

DIVERSITY = PROFITS, SO WHY IS THERE STILL A PROBLEM?

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Background

As I continue into my 22nd year of practice, being in a more senior position where I was more comfortable speaking my truth, I began pondering the diversity issues still problematic in the legal profession. Having worked in minority owned, majority owned and female owned firms throughout my career, I was intrigued by the similar experiences my diverse colleagues from all over the country were having relative to being diverse attorneys in primarily majority owned law firms. Some of these experiences are not exclusive to firms owned by the majority, however, the grim reality is that most of the law firms in the United States remain owned and controlled primarily by the majority population. The consistent experience was that more often than not, the advancement of minority, female and LGBTQ attorneys is not progressing, despite the value and certain profit they bring to their respective firms.

In spring 2004, Sara Lee General Counsel Roderick Palmore created “A Call to Action: Diversity in the Legal Profession,” (Call to Action) a document reaffirming a commitment to diversity in the legal profession and acting to ensure that corporate legal departments and law firms increase the number of women and minority attorneys hired and retained. In addition, this Call to Action states, “We [the undersigned corporate legal department representatives] further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.”

The purpose of this Call to Action and what actually transpired is compelling. Law firms were aware of the Call to Action. Law firms were aware of their need to have a commitment to diversity. However, Law firms did not necessarily heed the true purpose of the Call to Action.

Rather, the consistent experience of diverse attorneys situated throughout the country was the sudden interest that majority owned firms had in espousing that they were diverse, without recognizing their diverse talent with compensation, case opportunities, promotions, or client access. Instead, these diverse attorneys were being put front and center for purposes of marketing the firm's diversity so that their client base would be satisfied that they were responding to the Call to Action. Now, five years after the Call to Action, the numbers are still dire, revealing that minority, female, and LGBTQ attorneys continue to be sidelined—with no real advancement in their careers, leaving them discouraged, causing them to leave their firms, and revealing to those corporate counsel committed to diversity that their law firms are not honoring their demands.

The numbers tell the story. Law firms represented in the 2003-2004 NALP Directory of Legal Employers collectively reported demographic information on 53,000 partners and approximately 63,000 associates, senior attorneys, and staff attorneys. Attorneys of color accounted for 4.04 percent of partners and 14.63 percent of associates. As it relates to women, the figures were 16.8 percent women were partners and 43 percent were associates. Nationwide, a plurality of offices had no partners of color while 21 percent of all offices reported no associates of color. As a double minority myself, being a woman of color, these figures are of concern.

Even more concerning, NALP found in 2018 “that the representation of minority partners increased by the largest amount in the 26 years the legal employment association has been compiling diversity information at law firms.” One would think this was progress however, the report noted that the partner level upticks should not be overstated and were “minimal” at best, with the increase from 2017 of minority partners at .7 percent, while the increase for female partnership was less than one percent.

What do the common experiences of diverse attorneys spanning the country coupled with the grim statistics mean? It means that law firms did not heed the Call to Action. Rather, they readjusted and marketed their diversity with no real plan to implement a strategy to promote the advancement of diversity. It meant that while a handful of minorities were advancing in law firms, many more minorities were literally feeling the glass ceiling upon their heads. This reality is not only a problem for those diverse attorneys who want to excel in their careers, it is equally a problem for firm clients, who not only demand—but need—a diverse attorney community to choose from when presenting cases to the diverse jury pool that is now defining the United States. We are no longer a nation where everyone on the jury looks exactly like the attorneys in the court room. Failure to recognize this reality and a refusal to implement a true commitment to diversity is tantamount to not serving your clients.

What many law firms unconsciously did was begin a process of what I call “faking diversity” for the purpose of advancing their own self-interests of maintaining the status quo, which adversely impacts its diverse attorney community. They convince themselves that because they hire women, they promote people of color to non-equity levels, and they have one or two gay employees, that they are not the problem when it comes to law firm diversity. Unfortunately, a true commitment requires action. I propose that if a law firm has a diversity statement on their website but no written diversity plan of action in place, they are not committed to diversity. Rather, they are marketing diversity in order to sell a perception to current and prospective clients to promote their own interests.

I am sure this sounds unpleasant. And, quite frankly, it is definitely an uncomfortable proposition. However, it is time to get uncomfortable. It is time to stop talking about it and do

something about it. The truth of the matter is that if the concept of promoting diversity were comfortable for everyone, we would not need to have diversity initiatives.

Unconscious Bias

It is important to understand that while these majority-owned firms are implementing these practices, it is possible that, on some level, they are unable to recognize or see what they are doing. Unconscious bias is powerful and something we all have within ourselves. It is the prejudice or stereotypes about certain groups of people formulated outside of someone's consciousness. It is something that some folks say is automatic and unintentional. We are all products of our upbringing and, as such, our social norms are necessarily impacted by those experiences. However, what happens when someone is made aware of their unconscious bias? I believe that once educated on the issue, it should be something that someone can either reverse or simply become *conscious* of, so that any conduct they engage in that includes an unconscious bias on their part can be recognized and prevented.

I will use myself as an example. I am a Black female. I generally see myself as a person of color before I see myself as a woman. As such, I identify with the struggles of people of color more than I do women. Not that I do not appreciate the plight of women, and not that I have not experienced that discrimination. Rather, I carry the color of my skin in a different way. Coming from this perspective, my unconscious bias could cause me to empathize with a person of color being treated poorly at work more than a Caucasian woman being treated poorly at work. That could cause me, unconsciously, to address the same situation involving two different individuals differently based upon my own experiences. Some would say that the unconscious bias prevents me from seeing the wrong in my thought process, and that my improper handling of the situation

is unintentional. My perspective is that once I am aware of my own bias, I can no longer use unconscious bias as an excuse for my improper handling of the situation.

Faking Diversity

I had been pondering the need for an honest and frank discussion on what I have termed, “faking diversity,” and it was not until a client of mine brought to my attention his observation of this phenomenon that I committed to bringing this uncomfortable reality to light.

The glitch was that this particular client wanted the diverse attorneys in the firms he utilized to receive financial credit for their business generation arising from his assignments. He would attend functions and meet diverse attorneys he was interested in retaining. However, when he contacted the attorneys’ managing partner, an equity shareholder in the firm, he was disappointed in the ability of the managing partner to commit to recognizing the diverse attorney for generating the business. The firm’s refusal to recognize these attorneys led him to refuse to send his business to this firm, as he found it to be inconsistent with a diversity commitment. He contacted the attorneys to say, “If you leave and go somewhere else, contact me.” In short, this individual has learned to recognize what window dressing looks like and refuses to participate in it. More importantly, the firm lost business, and financial profit by refusing to even provide a token share of the profits with the diverse lawyer who generated the profit.

“Faking diversity” can take on many forms such as: fake marketing, fake promotions and fake partnership, manipulated statistics, and diversity awards. I will expand on each below.

Fake Marketing

Diverse attorneys in law firms are front and center to demonstrate a firm’s “commitment” to diversity; however, they are sidelined on the inside of the firm with no real advancement

opportunities or compensation incentives. Often, the firm does not have a true commitment to diversity, lacking any real diversity program or diversity committee. This so-called “commitment” to diversity is just for show when pitching to clients. Clients may send work to the firm, sometimes directed to the diverse attorney with whom they establish a rapport; however, this attorney reaps no award from his or her success in marketing and obtaining the business. Rather, the firm sees it as “they provided the opportunity” to this attorney and without their generosity in doing so, this individual would never have had such exposure. As such, the business properly belongs to the firm, and the employee is not really entitled to any concrete benefit. We are all familiar with the “discretionary raise and bonus” business model.

Fake Promotions and Fake Partnership

Equity partnership is different from promoting someone to the generic title of partner. Many corporate clients and in-house counsel do not realize that individuals identified on a website as a partner are not receiving an interest in the business they generate or in the profits of the firm. Rather, the equity owners hold onto their interest and compensate the “partners” as employees. Their use of discretionary decision making prevents the partner from having any financial expectation relative to their business generation, quality of work product, or contributions at all to the firm. Many law firms create layers of promotions between associate and equity partnership for the purpose of placating employees—making them believe they are advancing, when in reality, there is never an intent to promote a diverse attorney to the level of equity or even compensate them with a percentage of business. This can never be good for the clients they serve because clients want their attorneys to be personally invested in them and their work.

Manipulated Statistics

When data is compiled, how are law firms reporting their statistics? A client brought to my attention that we need to focus and investigate the methods in which law firms report their employee data. For example, is a gay, disabled, woman of color satisfying four categories at a law firm, versus being categorized as one diverse individual? For purpose of accurate reporting, this is one individual, not four. One individual cannot be used to imply that more individuals of a diverse background exist in your firm environment. A corporate counsel stated to me once, “If an attorney is being counted as four, they need to be compensated as four.”

Diversity Awards

One of the most convincing marketing strategies firms use to demonstrate to their clients that they are truly committed to diversity is the efforts to obtain diversity awards. This is a simple, inexpensive process where the firms identify diversity awards and creatively draft language that convinces the organization giving the award that they deserve it. Once selected to receive the award, they use the receipt of this award to market themselves as a diverse-conscious firm. When reviewing the firm’s website or marketing materials, a prospective client is led to believe that these firms are truly committed to diversity, sharing the same values that the client expects. Often, the marketing materials are designed to highlight a diverse demographic with photographs. However, if you look behind the curtain, many of these firms do not have diversity initiatives, committees, business plans, or any real intent to pursue the advancement of diversity in the legal profession.

What Can We Do?

Law Firms

A true diversity commitment is not simply running numbers to identify how many diverse employees you employ. Rather, a true diversity commitment requires equal opportunity for these diverse attorneys so that they can reach the equity level of the firm. Promoting someone to partner when you have zero intent to open up the door to the top to them is not true diversity. That is not to say that every diverse attorney deserves to be a member of firm ownership. It also does not mean that non-equity partners do not serve a valuable and needed position at law firms. What it does mean is that if you are a diverse attorney at a firm and none of the owners look like you in any fashion, you may need to re-evaluate whether your true potential can be reached at this firm. If you are at a firm where all the owners share in a similar category, whether it be race or gender, you may need to re-evaluate whether your true potential can be reached at this firm. If you are at a firm that does not support your growth and provide you with opportunities outside of billing hours and working on files, you may need to re-evaluate whether your true potential can be reached at this firm. If you are at a firm that does not compensate you for the business you generate by giving you a piece of the pie, you may need to re-evaluate whether your true potential can be reached at this firm.

I struggled for a long time with this concept for a long time and challenged the proponents of the notion that people should leave firms because they were dissatisfied. I had concerns about a message to our diverse community that somewhat implies you need to move on if your firm is not on board. Part of my struggle is that in my career I worked at two majority-owned firms, and at each, I was fortunate enough to have a majority mentor who helped me develop my skill set. This good fortune instilled a desire in me to support the diverse attorneys

who wanted to succeed at their majority-owned firms that had not yet figured out the diversity issue. When I make this argument, attorneys say to me, “You were lucky.” And while there is no question that non-equity partners serve an important role and are valuable to a firm, to the extent that they are generating business and either not being compensated for it or not being told how they can reach the next level, they are going nowhere fast.

During a telephone conversation I had on this issue with Donald Prophete of Constangy Brooks Smith & Prophete LLP, he said it best, “A true commitment to diversity involves addressing diversity and inclusion in your firm in the same fashion the firm addresses any other business metric.” In essence, diversity and inclusion need to be as important to a law firms’ business plan as any other important business decision. Until then, we will simply be “faking diversity.”

Clients

The next question was, “What do firm clients do to ensure that their outside counsel are implementing strategies consistent with the purpose of the Call to Action?” The overwhelming consensus from the corporate clients concerned about diversity in the law firms they hire was to have the honest conversation with their law firms. In these conversations, you must ask the difficult questions about attorney compensation and business generation credit. The law firms must be required to commit to giving credit to the diverse attorneys receiving the business and stop interfering with the attorney’s relationships with the clients by calling the business, “firm business.” Loyalty cannot flow in one direction, and anyone who generates business deserves a certain benefit from that business generation that is not discretionary. Clients must reject the notion that only the people at the top should make more money when more business comes

through the door—especially when they did not generate the relationship that created the business.

From my perspective, I believe all law firms should do diversity and inclusion training. This helps people recognize their own unconscious bias as well as the significant benefits a diverse work environment has on its growth and performance. If clients force the firms to engage in diversity and inclusion training, it will assist in identifying their own unconscious bias. Beginning in 2020, all California law firms will be required to provide sexual harassment trainings. I would submit that diversity training is equally important.

Final Thoughts

In closing, the reality is that we all need to get out of our comfort zones in order to address this issue productively. We need to work together to close the disparity that exists among majority attorneys and diverse attorneys. Having said that, true diversity includes everybody and requires everybody's involvement. Being diverse does not mean you are brown, female, or a representative of the LGBTQ community. Diversity means we all come together for a common goal and support one another in reaching the goal. Therefore, any notion that diversity is exclusive to the white male is an improper interpretation of the true goals of this movement. If we exclude anyone from the discussion, we will never succeed.