

**ABA Litigation Section Corporate Counsel CLE Seminar  
Rancho Mirage -- February 11-14, 2010**

***The Diversity Dilemma: Another Victim of the Bad Economy?***

**Sponsored by:**

**Woman Advocate Committee and Minority Trial Lawyer Committee**

**I. Introduction**

In 2004, Roderick Palmore, then General Counsel of Sara Lee Corporation, wrote “The Call to Action.”<sup>1</sup> This simple one page document urged General Counsels all over the country to examine the diversity records of the law firms that rendered services to their corporations, and called for the law firms that serviced their business to be more diverse. Ultimately, one hundred and ten General Counsels responded and signed “The Call to Action,” committing these leaders of legal departments in the top companies around the country to making measurable diversity progress in their own legal departments, and demanding the same of their outside law firms. In April 2008, Palmore and others called together law firm leaders and General Counsels to a Diversity Summit, to discuss the progress that had been made, and assess what further steps could be taken. Further action steps were announced, and it appeared measurable progress, albeit slow going, was being made. Since that 2008 Summit, the economy has spiraled downward, law firms have laid off associates (and partners), and the demand for legal services has been dramatically scaled back.

The nation’s economic woes are impacting the diversity discussion. Some in the profession say the diversity effort must wait for better economic times before the diversity banner can be carried forward. Others say now is the time diversity advocates must press even harder for change, or the progress made thus far will be lost. The focus of our Diversity Dilemma discussion will be this fundamental question: What impact has the recession had on our efforts to diversify the legal profession? The necessary predicates to this discussion are the efforts that have been undertaken so far to incentivize law firms to diversify their ranks, and whether those

---

<sup>1</sup> The Call to Action” was authored by Rick Palmore, then General Counsel and Chief Legal Officer of Sara Lee, and a member of the Board of Directors of the Association of Corporate Counsel (ACC)s. ACC’s Board endorsed the Call to Action, and it is posted, along with a list of all signatories, at [www.cloCallToAction.com](http://www.cloCallToAction.com).

diversity initiatives really work. The following paper sets forth the history of the profession's efforts to respond to the call for diversity, and highlights those "best practices" that have helped law firms make progress towards those diversity goals that we have set for ourselves.

## **II. Background of Efforts to Diversify Legal Profession**

In the 1990's many law firms and law schools talked about the need to diversify the ranks of United States law firms, but little beyond talk was accomplished. In 1999, nearly 500 corporations signed the "Diversity in the Workplace, A Statement of Principle" which was authored by Charles Morgan of Bell-South, and promulgated by the Association of Corporate Counsel. Many local bar associations adopted corollary statements, and pushed for law firms to adopt the Principle. The statement was simple: "We expect the law firms which represent our companies to work actively to promote diversity within their workplace. In making our respective decisions concerning the selection of outside counsel, we will give significant weight to a firm's commitment and progress in this area." (Diversity in the Workplace: A Statement of Principle, Association of Corporate Counsel.)<sup>2</sup>

The Statement of Principle, however, did not call for any particular steps or actions to be taken by law firms, or address how progress should be measured. Five years later, Rick Palmore, frustrated by the lack of progress that had been made, wrote "The Call to Action." It asked general counsels to take *action*, not just talk about diversity. It encouraged signatories to assess the specific numbers of women and minority lawyers in the law firms that serviced their business, measure the forward movement progress of firms in increasing those numbers, and limit or end relationships with law firms that were not making meaningful progress towards the diversity goal. In response, law firms swiftly developed a flurry of diversity "initiatives" to demonstrate their commitment to diversity.

Among other steps, law firms hired "diversity professionals" and began tracking and reporting the numbers of women and minority lawyers in their firms, and the advancement of diverse and female associates into the partnership ranks. They launched diversity business plans,

---

<sup>2</sup> The Statement of Principle, along with a list of 1999 signatories, can be found at <http://www.acca.com/public/accapolicy/diversitystmt.html>

sponsored minority scholarship programs at local law schools, and created diversity pipeline programs for aspiring minority undergraduates with an interest in the law. They formed mentor programs, and heavily courted the top minority and women lawyers graduating at the top law schools. They promised to monitor work assignments, client access, and career development opportunities, to ensure that minority and women lawyers had equal chances to achieve partnership. Law firm websites devoted whole pages to their diversity efforts. Much was written, and continuing legal education programs sprang up around the country to educate law firms about the importance of diversity.

While all of these programs had the laudable goal of increasing the numbers of diverse and female lawyers in their firms, and ensuring that diverse and female associates had the opportunity to advance to partnership, certain of these programs were more successful than others in achieving the purpose of recruiting and retaining diverse lawyers. Before we review what has worked, however, we need to gauge the numbers – are these extensive efforts yielding results? What progress has been made over the past five years now that diversity has become a priority item for law firms?

### **III. Progress, Albeit Slow Going, Has Been Made**

The numbers show that slow but steady progress has been made over the past five years as a result of the active efforts made to increase law firm diversity. According to the National Association for Law Placement, the percentage of minority attorneys overall at large U.S. law firms in 2009 was 12.6 percent, which is a 2.6% increase over the 10% of minority attorneys in law firms as of 2004, when the Call to Action was first published.<sup>3</sup> The Minority Law Journal's Diversity Scorecard, which monitors the diversity statistics of the Am Law 200, shows that the proportion of diverse lawyers in large law firms grew from 10.4% in 2005 to 13.9% in 2009.<sup>4</sup>

Unfortunately, minority lawyers are becoming partners at large U.S. law firms at an even slower pace. As of 2009, minority lawyers comprise only 6.1% of the total partner ranks which

---

<sup>3</sup> National Association of Law Placement, Law Firm Diversity Demographics for 2009, located at <http://www.nalp.org>

<sup>4</sup> Minority Law Journal Diversity Scorecard, May 1, 2009, published by the Minority Law Journal, can be found at <http://www.law.com/mlj>

is only a tick up from the 4.3% level of 2004.<sup>5</sup> These numbers are particularly disturbing when contrasted with the numbers of diversity professionals working as doctors, surgeons, dentists, and certified public accountants. According to the U.S. Census Bureau, Blacks, Asians, and Latinos counted for 11.8% of all U.S. attorneys in 2007, but by contrast, these same groups represented 19.9% of all dentists, 25% of all certified public accountants and auditors, and 27.7% of all doctors and surgeons.

A different aspect of the diversity picture emerges when assessing the number of women lawyers practicing in law firms today. A recent study published by the National Association of Women Lawyers (“NAWL”) reports that women currently constitute 48% of first- and second-year associates in law firms, which is a percentage that roughly approximates the average law school population.<sup>6</sup> By the time a lawyer becomes a seventh year, the ranks of women associates drop slightly to 45%. A more startling drop off occurs, however, as women become more senior in the profession. On average, women constitute 34% of “of-counsels,” 27% of non-equity partners, but only 16% of equity partners. In other words, less than one third of the women who start in the profession ultimately make it into the equity partnership ranks. According to the NAWL study, this particular statistic has not changed dramatically over the years despite the fact that women have been graduating at roughly the same numbers as men for nearly twenty years.

Many in the legal profession lament the lag of the legal profession behind the other professions, but cite the small pool of “qualified” applicants to recruit from, and the intense competition for that small pool. Leaders in the profession however, view the problem in a different way. The publication in 2003 of the “The Myth of the Meritocracy” by the Minority Corporate Counsel Association, has done much to debunk the concept that only those minorities who graduate from the best law schools, with top grades, can be successful in the profession. Using data from a demographic pool of 1,833 lawyers at the top 250 firms in the country, the “Myth” empirically demonstrated that a higher recruiting standard was being set for minority applicants applying for jobs at large law firms, and that the top law school/high grades standard

---

<sup>5</sup> *Id.*

<sup>6</sup> NAWL Fourth Annual Survey on Retention and Promotion of Women in Law Firms, published October 2009, located at <http://www.nawl.org/assets/2009>

was more the exception than the norm when examining the lawyer credentials of non-diverse attorneys at the country's largest law firms.<sup>7</sup> Moreover, the study demonstrated that graduation from a top law school with high grades was not necessarily the best indicator for determining who would be successful in practice.

In addition, diversity leaders cite the need to examine retention policies, as vigorously as recruitment, to deal with the issue. The knowledge that a critical mass of minorities and females have been part of the law school pipeline for at least twenty years, but that the percentage of those who make it into the partnership has remained in the low single digits, triggered the realization that the focus of the diversity effort needs to be expanded to focus on lawyer development and retention, not just recruitment. Finally, the profession has recognized the need to address the significant problem of retaining women lawyers in law firms, who often lose many of their best and brightest lawyers to the child bearing and rearing responsibilities that still fall more heavily on women than men in our general society. This work/life balance conundrum has raised another whole host of issues that must be addressed in the continuing dialogue.

The diversity movement has reached a certain age of maturity in the legal profession. There exists an established track record of what works, and what doesn't, to increase the numbers of minority and women attorneys who will start their careers at large law firms, and to encourage them to stay the course and successfully progress into the partnership ranks. Those programs that actually work need to be the focus for firms that are truly motivated to solve "the diversity dilemma."

#### **IV. What Steps Actually Work to Increase Diversity in the Profession?**

One group that will be looking closely at the issue is the Leadership Council on Legal Diversity, a relatively new organization formed in May 2009 comprised of law firm managing partners and general counsel. The Leadership Council is an outgrowth of the 2008 Call to

---

<sup>7</sup> See [A Report on the Bridges and Barriers to Success in Large Law Firms: The Myth of Meritocracy](http://www.mcca.com), located at <http://www.mcca.com>

Action Summit, and its mission is to advance the principles espoused by the Call to Action.<sup>8</sup> It has announced plans to develop strategies for promoting diversity throughout the industry and hold legal leaders accountable for the makeup of their legal staff. Rick Palmore serves at the chairman of the council's Board of Directors, and Wally Martinez, managing partner of Richmond, Va.-based Hunton & Williams, will be the vice chairman. According to Palmore, the thing that distinguishes the Leadership Council from other diversity organizations is its focus on interaction between companies and law firms at the highest level, rather than general counsels trying to mandate diversity from outside firms. Many in the profession applaud the joint effort, and believe that a partnership between corporations and law firms working to achieve the goals of diversity will have better success than external pressures being placed on internal hiring, staffing, and partnership decisions.

The creation of an organization like the Leadership Council is an important strategic step for the profession overall in advancing the diversity goal. Focusing the diversity lens more closely, however, on what have individual law firms have done that has resulted in forward movement progress on the diversity front lines is an instructive process. Law firms that have experienced success in bettering their "diversity scorecards" report a number of common practices that have worked. These include:

- Stressing the strategic importance of diversity and inclusion at the leadership level, including articulating why it is a priority, and ensuring that the law firm managing partner and other law firm leaders are invested in the discussion.
- Ensuring that white male voices are included in dialogues on diversity and inclusion, and that the discussion focuses on how more-inclusive workplaces are better workplaces for all.
- Examining the criteria that leads to success in your particular law firm, and creating interviewing and hiring protocols that reflect that reality, rather than perpetuating the

---

<sup>8</sup> After the 2008 Call to Action Summit was held, the group published a White Paper on the results of the Summit, which can be found on the Minority Corporate Counsel Association website located at <http://www.tools.mcca.com/CTA>

myth that success is predetermined by the rank of the law school candidates attended or the law school grade point average and/or individual class rank achieved.

- Articulating and communicating “reality-based” hiring criteria, and ensuring that the criteria are consistently and uniformly applied to all candidates.

As to associate career development and lawyer retention, an overarching theme is the importance of development and retention programs that address the needs of all associates, not just women or minorities, to dispel any concerns regarding disparate treatment or unfairness. Some of the critical components of successful associate development and retention programs include:

- Creation of leadership and career development programs that articulate the appropriate skills and characteristics for advancement within the firm that are a predicate to creating a diverse pipeline into leadership positions.
- Development of specific succession programs for key clients to ensure that diverse groups of lawyers are being groomed and mentored to assume relationship and/or billing responsibility for these clients. Such programs should not exclude non-diverse lawyers, but instead should be formulated to ensure that a well thought out and institutionalized approach to succession is communicated and implemented.
- Ensure equal opportunities in work allocation, including regularly evaluating work allocation protocols on an annual basis, to ensure that all associates have equal access to the quantity and quality of work they need to effectively develop and advance in their careers. (This includes creating accountability measures for leaders of departments and practice groups to ensure that inequality of opportunity is immediately and effectively addressed by firm leadership.)

Finally, as to the age old question of how to grow the numbers of women in the profession, one of the mechanisms advanced that has had the most traction is the concept of flexible work schedules for those lawyers seeking that elusive work/life balance. Studies have shown that work/life conflict affects dramatically affect the retention and promotion of talented women in the profession. In addition, however, there is now empirical data demonstrating that

attrition related to work/life conflict has economic consequences for law firms and their clients, that can be overcome utilizing flexible time and other work/life balance solutions.

Specifically, the “Balonomics” initiative published a study in November 2009, supported by statistical analysis underlying the work of the Chicago based consulting firm NERA for the ACC Value Challenge, which demonstrated that the billable hour model can be leveraged to actually utilize work/life balance flexible schedules to increase value for law firms and their clients, rather than costing them money.<sup>9</sup> This is accomplished by reducing the heavy attrition numbers that are typically experienced during the period a lawyer works as an associate (which, for women lawyers, often occurs due to child bearing and rearing responsibilities.) The theory set forth by “Balonomics” demonstrates that profits for law firms actually increase over a five year period if a law firm manages their associate work hours by reducing billable hours and commensurately lowering compensation overhead, instead of decreasing associate headcount altogether through lay off or attrition.

## **V. Conclusion**

While none of the foregoing solutions are guaranteed to increase diversity in the profession, at the very least, analyzing the metrics of the diversity issues suggests that the economy ought not be a deciding factor in moving forward with the diversity agenda, and indeed, to the contrary, adopting diversity solutions can positively impact the bottom line for law firms and their clients alike.

Lucia E. Coyoca  
Mitchell Silberberg & Knupp LLC  
Los Angeles, California

---

<sup>9</sup> See *Increase Profits And Savings Through Work/Life Balance*, November 2009 ACC Docket, authored by Darragh J. David, Deborah Epstein Henry, Rupa G. Singh and Elizabeth B. Daniels, located at <http://acc.com/legalresources/publications>