women and minority lawyers than in more senior cadres and who help to grow the business,” Scharf told me. The traditional approach empowers the lawyers with control over the clients who generate substantial revenue each year.

Even with the best training, many lawyers, like the best surgeons and academics, are never going to excel at bringing in new clients. Developing new clients demands a robust, personal network of referral sources and empowered decision-makers, who hire lawyers for the type of work the firm does. Even if everyone had similar access to decision-makers, despite the obvious bar because of socioeconomic differences, differences in thinking and personality also affect whether
a person will feel excited and energized or exhausted and overstimulated when marketing and networking (see Susan Cain’s book *Quiet: The Power of Introverts* for more details on the differences between introverts and extroverts on the Myers-Briggs Type Indicator). The best lawyers are not necessarily also the best rainmakers, nor should they be. Further, the multiple processes that come after the first touch and that keep a client coming back to the same firm involve the best lawyers, who are quite capable of one-to-one conversations in contrast to the one-to-many conversations that characterize the very early stages of marketing and networking. Wouldn’t it be better to have the best lawyers practicing law, and the best people, lawyers or not, focusing on marketing and developing new clients?

Despite best efforts from well-intentioned law firm leaders over the past decade, the types of organizational changes that have the best chance of creating parity, like the newer business development models, are not experiencing widespread adoption. Instead, many firms stop at offering a variety of trainings, mentoring programs, and affinity groups, perhaps necessary changes; however, not sufficient to bring about parity in status and compensation.

**The Two Challenges with Change Initiatives in Law Firms**
First, the empowered leaders who could change business development and talent development—including compensation models—do not feel any need to do so in the largest firms. Changing a business model and culture requires three factors:

1. leadership,
2. a “felt need” among empowered leaders, and
3. motivation to make specific changes, such as changing the business development and compensation model.

Second, change depends on people changing their thinking. Change always feels like a loss. Our brains seem to be wired to like the comfort of the familiar and to dislike change, even for the better. Nobel Prize–winning economist and author Daniel Kahneman calls it “the asymmetric intensity of the motives to avoid losses and to achieve gains.”

Change requires a particular way of thinking that is contrary to how lawyers typically think. Successfully leading or navigating a change initiative requires suspending or rebalancing the

1. skepticism in favor of seeking new information and brainstorming new solutions, without judgment;
2. debate to find a single right answer in favor of being open-minded to new possibilities;
3. dependency on an expert to provide advice or the right answer in favor of self or group reflection on what has not worked and what might be worth trying;
4. the need to be perfect in favor of a willingness to make mistakes, learn from them, and bounce back to try again;
5. directive leadership in favor of leading engagement and buy-in; and
6. individualism and independence in favor of collectivism and collaboration.
Leadership Does Exist
Some large firm leaders are different. They are responsible for the outstanding VAULT scores that measure the degree to which women and minority lawyers report a positive work atmosphere. They monitor the diversity of client teams and attempt to influence the purposeful addition of women and minority lawyers to these and other career-making opportunities. Some may be showing diversity in the newest classes of equity partners; however even in these firms, the highest earners are not diverse.

Do These Leaders Have a “Felt Need” to Change the Culture?
We read and hear about clients leaving law firms, revenues dropping, and ineffective leaders. One might think the felt need for a change is obvious.

Consider the following, according to the ABA:

- In 2013, Altman Weil reported that 47 percent of law departments were decreasing their outside counsel budget, an increase from 39 percent in 2012 and 25 percent in 2011.
- Tymetrix reported a 5 percent drop in demand for hours.
- Citibank reported that 39 percent of law firm managing partners expected profits to decrease or remain flat.

The Cornell University Law School Legal Information Institute website reports the following:

- According to Altman Weil, 85 percent of partners think clients love them; however only 35 percent of clients would recommend their counsel, only 17 percent would give an “A” rating to the firm, and 87 percent think their law firm is inefficient.
- 77 percent of participants in the Altman 2012 Legal Officer Survey terminated their relationship with at least one firm in the prior year.

ALM Legal Intelligence offers these statistics:

- 37 percent of firm leaders want more work from existing clients and 28 percent want to improve client relationships, yet only 22 percent say they are “extremely knowledgeable” about their clients’ businesses. This should come as no surprise, because only 56 percent have a plan to track client loyalty and satisfaction, and of those, 47 percent track this data only “episodically.”
- 96 percent of firm leaders intend to pursue growth by acquiring laterals, yet only 28 percent think that their lateral strategy is very effective.

You may be surprised to discover that despite these dire statistics, they do not matter to many of the largest “super rich” firms’ empowered leaders. Steve Nelson, managing principal of the McCormick Group, looked at the five-year history of revenues and profits among leading law firms and concluded that most have not faced difficult times at all. The statistics reported by Steve and Above the Law show that profits per partner, the chosen measure of performance for
these firms, has remained stable or risen over the past five years. If the worst-case scenario for these firms is that average annual profits per equity partner of approximately $700,000 remains flat, what exactly is the felt need to change any aspect of the business model? Cutting costs seems sufficient to maintain the profits of the most powerful equity partners. Indeed, these empowered leaders get their power and profits from the traditional model, and fighting for and controlling the client relationships. Instead of a “felt need” for a different business model, they feel the need to maintain the status quo.

Perhaps a leader of an AmLaw 200 firm feels the need to become a member of the elite AmLaw 100. Gianmarco Monsellato, head of the TAJ law firm in France, wanted to transition his firm from a second-tier to a first-tier firm, and was open to solutions based on the organization performance research literature. He personally ensured that the best assignments were distributed evenly among men and women, tracked compensation and promotions for parity, and asked for reasons when gaps were evident or client permission if the client is the source of resistance. That talent development model transitioned the TAJ law firm from a second-tier firm in France to one of the top five firms (see the Deloitte case study on the firm, and this Harvard Business Review blog post).

Perhaps a few of these empowered leaders recognize the difficulty of changing the culture in a way that will affect the highest earners, and are seeking other meaningful options. If so, aim intentional change where change is already happening, at the beginning and ending of one’s legal career.

First, newer lawyers—those without any originations and limited experience developing new clients and new matters—are ripe for training and practicing what they learn. Carve out an exception to the business development and compensation model for this group. Second, develop a succession plan to transition clients of retiring partners to the firm and not to an individual lawyer, and carve out an exception to the model for these clients. The exception in both instances is to encourage a collaborative approach to client relationship management, new matter development and cross-selling, and working on client matters.

Among the largest group of practicing lawyers, many feel the need to change. They simply aren’t the leaders of the largest law firms. Some work in those firms, others work in midsize and small firms, and yet others are not in private practice. Some develop new clients or new matters, and under their firm’s business development and compensation model are not receiving the support to do the work. Some are excellent lawyers but not excellent rainmakers. Law schools with unemployed graduates, and law school graduates who can’t find opportunities to develop their legal skill and expertise, also are feeling the need for a change. Some are in-house lawyers, who want to work with firms that can show diversity at the highest levels. And let’s not forget clients—including people who need lawyers but who under many pricing models can’t use their first choice of lawyer or cannot afford any lawyer.
Motivation to Change: The More Modern Model Is Better for the Organization

Although traditional models may be better for the individual lawyer with control over a few clients that generate a large book of business, recent research by Michelle Rogan on client loyalty and retention shows that the traditional law firm model for business development and compensation is not the best model for developing organizational strength, client loyalty, and client and lateral retention. She reports that when multiple people and groups within a professional services organization were not competing with each other for client control, and instead formed multiple ties with multiple individuals and groups within client organizations, client retention and organizational stability improved, even upon the departure of individual leaders and rainmakers.

In fact, scientific research on organizational performance has repeatedly shown the organization and group advantages of models that embrace the more modern business development and compensation model and promote diversity and inclusion.

- **Relationships** with clients, colleagues, and other strategic partners is at the heart of increases in client loyalty, revenue, and perception of good leadership skills.
- The overall **density of friendship relationships** within an organizational group is positively related to client loyalty.
- **MIT’s Center for Collective Intelligence** reports that the higher the proportion of women on a team, the more likely the team is to exhibit collective intelligence and achieve its goals.

The changes to the law firm business model that are best for the organization as a whole, coincidentally, are also best for building inclusion and diversity at the highest levels of power and earnings. Friendship relationships create trust and understanding across differences and discourage internal competition for client control. Collective intelligence depends on having a higher proportion of women within a group.

For midsize and smaller law firms, already feeling a need to build organizational strength and looking for a competitive advantage in the marketplace, this research may sufficiently motivate a wide-scale change in business model and culture. The more modern business development and compensation model encourages new thinking and behavior.

At Barran Liebman LLP, a niche employment, labor, and benefits law firm in Portland, Oregon, 50 percent of the attorneys are female or minority attorneys, 30 percent of the partners (including the executive director) are female, and all of those women are among the top 10 earners. The firm has no origination credit. The firm was founded with the value of diversity and inclusion as part of its DNA. The group of partners that came together to form the firm, led by managing partner Ed Harnden, chose a woman, Paula Barran, to be the first name partner. It goes without saying, as with all successful firms, its lawyers are the “best” at what they do.

What else does the firm do differently? It “markets and sells” the firm as a whole team, not individual lawyers. The firm has branded itself through its actions as committed to the Portland
community, including by being a “family-friendly” place to work. As Rick Liebman, also a name
partner, says, the firm wants to be known as the law firm that “goes above and beyond in terms
of public service.” He believes that business development goes hand-in-hand with diversity and
inclusion. The firm has built that reputation, being recognized with “many accolades in the state
for both monetary donations and pro bono work for public service—including being named the
best small company to work for in Oregon in 2013.” The firm’s business model is to “really
embody and relate” the firm and its people to its corporate clients, who are “known for diversity
and equity, just like us.”

As executive director Traci Ray phrases it, “lawyers here enjoy practicing law and are able to
focus on being the best lawyer for their clients.” She “focuses on client needs” and works to
ensure “clients are getting the best service and representation in the industry.” She also responds
to RFPs, and uses her knowledge of the industry and the law to meet and exceed client
expectations. She “understands our practice and how cases are won,” and “enjoys client
relationships and facilitating them,” explains Liebman. She is an integral participant in strategic
planning. She is a lawyer, who has chosen to be a business advisor and marketer. She sees a
growing “trend of lawyers becoming marketers” and says to be successful, a person needs to
“choose” the role for themselves, and own it. “Helping lead a law firm is about relationships,
with the attorneys, staff and clients—it’s a role filled with many challenges, but with those
challenges come opportunities to problem-solve and achieve success with innovative solutions.”
The firm promotes a culture of camaraderie. It was built and continues to grow on that
philosophy; five of its founders, still working together, have practiced together for over 35 years.
There is no internal competition for clients. What makes this firm so interesting is that with no
more than a gut feeling, its lawyers created a business model that research says is positively
correlated with increased revenue and client loyalty.

Corporate Legal Departments and the Power of the Purse
Paul Dacier is the executive vice president and general counsel of EMC Corporation, president
of the Boston Bar Association, and a panelist on the upcoming Magnitude 360 CLE Showcase
Program. Diversity is a value for Paul and part of the culture he creates every day at EMC
Corporation. At EMC, he leads a “world-class legal team” which also happens to be the most
diverse department in the entire organization. Ninety percent of Paul’s direct reports are diverse.
Serendipity did not create diversity at EMC; Paul did.

Values rise out of beliefs, and Paul believes that because our society is diverse, the leading
institutions in our society, particularly law firms, should be diverse. He also believes that lawyers
should be activists on legal and social principles. “We, as lawyers, should speak up” to bring
about change, Paul says. He speaks up with his outside counsel firms because it’s only natural to
“want to go with those who have similar DNA to you.” He uses his power of the purse to ask law
firms what they are doing to build diversity, and if the answer he receives is unacceptable, “there
are lots of [others] who want to do business with us.” Paul is a highly empowered leader who
models the behavior he wants others to embrace, speaks up about injustice in the profession, and
uses his in-house role to hold law firms accountable.
Conclusion
Law firms of all sizes have opportunities to create diverse, stronger, and more profitable organizations. All that is required are leaders with a strong desire to create organizational sustainability, and the willingness and the motivation to lead an intentional strategic culture change over time.

Susan Letterman White is founding principal of Letterman White Consulting in the greater Boston, Massachusetts, area.
NEWS & DEVELOPMENTS

Project Implicit Test

People do not always say what's on their minds. One reason is that they are unwilling. Take Harvard's Project Implicit Test and measure your attitude and beliefs that you would otherwise not report. If the test shows that you have an implicit attitude that you did not know about, examine your beliefs.

Figure out your unconscious roots of thought and feeling. Only through introspection can we begin the process of change.

Diverse Attorneys Grassroots Pilot Project

In its effort to improve diversity in its membership, the Section of Litigation will launch a Diverse Attorneys Grassroots Pilot Project. The project includes the Section's largest committees, Commercial and Business Litigation, Insurance Coverage, Trial Practice, LGBT Litigator, Products Liability, Employment & Labor Relations Law, Real Estate Litigation & Condemnation, and Minority Trial Lawyer committees. The leaders of these committees will aggressively recruit diverse attorneys in a 10-state geographical area and encourage them to join the committee. The ideal candidate is either a senior associate or a young partner who has demonstrated leadership in their local market, has demonstrated ability to lead at the national level, and who is already a member of the ABA. These talented candidates will be invited to join the Section of Litigation and also be provided an opportunity to get embedded in the work of the Section. By making the choice to join our ranks, these talented candidates will be given the opportunity to be included, along with all existing diverse section leaders, in an online directory that the Section will market to our in-house counsel contacts.

If you are that person, you can reach out to the leadership of the committees included in the project. Diverse attorneys who join as a result of the DAGP will be invited to join Section members and leaders at a diversity reception during the 2015 Section Annual Conference, which will be held in New Orleans, April 2015. We invite you to join our ranks.
The views expressed herein are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association, the Section of Litigation, this committee, or the employer(s) of the author(s).

ABA Section of Litigation Business Torts Litigation Committee
http://apps.americanbar.org/litigation/committees/business-torts/home.html