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ANNOUNCEMENT

Federal Magistrate Judges Association Honors Judge Karen Roby with Two Awards

The highest award conveyed by the Federal Magistrate Judges Association (FMJA), a national organization of United States magistrate judges, is its Founder’s Award. This award is not given out each year but rather is reserved for extraordinary activities and individuals who have displayed exceptional support, loyalty, and dedication to the FMJA.

The list of recipients who have been selected for this award is long but very impressive. Past recipients have been William Rehnquist, former Justice of the U.S. Supreme Court; Jim Duff, director of the United States Courts; and other notable U.S. magistrate judges. This year, the Diversity and Inclusion Committee of the Section of Litigation’s very own U.S. Magistrate Judge Karen Wells Roby received the award for her exceptional leadership at exactly the right time.

Judge Roby, a Magistrate Judge for the Eastern District of Louisiana with 17 years of service, led the organization in 2012 through the critical deliberations to bring the salary restoration litigation, which resulted in a salary increase for all 600 magistrate judges in the country. Judge Roby, along with Judge Sidney Schenkier and Judge Karen L. Strombom, successors in leadership who managed the litigation after Judge Roby’s term expired, will also be honored with the award. Judge Roby also led the organization through digital communication enhancements, which allow for improved methods for magistrate judges to share information.

Judge David Keesler, former president of the association, says that Judges Roby, Schenkier, and Strombom were each “the right leader at the right time whose steady hands, impeccable judgment, servant hearts and relentless focused led us through a game-changing salary restoration effort.” The award was given to Judge Roby during the association’s Annual Meeting, which took place in San Francisco in July.

The FMJA has also created a Diversity Award, which is given to a judge who exemplifies a commitment to diversity. The association awarded Judge Roby with the Inaugural Diversity Award on July 17, 2016, at the San Francisco War Memorial and Performing Arts Center.
The Importance of Diversity in the Classroom: Fisher v. University of Texas at Austin

By Sydney V. Colbert

On June 23, 2016, the Supreme Court of the United States decided one of the most anticipated cases of this year, Fisher v. University of Texas at Austin. This litigation, which had been pending since 2008, gives some guidelines on how universities should consider race in their application process.

The proposal to use race as an admission factor has to survive a three-part test of “controlling principles”: (1) The program must be able to withstand strict scrutiny, or be able to demonstrate that the use of the classification is necessary; (2) pursuing substantial benefits from a diverse student body is a proper academic judgment; and (3) the university bears the burden of proving race-neutral approaches do not suffice to achieve the goal. Petitioner Fisher had four arguments, all of which failed.

First Argument: The university has not clearly articulated what constitutes a critical mass. The Supreme Court, in this case (among others), has made clear that consideration of race in the admissions process is not for a limited number of students but a means of “obtaining the educational benefits that flow from student body diversity.” The university is actually prohibited from seeking a quota of minority students. Thus, there is no “clear number” to validate Fisher’s argument.

Second Argument: The university achieved “critical mass” by the Top Ten Percent Plan alone (a race-neutral initiative). As background, Texas has a legislatively mandated program that students who graduate from the top 10 percent of their high school are automatically admitted to any of the University of Texas (UT) schools. (This plan has actually been required to be capped, and most have to finish in the top 7 or 8 percent to be admitted under this category.) About 75 percent of UT’s freshman classes are admitted through this plan. However, this argument was invalidated by the Court as well. At the time of Fisher’s application, the university conducted many studies and concluded that the race-neutral policies did not help achieve its diversity goals. Because Fisher did not challenge the good faith in conducting these studies, the Court did not discuss them.

Third Argument: Race considerations have only had a minimum impact on the goals of University of Texas at Austin. According to the record, in 2003, 11 percent of Texas residents admitted outside of the Top Ten Percent Plan were Hispanic and 3.5 percent were African American. In 2007, 16.9 percent were Hispanic and 6.8 percent were African American. That is a 54 percent and 94 percent increase, respectively. The Court says that these increases show that consideration of race has had a meaningful impact on the diversity of the university’s freshman class.
Fourth Argument: There are other ways to achieve the university’s goals without having to consider race. The record shows that in 2004, when proposing to consider race and ethnicity in admissions, the university was seeking to provide an academic environment that offers a number of different ideas and cultures to prepare for the challenges of an increasingly diverse workforce. However, Fisher gave three suggestions for other ways to achieve this goal, each of which the Court rejected:

**Intensify outreach to African American and Hispanic applicants.** This first proposal fails because the university already created three new scholarship programs, opened new regional admission centers, increased the recruitment budget by $500,000, and organized over 1,000 recruitment events.

**Alter the weight given to academic and socioeconomic factors.** The second proposal fails because it ignores the fact that the university tried and failed to increase diversity by giving more weight to socioeconomic factors. It also ignores a point the Court made clear in the past, that the Equal Protection Clause does not force universities to choose between diversity and a reputation for academic excellence.

**Uncap the top ten percent plan.** The third proposal fails because it would sacrifice all other aspects of diversity while attempting to enroll a greater number of minority students. The Court gives examples on page 17 of the opinion, stating that using solely class rank “would exclude the star athlete or musician whose grades suffered because of daily practices” or “a student whose freshman year grades were poor because of a family crisis” but fought her way back up to right outside the top 10.

**Conclusion**
In sum, the Court found that a diverse student body is very important to our educational system. Race (among other diversity factors) plays a huge role not only in the classroom but also in the long run with our changing workforce demographics. However, this university, among others, must “engage in constant deliberation and continued reflection regarding its admission policies.” Diversity teaches students how to interact with people who may be different from them, and this is a necessary skill for success.

**Keywords:** litigation, diversity, inclusion, *Fisher v. University of Texas at Austin*, race-conscious admissions policy, diverse students, University of Texas

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Six Stark Predictions about Diversity and Inclusion for 2020 and Beyond

By Robert K. Dixon

Over the past several years, Fortune 500 companies, law firms, legal organizations, law schools, and others have launched countless diversity and inclusion programs and initiatives. It goes without saying that all of these efforts have been beneficial. But there is always room for improvement. With that in mind, I reached out to various members of the legal community who, collectively, represent each major aspect of the profession, for a well-reasoned outlook on the issue of diversity and inclusion.

Beth Kransberger | Legal Educator and Diversity and Inclusion Consultant with ME Kransberger Consulting Group

Trend data about the future of diversity and inclusion in the legal profession continue to reveal deeply persistent, troubling issues of equity and inclusion. Despite herculean efforts by many, very little measurable progress in the overall level of inclusion in our profession has been made in the past 15 years. In 2000, 89 percent of the profession was Caucasian. The Bureau of Labor Statistics tells us we are still at that exact same level of inclusion 15 years later. We remain at 11 percent lawyers of color nationally, despite the fact that the overall percentage of students of color in all law schools reached a national average of nearly 27 percent in 2014. The good news is that we have the ability and knowledge to alter this future landscape at any time. All that is missing is a broad, collective will to act, within an integrated, collaborative approach.

Eileen M. Letts | Co-Managing Partner | Greene and Letts

Firms and legal departments will become more diverse in the future because of the predicted face of the world being more diverse. However, I don’t think the percentages will be the same as the population because I don’t think the opportunities are going to increase the way they should. I think it will still be difficult for persons of color to achieve the same benefits as others. I make those statements based on the statements and sentiments made by many about diversity. I recently heard that some lawyers think there are too many diversity initiatives now.

Candice A. Garcia-Rodrigo | The Rodrigo Law Firm, PC

While the industry has made great strides toward more diversity and inclusion of legal professionals of different ethnicity and women, the legal profession remains largely dominated by white male attorneys and law students. I believe that will continue to be true for the industry, without any measurable change in the next decade. Although diversity encompasses at least those two types of backgrounds, a third underrepresented population will become increasingly significant to the legal profession; that is, members of the lesbian, gay, bisexual, and transgender (LGBT) community. I do not believe that there will be much change in the future for inclusion of women and persons of non-white race/ethnicity, but there will be growth in the LGBT population for the legal profession.
The Honorable Karen Wells Roby | Eastern District of Louisiana
I predict that diversity will remain a factor for law schools. At present, fewer African American men are seeking out graduate degrees, which will continue to remain a challenge. While African American women apply at higher numbers, given the current racial disparities in the profession, they too may begin to seek out other higher learning experiences. Law schools will have to remain focused on the importance of a diverse learning environment and the impact that increasing the number of diverse attorneys will have on the profession.

Bradley Muldrow | In-House Counsel | San Diego Gas & Electric
I believe that the recent events involving the killing of unarmed African Americans by police officers and private citizens, particularly those killings that did not result in indictments or convictions, will inspire many young African Americans to pursue careers in the legal profession. This will result in an increase in African American law students and attorneys within the next decade or so. However, while representation of African Americans in district attorney, U.S. Attorney, and public defender offices throughout the country will increase, there will not likely be a similar trend of increased representation of African Americans in civil litigation positions. Therefore, law schools, community groups, and employers will need to continue, if not increase, their efforts to attract African American attorneys to the civil litigation field.

Daniel E. Eaton | Shareholder | Seltzer Caplan McMahon Vitek
The U.S. Bureau of Census estimates that by 2043, members of minority groups will constitute a numerical majority of the overall U.S. population. As this trend has unfolded in recent years, corporate clients have demanded with some success that the law firms that service them staff their matters with lawyers that reflect clients’ increasingly diverse customer base. To what extent will that client-driven law firm diversity expand? To what extent will the contraction in the overall demand for legal services and the increased pressure on the corporate bottom line affect this client-driven demand for diversity? Will the demand for, and accommodation of, law firm diversity get louder in the face of demographic growth or go silent in the face of a backlash driven by stress on the bottom lines of corporations and law firms alike?

A Shared Outlook
It is interesting that while these contributors are seasoned members of the profession, millennial attorneys, partners in private law firms, a managing partner, a sole practitioner, a member of the judiciary, an in-house counsel, and even a legal educator, almost all of the contributors painted a somewhat pessimistic view of the future. However, despite these stark predictions—and to borrow a phrase from Doc Brown (Back to the Future)—the future is whatever we make it; so make it a good one. Members of the legal community should assess their own efforts to build more diverse law firms, law schools, and legal departments to determine whether any of their current practices might be modified or enhanced to prevent or at least mitigate these predictions.

Robert K. Dixon is an associate with Wilson Turner Kosmo LLP in San Diego, California.
Q&A with Tucker Ellis Attorney Amanda Villalobos

By Liane Jackson

Amanda Villalobos is an attorney with Tucker Ellis LLP, which is a full-service, nationwide law firm. At Tucker Ellis, Villalobos is a civil litigator who primarily represents pharmaceutical and medical device companies in product liability cases. She also represents a variety corporate entities in consumer class actions. She was elevated to the position of counsel at her firm in January 2016.

Recently, Villalobos shared her perspective on the following questions:

How did you decide to become an attorney?
As I was growing up, my dad discouraged me from attending law school, so I never really thought about becoming an attorney until I was a junior in college. During my junior year, a close family friend was falsely accused of a crime. He retained a defense attorney, and ultimately I had to testify at the trial. It was rather a traumatic ordeal for my entire family. But at the end of the day, he was acquitted, and he and my family were so grateful to this attorney. I thought it was remarkable that an attorney, who didn’t know my family friend or anyone in my family, nevertheless came in, advocated on my friend’s behalf, and saved the day. Since this attorney had such a powerful impact on everyone involved in the case, I thought the legal profession must be a worthwhile endeavor because it gives you so much power to help people. So against my dad’s fatherly advice, I enrolled at University of San Diego Law School and never looked back.

What accomplishments as an attorney are you most proud of?
I’ve done a lot legal work and work in the community that I’m proud of, but I’m probably most proud of the work I did on a pro bono asylum case. I represented an individual from Somalia who was seeking asylum in the United States because he was a member of a persecuted group. During the case, I was able to secure his asylum so that he could stay in the United States. Being his advocate was a very personally rewarding experience.

What about being an attorney do you like the most?
My favorite part about being an attorney is being in the courtroom because that’s when an attorney’s advocacy skills really shine—or are found lacking. Since being in court requires you to answer the judge’s questions and think on your feet, your analysis and argument skills are really tested. When you’re writing a brief, you have forever to think about your arguments, how to articulate them, how to draft them precisely, but when you’re in the courtroom you’re pressed for time, so you’re often forced to come up with cogent arguments on the spot. It definitely separates the real litigators from the fake ones.

What about being an attorney do you like the least?
One element of the practice of law that I particularly dislike is that the wheels of justice move too slowly to resolve disputes, especially now due to the lack of funding for the state courts. So if you encounter a legitimate discovery dispute or some other problem that you want to resolve for
your client, the resolution will likely be delayed because there are too many cases and not enough judges and judicial staff to process the volume.

**What was the biggest challenge associated with the change from being an associate to becoming a counsel?**
The biggest challenge is developing my management style. I’ve had a lot of managers over the years. Some were good and some were not so good, so I’m currently developing a style that I hope will incorporate the good traits and eliminate the bad ones. Another challenge is finding time to mentor as well as to figure out the best way to mentor junior attorneys.

**What do you believe are the biggest obstacles for law firms in terms of delivering on the promise to build a diverse and inclusive work environment?**
The biggest obstacle is retention of diverse attorneys. While firms’ diversity numbers for new hires seem to be improving, many of these attorneys do not stay long term for one reason or another. There’s so many factors that contribute to the lack of retention. But for firms to improve their retention numbers, they probably need to assess why diverse attorneys are leaving and determine if there are areas in which they can intercede to reverse this trend.

**What is the most important advice that you have for a first-year attorney?**
Work hard, and if you think you’re working hard, work harder. As a first year, you probably don’t [have much] to bring to the table. But if you show that you’re diligent and you’re willing to put in the time on even the most mundane assignments, then the people you work with will recognize these traits and will want to give you work.

**What are three things you wish you knew as a junior associate that you know now?**
I wish I knew that it was my responsibility to guide my own career from the outset. Even as a junior associate, you’re the one in charge of your career and you really have to take ownership of it. So, if you’re practicing in an area of law you don’t like or working in a group that you do not particularly care for, it’s OK to go to your practice group chair or superior and talk with him or her about ways in which you can expand into other areas of law or other practice groups. I also wish I knew it was OK for me to share my opinions, especially if I thought something was wrong or if there was a better approach. As I’ve gotten more senior, I’ve realized that the more junior attorneys are the ones doing the research or they’re the ones reviewing numerous documents, and for that reason, junior attorneys have valuable insights as they lived with the research or analyzed more of the facts than the senior attorney who is handling this case in addition to 10 more. So even if you’re the junior attorney on file, remember that you might be in the best position to give insights about certain facts or advice about a specific course of action. I also wish I knew not to worry so much. If something doesn’t go exactly according to plan, don’t stress out. The law is all about being flexible, so if a mistake is made or something unforeseen happens, remember the law is fluid and there a solution to whatever the problem is, because there’s almost always a solution.
What are the biggest challenges facing law firms in the next 10 years?
The biggest challenge is being competitive in the market with regard to legal fees and billing rates as well as being a profitable firm. There’s so much downward pressure on the fees, as outside firms are being retained to analyze legal bills. And this type of oversight is probably going to be more and more common. So firms will have to find the right balance between economically litigating the case and ensuring all of the necessary work is done to defend the case.
How In-House Counsel Can Promote LGBT Diversity in the Legal Profession
By Samuel L. Felker

Over the past several years, law firms in the United States have made great strides in promoting LGBT diversity. Most large law firms in the United States now express a commitment to LGBT diversity in the diversity section of their webpages. More importantly, many have adopted nondiscrimination policies, equalized employee benefits, and dedicated resources to the recruitment of LGBT law students and laterals. Many firms now include LGBT content in their diversity training to attack stereotypes and build cultural competency regarding LGBT issues. It is also very common now for law firms to have an affinity group (i.e., employee resource group or ERG) for LGBT attorneys. My firm, Baker Donelson, has such an affinity group for LGBT attorneys and staff, and we operate alongside the long-standing affinity groups and diversity initiatives for women and lawyers of color. It is fair to say that in recent years, LGBT diversity has become entrenched in the culture of major U.S. law firms, at least on the surface.

To measure this cultural shift in law firms, one need only look to the Human Rights Campaign’s (HRC’s) annual Corporate Equality Index, which is widely regarded as the leading national benchmarking tool on policies and practices pertaining to LGBT employees. The HRC Index is a voluntary survey examining the extent to which employers demonstrate fully inclusive equal opportunity policies, equal employment benefits, organizational LGBT competency, a public commitment to LGBT equality, and responsible corporate citizenship. This year, 149 law firms, including a majority of the Am Law 200 firms, participated in the survey, and a record 89 received a perfect score of 100 and earned the distinction of “Best Places to Work for LGBT Equality.” An additional 36 law firms scored 90 percent. By comparison, in 2006, when law firms were first requested to participate, only 12 law firms scored 100. That number jumped to 64 in 2009, with law firms for the first time eclipsing the number of businesses who received the top score in the banking and financial service sectors. The 2009 HRC Corporate Equality Index contained the following statement indicating that was a watershed year: “Law firms are highly competitive in their recruitment efforts for law school graduates, and are also held to increasing standards of diversity by their corporate clients. LGBT equality is an integral part of these efforts to recruit and retain top talent and cultivate clients.”

I am not aware of any data to support the proposition that even today law firms regard LGBT equality as an integral part of their efforts to cultivate clients. However, there is good evidence that law firms have dramatically increased their recruitment of LGBT law students and laterals. The annual Lavender Law Career Fair, sponsored by the National LGBT Bar Association, demonstrates that virtually all of the major law firms in the United States are actively recruiting LGBT law students. Last year in New York at the Lavender Law Career Fair, 500 law students participated in the recruiting job fair, which offered the opportunity to interview with 142 law firms. Liz Youngblood, “Strength in Numbers,” LGBT Bar Talk (Dec. 10, 2014). The list of sponsoring law firms is impressive and includes the top 10 firms in the United States by revenue:
Baker & McKenzie, Skadden Arps, Latham & Watkins, Hogan Lovells, Jones Day, Kirkland & Ellis, Sidley Austin, White & Case, Weil Gotshal, and Greenberg Traurig. It is also instructive to examine the advertisements by law firms in the 2014 Lavender Law Conference brochure. The advertisement by my firm contains the following statement about our commitment to LGBT diversity: “The best client service comes from a diverse legal team that works in harmony. That’s why we have devoted ourselves to striking up the band for diversity and inclusion—because despite our differences, when we work together, the music sounds that much sweeter.” Here are some other advertising statements by sponsoring law firms:

- “Morrison & Foerster is proud to support the Lavender Law Conference and its mission to promote LGBT diversity within the legal profession.”
- “At [Sullivan & Cromwell], we believe that attracting, developing and retaining the finest lawyers of all backgrounds is vital to providing the highest level of service to our clients.”
- “At Covington, we recognize the differences among us as an asset and a source of strength. Promotion of diversity is never complete and we strive to lead by example.”
- “Sidley is proud to support the Lavender Law Conference and Career Fair and to be a progressive proponent of law firm diversity and inclusion.”

Although not the focus of this article, it is important to also recognize that corporate America is far ahead of the legal profession in promoting LGBT diversity. In the 2015 HRC Corporate Equality Index, it is reported that 89 percent of the Fortune 500 companies include sexual orientation in their nondiscrimination policies. The report also contains this overview: “In this year’s national benchmarking report, an all-time record of 366 major businesses—spanning nearly every industry and geography—earned a top score of 100 percent and the coveted distinction of ‘Best Places to Work for LGBT Equality.’” By comparison, a decade ago when the HRC Index was first issued, only 13 businesses achieved a top score of 100 percent, and in 2012 just 189 businesses earned top marks. This data graphically demonstrates a watershed cultural shift in corporate America in recent years.

Despite this remarkable progress in the legal profession and corporate America, significant work remains to be done to fully integrate out LGBT attorneys into law firms. Diversity trainers will tell you that LGBT content in diversity training programs in law firms will routinely draw the strongest reactions from participants. Additionally, recent scholarly work in the field of implicit bias emphasizes the need to address head-on LGBT stereotypes and biases that exist in the workplace, including law firms.

In-house counsel are in an excellent position to push for continued progress in LGBT diversity in the legal profession. After all, law firms realize there is a business case for diversity and, if they are to be successful, they must listen to and adapt to their client’s needs. In-house counsel can send the message that they expect their company’s commitment to LGBT diversity to carry over to the law firm’s handling of their legal matters, and that the law firm should mirror the diversity the client embraces in its corporate culture.
Here are some suggestions for how in-house counsel can send that message:

1. **Let your outside law firms know that LGBT diversity is important to your business.** It is now routine for many corporate clients to include in requests for proposal (RFPs) a question about the law firm’s diversity practices. This is an excellent opportunity for in-house counsel to send a message that LBGT diversity is a factor that will be considered when selecting outside counsel. Beyond the RFP process, in-house counsel should inquire about the law firm’s diversity practices, for example how it scored on the HRC Index and whether it recruited at Lavender Law. This sends a strong message that LGBT diversity is important to the corporate client, and that the client wants its law firm to share its commitment to diversity.

2. **Engage your important outside counsel partners to join in your company’s LGBT diversity efforts.** This can be done in a variety of ways, depending on the diversity activities of the client. For example, if the company’s ERG participates in a local Pride event or similar activity, in-house counsel should ask the law firm to participate. Or, the law firm’s LBGT lawyers can be invited to participate in one of the many in-house events sponsored by the ERG. The main point is that by reaching out to the law firm, in-house counsel sends a message that LGBT diversity is important. After many years of private practice in two large firms, I can assure you that the law firms listen.

3. **Take an interest in and make a point to work with LBGT attorneys at the firm you employ.** In-house counsel should think of ways to reach out to the LBGT attorneys who work in the law firms they regularly employ. An example would be sponsoring a “meet and greet” for LBGT attorneys to network with the legal department. Many corporations have LBGT ERGs, and a joint networking event for LBGT employees and attorneys at both companies would provide an excellent opportunity for the LBGT attorneys in the law firm to get to know the client. Also, if the company offers diversity internships or employment opportunities, in-house counsel should inquire of law firms whether there are LBGT associates who may be interested in applying. Again, this reinforces to the law firm that the client is committed to LBGT diversity.

4. **Monitor and enforce the extent to which your partner firms assign LBGT attorneys to work on your matters.** It is apparent that the majority of U.S. law firms espouse commitment to LBGT diversity, but in-house counsel can make sure they “walk the walk” by assigning LBGT attorneys to handle significant matters. Once matters are assigned to a law firm, in-house counsel should monitor that firm’s diversity commitment by periodically asking the extent to which diverse attorneys (including LBGT) have been assigned to and billed on matters. It is crucial to move beyond the RFP stage (when LBGT diversity efforts are reported and espoused by the law firm) and to the day-to-day handling of matters.

Substantial progress in LBGT inclusion has been made in the legal profession, but much more is possible. By following these simple steps, in-house counsel can send a strong message to law firms that the client expects the firm’s commitment to LBGT diversity to have legs. By
demonstrating commitment to LGBT diversity in the profession, in-house counsel can send a strong message that there is, in fact, a strong business case for LGBT diversity.

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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
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