

Corporate Diversity Programs: Fostering Inclusion in the Selection of Legal Counsel

by M. Christina Floyd

THE QUESTION IS OFTEN POSED: “Why should companies have diversity programs?” For many, the answer is simple: our population—including the American work force—is changing. Demographers routinely report that the work force includes growing numbers of women, racial and ethnic minorities, aging workers, persons with disabilities, and persons with alternative lifestyles. Companies and law firms that do not recognize these changing demographics will be left behind in the race for attracting and retaining the best and the brightest talent, as well as the opportunity to compete in the global market. This globalization of many companies has forced the issue of diversity to become a top priority. Many corporations find that they need a multicultural perspective in order to compete abroad. Through acquisitions, mergers, and relocation overseas, the issue of diversity in American corporations has become critical to success.

Statistics that measure women and minorities in law firms are discouraging. Although women make up almost half of law school graduating classes, studies show that they represent a disproportionately low number of equity partners. We also know from *Visible Invisibility: Women of Color in Law Firms* (American Bar Association Commission on Women in the Profession, 2006) that law firms are riddled with impediments to the advancement of minority women. While many law firms profess dedication to diversity, the fact remains that they are not improving their diversity.

Diversity can be whatever the organization defines it to be. Some companies and law firms have focused diversity efforts mainly on increasing the racial composition of their staffs and service providers. Others have considered diversity initiatives to include a mixture of people of different races, ages, and genders.

A majority of companies engaged in diversity initiatives report that the primary reasons for managing diversity are to improve employee productivity, to gain or retain competitive business advantage, and to improve working relationships among employees and service providers. This remains consistent in programs that also target the provision and receipt of legal services, through in-house legal departments or outside providers. Many diversity initiatives result from concern about adhering to the law. For some companies, the mere expectation of avoiding fines or Equal Employment Opportunity Commission lawsuits is enough to justify the expense of diversity programs. Finally, some businesses pursue diversity because they consider it to be socially responsible.

Articles published from the late 1980s through the present reveal a few clear trends in diversity initiatives among major corporations. Programs in the early 1990s seemed to focus almost exclusively on the intangible “feel good” benefits of diversity initiatives. Much was written about why diversity is socially responsible; however, little was written about benefits a business may reap from diversity initiatives. That changed in the late 1990s, and literature today often focuses on diversity’s return on investment (ROI) to the organization. The analysis of ROI, however, is often seen more in the context of isolated portions of a diversity program, rather than the whole program. For example, equal employment opportunity and affirmative action usually are components of a diversity program and are keys to identifying the ROI. Isolating specific events translates the intangible “people” effect of diversity programs into business dollars.

In 1999, chief legal officers of almost five hundred major corporations signed a document, “Diversity in the Workplace – A Statement of Principle.” This statement asserted the companies’ commitment to diversity in the legal profession and inspired more than 250 companies to commit to working with law firms that had a proven record of promoting diversity. In 2004, Roderick A. Palmore—then executive vice president and general counsel of Sara Lee Corporation—wrote a letter titled “A Call to Action – Diversity in the Legal Profession,” in which he concluded that “all objective assessments show that the collective efforts and gains of law firms in diversity have reached a disappointing plateau.”¹ Palmore’s letter asked the general counsel of Fortune 500 companies to take a stand for diversity by signing a pledge. The pledge stated:

As Chief Legal Officers, we hereby reaffirm our commitment to diversity in the legal profession. Our action is based on the need to enhance opportunity in the legal profession and our recognition that the legal and business interests of our clients require legal representation that reflects the diversity of our employees, customers and the communities where we do business. In furtherance of this renewed commitment, this is intended to be a Call to Action for the profession generally and in particular for our law departments and for the law firms with which our companies do business.

In an effort to realize a truly diverse profession and to promote diversity in law firms, we commit to taking action

consistent with the referenced Statement. To that end, in addition to our abiding commitment to diversity in our own departments, we pledge that we will make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms. We intend to look for opportunities for firms we regularly use which positively distinguish themselves in this area. We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.²

This initiative prompted responses from 110 general counsel from nationally known companies who pledged their commitment to diversity in their law departments and in use of outside legal resources. As a result, a number of diversity programs were developed and implemented by corporate law departments.³ The following are statements from several prime examples of companies with such programs:

Exxon Mobil Corp.: “By supporting [minority organizations] we not only work to improve the legal profession overall but most importantly, we broaden the available talent pool for ExxonMobil. Our participation enables us to meet and network with highly skilled minority attorneys from around the country. Sometimes that leads us to new employees; other times it leads us to minority-owned outside counsel that can represent ExxonMobil. Through our involvement, we gain access to talent that we might not otherwise find. Wherever we are involved, we strive to provide resources, support, networking and mentoring to minorities in the legal profession. . . . And by being visible in these organizations, we are ‘walking the talk’ by proving that ExxonMobil is committed to diversity.”⁴

General Electric Co.: “As a global Company with operations in more than 100 countries, diversity isn’t merely a noble idea – it’s the reflection of our business. Every day, GE works to ensure that all employees, no matter where they work today or where they come from, have an opportunity to contribute and succeed. Encompassed in that goal are traditional ideas of diversity, including ethnicity, race and gender, and exploring more contemporary concepts like inclusiveness.”⁵

HSBC Bank USA N.A.: “We know that employing and managing diverse people gives us a more rounded and balanced organisation and makes us more adaptable to new situations. This is not simply about gender, ethnicity, disability or age: it is about open mindedness, embracing non-conformity and creating balanced teams. Respect for individuals of all types will inspire loyalty in both employees and customers, which will have a direct line of sight to the achievement of business goals.”⁶

Goodyear Tire & Rubber Co.: “Diversity makes good business sense for a global company such as Goodyear that is committed to continued growth and maintaining its position as the world’s tire industry leader. Goodyear has embraced diversity throughout the organization — from its world headquarters in Akron, Ohio, to all its facilities and markets around the globe. As the workplace and technology bring associates together in pursuit of common objectives, personal bonds are created beyond whatever racial, ethnic or cultural differences exist in society. A diverse and inclusive workforce provides the strategic advantage to successfully conduct business in multi-cultural marketplaces globally, and Goodyear’s diverse mindset has enabled it to respond to change much quicker than its competitors.”⁷

The commitments by these companies acknowledging the importance of diversity in the workplace are not novel premises. In *Land of Plenty: Diversity As America’s Competitive Edge in Science, Engineering and Technology*⁸, published by the Congressional Commission on the Advancement of Women and Minorities in Science, Engineering and Technology Development, the reporter emphasized the importance of a diverse workforce if America wants to sustain its preeminence in the global economy. The report stated:

Beyond the demographic reality that skilled workers must be drawn from an increasingly diverse domestic population, there are other compelling reasons why a workforce that includes more women, underrepresented minorities, and persons with disabilities helps to strengthen business, academe, and government.⁹

A recent survey of Fortune 100 human resource executives found that increasing diversity is desirable for the following five reasons: better utilization of talent; increased marketplace understanding; enhanced breadth of understanding in leadership positions; enhanced creativity; and increased quality of team problem solving. Another recent survey conducted by the American Management Association of more than one thousand of its members found that heterogeneity — a mixture of genders, ethnic backgrounds, and ages in senior management teams — consistently correlated with superior corporate performance in such areas as annual sales, growth revenues, market share, shareholder value, net operating profit, worker productivity, and total assets.¹⁰

In some instances, companies demand that their outside legal service providers meet diversity requirements. For example, in 2005 Walmart threatened to end or limit relationships with law firms that fail to demonstrate a meaningful interest in diversity. In July 2008, Microsoft Corp. offered cash bonuses to outside counsel who increased the number of women and minorities in their firm by 0.5 percent or those who work on

Microsoft matters specifically by 2 percent. Mandates such as these led to questions about legality, and whether firms that take affirmative action to meet their corporate clients' diversity demands risk violating federal law prohibiting discrimination.¹¹ Case precedent suggests that courts are likely to view a company's diversity recruitment efforts as a legitimate exercise of business judgment. For example, in *Grutter v. Bollinger*, the U.S. Supreme Court stated that "[m]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." 539 U.S. 306, 330 (2003). Similarly, in *Duffy v. Wolle*, the Eighth Circuit U.S. Court of Appeals stated:

An employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination. An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. This not only allows employers to obtain the best possible employees, but it, "is an excellent way to avoid lawsuits." 123 F.3d. 1026, 1038-39 (1997)

In September 2007, the Minority Corporate Counsel Association published a report addressing the issue of legality of diversity programs under Title VII, which concluded:

A commitment to diversity does not equal discrimination. On the contrary, it generally entails taking steps to ensure that minorities, women and others are given opportunity for access to positions that historically have been denied to them or in which they currently are underrepresented. Race and gender are simply elements of diversity. They represent an aspect of the search for talented people who may succeed in employment, but might otherwise be overlooked.

From a business perspective, diversity is about the bottom line, which means hiring individuals who bring competitive advantage to the enterprise. As law firms diversify and seek new talent from traditional and non-traditional venues, and incorporate different but still legitimate criteria, the "qualified" pool expands and changes. In fact, what corporate America is saying to law firms is to try new approaches in hiring because the "old approaches" are not working.¹²

Broadening the scope of recruitment resources used ensures that all segments of the potential candidate pool, including minorities, are informed about job openings. In support of this approach, many corporations with diversity programs contact minority organizations, groups or bar associations when openings become available, which sends a message to applicants that the employment of minorities is important to the company.¹³

Corporate diversity programs also often include the use of assigned mentors. Since employees tend to gravitate towards co-workers or managers who are like themselves, informal mentor relationships may develop between similar individuals. Such informal relationships risk excluding minorities if the management ranks of a company do not include a significant number of minorities. Use of assigned mentors from ensures that all employees have the opportunity to develop relationships with individuals in higher-level positions. Pairing new talent with such relationship partners can be an especially effective way to assist in retention.¹⁴

Not only do the companies benefit from the mentoring relationships, but on those occasions when the participating corporate counsel move into private practice their experience with such relationships in a corporate environment enhances their ability to work with and relate to a wide range of colleagues and clients. Thus, corporate diversity programs contribute to the development of diversity oriented attorneys in the general practice of law.

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Another avenue corporate law departments and firms use to increase minority representation is to begin recruitment efforts before a prospective employee applies to enter the workforce.¹⁵ This usually occurs through the use of internships and clerkships coordinated with law school career services departments and minority student organizations. Such opportunities for both the company or firm and law student to "test drive" a potential employment situation provide invaluable insight as to whether the position sought would be a good fit for the individual. These temporary assignments can also help the intern or clerk later advance in the organization if employment is offered, since they essentially have an advantage over new hires that were not provided with the opportunity to learn the company or firm culture prior to employment.

The legal profession should not depend on in-house counsel to be the primary agent to achieve diversity in the legal profession. But we cannot ignore the significant power that corporate legal departments have to effect such change. Corporate legal departments have been a stalwart voice not only for what makes good business, but also for what is right. Consequently, the time may be ripe for corporate counsel to address attrition and the slow advancement of women and

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minorities, and to use their economic power to increase diversification of legal services providers and identify new mechanisms to provide meaningful pathways for all members of the legal community to succeed. We encourage corporate counsel to keep the voice of inclusion strong and their diversity efforts moving forward. ■

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Endnotes:

- 1 Roderick Palmore, "Call to Action," reprinted in *New England In-House*, at www.newenglandinhouse.com/200410issue/call.htm.
- 2 *Id.*
- 3 A number of companies operating in Virginia have implemented diversity programs that include legal services, including Capital One: programs for supplier diversity program and minority/women business enterprise development; Dominion Power: partnerships with minority organizations, supplier diversity team; Norfolk Southern Corp: diversity council; Exxon Mobil Corp: global training and development programs; Genworth Financial Inc.: internal network groups; Nationwide Mutual Insurance Co.: chief diversity officer leads corporate diversity efforts, supplier diversity; and Verizon: supplier diversity program.
- 4 Joseph Yao, "Texas State Bar Honors ExxonMobil: Company named 2008 Champion of Diversity winner for its support of minority attorneys, law firms," <http://www.exxonmobil.com/news/>.
- 5 <http://www.ge.com/en/citizenship/employees/diversity.htm>
- 6 www.hsbc.com/hsbc/careers/diversity
- 7 http://www.goodyear.com/corporate/about/about_diversity.html
- 8 Congressional Commission on the Advancement of Women and Minorities in Science, Engineering and Technology Development, *Land of Plenty: Diversity As America's Competitive Edge in Science, Engineering and Technology* (September 2000).
- 9 *Id.*
- 10 *Id.*
- 11 See Curt A. Levey, *The Legal Implications of Complying with Race and Gender-Based Client Preferences* at 2 (March 12, 2007).
- 12 Minority Corporate Council Association, *Why Corporate Initiatives to Promote Inclusion through Selection of Outside Counsel Can Co-Exist with Title VII: Another Look at Corporate Counsel Requests for Law Firm Diversity*, at 9, 12, 15, September 2007.
- 13 *Id.* at 17-18.
- 14 *Id.* at 18
- 15 *Id.*

Hill-Tucker Dinner to Raise Money for Law Student Scholarships

Journalist Juan Williams will be the featured speaker at the Ninth Annual Oliver W. Hill and Samuel W. Tucker Scholarship Dinner on April 30, 2009, at the Virginia Holocaust Museum in Richmond.

The dinner raises funds for scholarships presented to first-year law students at Virginia law schools and Howard University. Recipients are chosen based on academic excellence and a desire to follow the examples of civil rights attorneys Hill and Tucker. Three scholarship winners will be recognized at the dinner.

Williams is a news analyst on National Public Radio and author of a biography of Thurgood Marshall and *Eyes on the Prize: America's Civil Rights Years, 1954-1965*. Daphne Maxwell Reid, an actress and owner of New Millennium Studios in Petersburg, will serve as master of ceremonies.

Delegate Jennifer L. McClellan and Richmond Mayor Dwight C. Jones also will be on the program.

The event is sponsored by the Greater Richmond Bar Foundation, the scholarship committee, and the Holocaust Museum. Individual tickets are \$55 in advance and \$65 at the door. Dress is business attire. For information, contact Crystal Y. Twitty at (804) 786-9583 or ctwitty@oag.state.va.us.