

Embracing “Phase II”

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The end goal of diversity initiatives is to create a work environment in which every individual’s differences are valued and utilized to develop new ideas and strategies.

A Diversity Primer for Young Lawyers

Each fall, law firms across the country descend on law school campuses to conduct what many law students believe will be the most important set of interviews of their professional careers. So that they may attract law

students who will mature into the next generation of productive and successful attorneys, law firms evaluate students based on many objective factors evident from their resumes, including class rank, grade-point average, journal membership, and moot court experience. However, how do law firms demonstrate their “commitment to diversity”? We are all familiar with this phrase, as those attorneys who practiced before us recognized that diversity is an asset, if not a necessity, in the legal world. This article maps the advancements that previous generations of lawyers have made in the area of diversity so that the next generation of attorneys can understand where we have been, where we are, and where we need to go. Only in that way can the next generation of attorneys spur progress toward a diverse workplace that mirrors their worldview.

We suggest that the youngest generation of attorneys views diversity through a much wider lens than those generations that preceded them. We also anticipate that, though diversity initiatives should and will

continue to tackle racial and gender diversity, a new generation of attorneys will fully embrace “Phase II” diversity, also referred to as “invisible” or “below the waterline” diversity. Phase II diversity may include such traits as political affiliation, religion, ethnicity, national origin, age, disability, veteran status, sexual orientation, gender identity, social-economic background, regionalism, and many others. This article will discuss the history of diversity initiatives within the legal profession, what we can do to encourage Phase II diversity, and ways in which young legal professionals can encourage Phase II diversity.

Importance of Diversity

Young attorneys undoubtedly hear a great deal about diversity initiatives in the workplace, but just how did these initiatives evolve? Historically, the driving force behind diversity initiatives within the legal profession has been the business case. Roderick A. Palmore, general counsel of General Mills, Inc., stated that “[t]his is about



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business. It's about finding the best talent." Kathryn Hayes Tucker, *Call to Action: Part Two*, Fulton County Daily Report, May 22, 2008. As minorities in the United States increase in number and business becomes more global generally, a diverse workforce enables legal business to respond to the needs of diverse clients.

In recent years, this benefit has become widely accepted among law firms. In an excellent article published in the May 2007 edition of *For The Defense*, Joseph M. Hanna and Nikia A. O'Neal identified a number of benefits diversity may generate, including increasing profitability by increasing an ability to market and advertise to diverse clients, leveraging a workforce's cultural difference to create a broad base of expertise that leads to the development of new ideas, reducing attrition within legal businesses by embracing differences rather than creating a culture in which diverse individuals feel as if they are outsiders, and strengthening the core societal values that "diversity should be accepted, encouraged and appreciated." Ralph C. Martin II, managing partner of the Boston office of Bingham McCutchen, LLP, and co-chair of the firm's national diversity committee, has stated that "the smart law firms are beginning to realize that they can have a lot of talent imbedded in their organization when they are a diverse workforce. The more people in your firm who come from different backgrounds, experiences, and educational opportunities, the more heterogeneous the environment and the more dynamic the workforce." Nancy Hatch Woodward, *New Faces, New Ideas: Diversity in Law Firms Makes Business Sense, Part 2*, LawCrossing.com, Aug. 23, 2005, <http://www.lawcrossing.com/article/1023/New-Faces-New-Ideas-Diversity-in-Law-Firms-Makes-Business-Sense-Part-2/>.

In a culture in which corporate clients recognize the value of diversity and demand commitment to diversity from their outside counsel, a diverse workforce becomes not simply a goal, but a business necessity. Further, though it cannot be denied that law firms and corporations are business entities that must keep in mind the bottom line, many have come to understand that having a workforce that mirrors society is "the right thing to do." See Nancy Hatch Woodward, *New Faces, New Ideas: Diversity in Law Firms Makes Business Sense*, LawCross-

ing.com, Aug. 8, 2005, <http://www.lawcrossing.com/article/999/New-Faces-New-Ideas-Diversity-in-Law-Firms-Makes-Business-Sense/>. Over the past decade or so, law firms, corporations, legal organizations, and law schools have recognized the need for diversity in the legal profession and taken steps to achieve it.

Commitment from Corporations and Law Firms

For the legal profession to truly embrace diversity, firms and companies must move from an intellectual understanding of the need for diversity to implementing policies that will truly effect change. Over a decade ago, BellSouth hosted the "Conference on Diversity in the Legal Workplace" in Atlanta. This conference provided a forum for corporate general counsel to exchange ideas and brainstorm ways that they could recruit, train, and mentor minorities. Charles S. Johnson and Lynn Faith Saunders, *More Than Words, Update on Diversity in the Workplace: A Statement of Principle*, ABA Goal IX Newsletter, Fall 2000, Vol. 6, Number 4. As a result of the conference, more than 400 Fortune 500 companies became signatories of the "Diversity in the Workplace Statement of Principle." Russell, E. Macey, *Wider Pipeline Is Vital to Progress*, The National Law Journal, Oct. 19, 2009.

In 2000, the Minority Corporate Counsel Association (MCCA) studied corporate legal departments and corporate law firms. Its results were published in "Creating Pathways to Diversity: A Study of Law Department Best Practices," which classified companies' and firms' diversity initiatives according three, ranked, developmental stages: compliance, diversity, and inclusion. The compliance stage focuses on bringing diverse individuals into an organization but leaves gaps between policy and practice and what senior management has outlined as goals as opposed to actual accomplishments. In the diversity stage, an organization focuses on appreciating the differences in its employees and valuing those differences. This is the stage during which an organization articulates a business case and makes a commitment to promoting diversity. In the final stage, inclusion, an organization effectively uses the diversity of its employees to address the needs of its clients and customers. In a

2005 update to the 2000 Pathways to Diversity report, the MCCA stated that none of the legal departments that participated in the 2000 study were still in the compliance stage, and that most had advanced to the diversity stage. Minority Corporate Counsel Association, *Creating Pathways to Diversity: A Study of Law Department Best Practices* (2005 Update of the Green Book).

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Thus, the MCCA noted advancement in the implementation of diversity initiatives.

In 2004, Roderick Palmore, who was then general counsel of Sara Lee Corporation, urged other general counsel to make an affirmative commitment to diversity. Kathryn Hayes Tucker, *Call to Action: Part Two*, Fulton County Daily Report, May 22, 2008. More than 100 general counsel accepted Palmore's challenge and signed a "Call to Action" that espoused a commitment to making progress regarding diversity within their own in-house legal departments and requiring the same of their outside counsel. *Id.* In 2008, Palmore reminded general counsel of their signatures on the "Call to Action," and invited all signatories and the managing partners of 150 law firms to a two-day conference to assess the success of the "Call to Action." Fifty general counsel and 100 law firms attended. *Id.* This conference established four working groups of general counsel and managing partners to address diversity issues: (1) A group to focus on recruitment, retention, and advance-

ment of minorities and women; (2) a group to work on goals by which to measure success in diversity; (3) a group to develop strategies for law firm and corporate partnerships; and (4) a group that to create a call to action document for law firms. *Id.*

Commitment from Legal Organizations

Numerous legal organizations have also

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been instrumental in affirming the need for diversity in the legal profession. DRI has been committed to promoting diversity in the legal profession for many years. In 2008, DRI's Diversity Committee, which addresses all types of diversity in the legal profession, became a substantive law committee and currently has a nearly 30-member steering committee and almost 500 members. Diversity is a topic that is often addressed in DRI publications and seminars, and DRI provides practitioners with tools to implement and track diversity initiatives within their own practices. Similarly, the American Bar Association has established a number of committees and initiatives focusing on diversity, which include the Center for Racial and Ethnic Diversity, the Commission on Mental and Physical Disability Law, the Commission of Sexual Orientation and Gender Identity, the Commission on Women in the Profession, and the Young Lawyers Division Diversity Team. Many other organizations, including local organizations, have joined this commitment to diversity. This commitment is important because these organizations provide forums in which attorneys from different companies and firms may gather and discuss diversity. These discussions are necessary to further the case for diversity and to develop new strategies that ensure inclusion.

Commitment from Law Schools

Nearly all law schools in the United States have policies prohibiting discriminatory admissions practices regarding race, color, religion, national origin, gender, age, or disability—essentially, characteristics that are protected by state and federal law. Not merely adhering to state and federal laws, most law schools have recognized the importance of diversity and have attempted to cultivate environments in which diversity is valued. For example, most law schools have student organizations that “bring together students of different racial, ethnic, socioeconomic and religious backgrounds, as well as people of different sexual orientations and political affiliations.” University of Virginia Law School, <http://www.law.virginia.edu/html/prospectives/diversity.htm>. Educational institutions have always been at the forefront of social change, providing forums for discussion and shaping the corporate world as students graduate and become productive members of the global workforce.

Broadening the Definition of Diversity

The 2000 Creating Pathways to Diversity report stated that organizations defined diversity as bringing more women and persons of color into an organization to meet affirmative action or equal employment opportunity criteria. Now that organizations and law firms have moved beyond merely complying with federal and state laws, the definition of diversity has broadened. For the purposes of this article, this broadened perspective on what constitutes diversity will be referred to as phase II diversity. While phase II diversity has been considered to include political affiliation, religion, ethnicity, national origin, age, disability, veteran status, sexual orientation, gender identity, social-economic background, and regionalism, in addition to gender and race, it is important to remember that these characteristics should not be considered exhaustive—but only suggestive. Further, phase II diversity can be a means by which individuals and organizations reexamine the goals and benefits of diversity and redouble efforts to look for the differences among individuals and use those differences to create a dynamic workforce.

Adoption of Phase II Diversity Strategies

The business case also applies to adopting phase II diversity strategies. The more diverse the workforce, the more successfully a business will respond to the growing and changing needs of the global marketplace. Additionally, if law firms use phase II diversity as a way to appreciate, support, and encourage the differences of its attorneys, they may potentially increase innovative thinking and problem-solving tenfold. Moreover, as with traditional diversity initiatives, phase II diversity initiatives create a workforce that mirrors today's global and diverse society.

To achieve phase II diversity and move from compliance to inclusion, firms must implement effective diversity programs. Young lawyers have an opportunity to be on the forefront of reshaping future diversity initiatives. The following factors can guide development of these programs.

Recognition of Broadening Definition of Diversity

First, firms must actually recognize and adopt phase II criteria. Many firms have already done so, but more work remains to be done. Diversity should not be based solely on what one can see, but must also grow to include other characteristics that provide attorneys with different viewpoints. Many potential diversity characteristics are mentioned above, but law firms should think expansively about what constitutes diversity. For example, perhaps your law firm is composed solely of attorneys who were raised and educated on the East Coast. An effective phase II diversity initiative would ask whether an attorney born in Colorado who attended law school on the West Coast would bring a unique perspective to your clients or assists your firm in courting prospective clients on the West Coast.

Commitment from the Top

The MCCA's 2000 Creating Pathways to Diversity report showed that to effectively implement a successful diversity initiative, senior management must buy in to the program and its principles. Though this seems simple enough, it is often quite hard to achieve with respect to phase II diversity initiatives. As with traditional diver-

sity initiatives, which require individuals to examine many of their core values regarding race and gender, phase II diversity initiatives present many of the same challenges, along with an additional challenge, which is that many characteristics of phase II diversity cannot be seen. Therefore, people must be comfortable discussing these invisible traits with other individuals. For example, during an interview with a lateral associate candidate, if an interviewee brings up that she was born and raised in a 500-person town in rural Tennessee, the interviewer should recognize this as a point of diversity. The interviewer may want to follow up with questions designed to elicit how the interviewee's background provides her with a differing perspective and how this perspective could bring fresh ideas to trying a case in other rural jurisdictions. Needless to say, to reach that point in an interview, a firm must create a culture in which individuals are comfortable discussing their diversity.

Ensure a Hospitable Environment

E. Macy Russell recently published an article in the National Law Journal stating that “[t]he fact is that our nation’s major law firms are not easy places for minorities to work.” E. Macey Russell, *Wider Pipeline Is Vital to Progress*, The National Law Journal, Oct. 19, 2009. In his article, Russell focuses on African-American attorneys, but the same statement can be made in reference to other individuals with other characteristics. According to an October 2009 press release from NALP, only 12.59 percent of the total number of attorneys in the over 1,500 offices surveyed were racial minorities. Press Release, NALP, *Law Firm Diversity Demographics Show Little Change, Despite Economic Downturn Representation in Some Markets Declines While Others Show Small Gains* (Oct. 21, 2009). More striking is the fact that racial minorities only accounted for 6.05 percent of partners in these firms. *Id.* This is only a marginal change from 2.55 percent in 1993 when NALP began compiling comparable aggregate information. *Id.* Additionally, women made up under one-third of the lawyers at these firms, and minority women accounted for only 6.33 percent of attorneys at these firms. *Id.* NALP also reported that openly lesbian, gay, bi-sexual,

or transgender (LGBT) attorneys made up less than two percent of the attorneys in the 1,321 law firms surveyed, and lawyers with disabilities accounted for only 0.23 percent in the 1,243 law firms surveyed. *Although Most Firms Collect LGBT Lawyer Information, Overall Numbers Remain Low*, NALP Bulletin, Dec. 2009; *Reported Numbers of Lawyers with Disabilities Remains Small*, NALP Bulletin, Dec. 2009.

Mandatory diversity training for all employees at every level helps to ensure a welcoming environment. Further, a strong message from upper-level management concerning the respect for and importance of phase II diversity encourages a culture in which all employees feel comfortable. Ensuring a hospitable environment transforms a law firm’s commitment to diversity from policy to practice and permits a law firm to successfully recruit and retain attorneys with diverse characteristics.

Ways to Measure Diversity Efforts

To ensure that a phase II diversity program is effective, a law firm must develop a method to evaluate its efforts. A written plan is essential to measuring diversity efforts. To develop a plan that specifically targets a law firm’s deficiencies, the firm should evaluate its current diversity plan and determine how best to incorporate phase II diversity initiatives and goals into the plan. This plan should contain specific initiatives and goals that have been identified through evaluation of an original diversity plan. For example, your firm may determine that it has no attorneys who have served as active-duty military, and, therefore, this may be an area in which your firm can focus recruiting efforts, building connections with local JAG officers or specifically tailoring advertising. Regardless of the areas in which your firm might wish to focus, it is imperative that you develop a cogent plan that assigns responsibilities, specifies a timeline, and includes accountability. We suggest that young attorneys can prove indispensable in this area. As discussed in more detail below, young associates have many opportunities to become involved early and contribute their impressions to diversity initiative discussions.

Targeted Recruiting

Most law firms understand that to truly

achieve a diverse workforce, they must recruit employees with diverse characteristics. To attract diverse candidate pools, law firms must show commitment to diversity. There are a number of ways that a law firm can demonstrate its commitment to diversity and diversify its workforce at the same time. Additionally, when a firm embraces phase II diversity, new avenues that can yield diverse attorneys present themselves.

Minority job fairs, for law students or lateral hiring, may yield not only candidates who embody diversity in terms of gender or race, but also candidates who embody diversity as we have defined phase II diversity. For example, the Virginia Bar Association Diversity Job Fair is “open to all students of diverse backgrounds including: race, ethnicity, national origin, gender, religion, sexual orientation, disability or age.” Virginia Bar Association, <http://www.vba.org/diversityjobfair.htm>. Students with all types of “diverse backgrounds” are encouraged to attend and, on their applications, each individual student is asked to describe how his or her characteristics might impact his or her practice of law. At a job fair such as this, law firms have the opportunity to meet a wide range of law students.

On-campus recruiting at law schools can also yield diverse candidates, especially when complemented by building relationships with student groups and faculty members. For example, the University of Michigan Law School has over 50 student organizations, including an Asia Law Society, Asian Pacific American Law Students Association, Black Law Students Alliance, Catholic Law Students Association, J. Reuben Clark Law Society, Jewish Law Students Association, Latin American Law Society, Latino Law Students Association, Middle Eastern Law Students Association, Muslim Law Students Association, Native American Law Students Association, Outlaws (LGBT law students), Senate Qualified Law Students Association (law students over 30 years old), South Asian Law Students Association, and Women Law Students Association. Law firms should work to build relationship with student organizations such as these and encourage members of these organizations to apply for available positions.

Law firms can also build connections with faculty members who advise student

organizations with gender, race, ethnicity, or sexual orientation affiliations or who teach courses that address diversity issues. These connections can lead to a diverse applicant pool consisting of individuals who may not otherwise have considered applying for positions with your firm. Law firms might additionally partner with student organizations and demonstrate their com-

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mitment to diversity by hosting seminars discussing the experiences of seasoned minority attorneys or the importance of marketing during the early stage of one's legal career. These types of events allow students to interact with attorneys in a different context than an on-campus interview, a method that may highlight an applicant's characteristics in a way in which the pressure of an on-campus interview will not.

These efforts can also extend beyond law schools to effectively create a dialogue with college and high school students who have an array of characteristics and may be interested in attending law school. These efforts are particularly important as it appears that the number of students to identify with particular racial or ethnic groups who decide to attend law school has decreased. For example, during the 1994–1995 school year, African-American students made up 7.5 percent of total law school enrollment, as opposed to 6.8 percent in 2008–2009. E. Macey Russell, *Wider Pipeline Is Vital to Progress*, *The National Law Journal*, Oct. 19, 2009.

One method that has diversified law school student bodies has been diversity scholarships. Law firms can build on this strategy as part of their phase II diversity initiatives. In addition to offering tradi-

tional minority scholarships to nurture and develop future lawyers, a law firm could offer a scholarship to an individual who best demonstrates a commitment to diversity through a written competition about phase II diversity. The firm could then post the winning essay on its website, which may spark additional discussion regarding phase II diversity, in addition to publicly demonstrating the firm's commitment to diversity to other applicants and clients.

Finally, regarding recruiting, law firms must commit to broadening the scope of characteristics that they define as diverse in recruiting candidates at all levels—from senior associates to partners to summer and junior associates to outside counsel. Many companies require that their outside counsel demonstrate a commitment to diversity. For example, in 2005, Accenture required that 40 firms on its preferred provider list complete a lengthy diversity questionnaire. Kenneth Davis, *Consulting Giant Demands Diversity among Outside Counsel*, *LawCrossing.com*, Jan. 22, 2007, <http://www.lawcrossing.com/article/2410/Consulting-Giant-Demands-Diversity-among-Outside-Counsel/>. In 2007, Accenture resurveyed its outside counsel and decided that it would drop from the company's roster those firms that had failed to progress regarding diversification. To truly move toward inclusion, both traditional and phase II, firms must demonstrate a commitment to diversify at all levels.

Importance of Retention

In the MCCA's 2005 *Creating Pathways to Diversity Update* report, 77 percent of those interviewed said "reducing attrition rates for diverse attorneys was a key element in their diversity initiatives." As discussed above, creating an inclusive and welcoming environment is vital to establishing a successful phase II diversity program. Individuals will be less likely to jump ship if they feel that their differences are valued and that their voices are heard. Mentoring provides a very powerful means to ensure that an individual knows that he or she is appreciated. "Reverse" mentoring offers one way that senior level attorneys can become aware of characteristics of phase II diversity of which they may have been previously unaware. For young associates, this holds true even if your firm only has a traditional mentoring program. Mentoring is a

push and pull, and a young associate should feel comfortable telling his or her mentor what diversity means to him or her and how the firm can improve its diversity initiative. Further, young lawyers should never feel constrained by traditional mentoring programs. Instead, seek the mentoring that you need to mature into an experienced, successful attorney. Finally, work-life programs that allow some flexibility regarding starting and stopping times, telecommuting, job-sharing, maternity and paternity leave, and offer options to care for aging parents are essential to any retention efforts. We can no longer assume that the workforce will conform to a model that we once considered the traditional model.

Organizational Efforts

Organizations such as DRI and the ABA are already well on their way to supporting the phase II view of diversity and creating forums in which attorneys can discuss phase II diversity. As mentioned above, establishing committees that focus on diversity and seminars and symposia that address diversity provide excellent tools by which attorneys can examine and improve diversity in their own practices. Legal organizations also play a critical role in keeping the pressure on the legal community and ensuring that law firms avoid diversity "fatigue." However, much more always can be done, and we expect these national organizations to play key roles in expanding the definition of diversity.

Law School Efforts

Law schools can also increase efforts to address and promote phase II diversity. Law schools should work toward developing nonexclusive diversity statements regarding their admissions processes that do not solely rely on the letter of state and federal law. Law school professors also have a responsibility to encourage students to explore different viewpoints in classrooms and are instrumental in creating an environment in which diversity is valued. Further, law firms should communicate with law school admissions committees and career services offices to emphasize the importance of diversity.

Young Lawyers Perspective

As new lawyers enter the workforce, the

definition of diversity will continue to change, presenting new challenges that affect the hiring and retention of associates. As a young lawyer, you have an unique opportunity to assist your firm in remaining competitive and maintaining a current diversity initiative, partly because you have been more closely situated than your colleagues to the most recent changes within law schools that have affected the definition of diversity. This means that your perspective that will be valuable to the managing partners of your firm. Finding a way to have your voice heard and becoming involved in your firm's diversity initiative can allow you to make a name for yourself within your firm, as well as within your local and the national legal community. Partners will appreciate your understanding of the business case for diversity, and you can make yourself invaluable in an arena outside of the billable hour, which many firms have started to value in partnership evaluations.

In addition, you are best positioned to develop many of the programs discussed above. You likely still have at least some ties to your alma maters, both undergraduate

and law schools, and can assist your firm by organizing programs that involve local or even national law schools and participating in on-campus interviews at these schools. As a recent graduate, your thoughts on the legal profession and your firm will shape the public image of your firm within the law school network. Your firm will undoubtedly appreciate your dedication to developing a recruitment strategy that ensures that your firm will remain competitive in today's ever-changing business world.

Further, take advantage of both local and national legal organizations. These organizations will only benefit from the addition of passionate, new voices. Most organizations have both young lawyer and diversity-oriented groups that provide numerous opportunities for new attorneys to learn about diversity and contribute to the forwarding diversity initiatives.

The bottom line for the young associate is to become involved early and often. There are many ways to show your firm's partnership that you are dedicated to the firm's future. You simply have to find the way that best suits you. Being aware of recent trends defining diversity and ensuring that your

firm is on the forefront of these changes will evidence forward-thinking business strategy—a characteristic that is often lost among young associates and, therefore, becomes a way to set yourself apart from the pack.

Conclusion

The ideas mentioned above are only some of the many ways that the legal profession and young attorneys can ensure diversity in the practice of law. It is undeniable that diversity makes sense—both from a business standpoint and because, ideally, the legal profession should reflect society as a whole. The end goal of diversity initiatives is to create a work environment in which every individual's differences are valued and utilized to develop new ideas and strategies. Phase II diversity programs will further this goal. We encourage the newest generation of lawyers to embrace diversity and work toward inclusion with your law firms. Young attorneys bring fresh ideas and fresh perspectives to the practice of law. Become involved, let your partners know what you think, and help shape the future of our profession. 