

Why Diversity? The Business Case for Enhancing Opportunities in the Legal Profession

by Dean Sparlin



The VSB Corporate Counsel Section, representing lawyers who work in an in-house setting, met for dinner at the Annual Meeting in Virginia Beach.

When the Virginia State Bar established the Diversity Conference in 2010, it was a latecomer to the scene. As long ago as 1986, the American Bar Association adopted Goal IX, which urged “full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.”¹ A number of state bars followed suit with their own diversity initiatives, many of which predate the Virginia State Bar’s Diversity Conference by several decades.²

Longstanding diversity programs also abound outside the legal profession. American industry has broadly embraced the goals of equity, access, and inclusion, evidenced by the proliferation of corporate diversity programs whose objectives extend well beyond the

minimum requirements of equal opportunity laws.³ Most large corporations have entire offices dedicated to diversity, often headed by a Chief Diversity Officer who reports directly to the CEO.⁴ These diversity programs enjoy broad public support. Polls indicate that more than 70 percent of Americans support “new steps to reduce racial and ethnic inequality in America through investments in areas like education, job training, and infrastructure improvement.”⁵

Increasingly, American corporations are demanding a similar commitment to diversity from the lawyers they retain. In 1999, the chief legal officers of several hundred large corporations signed a joint statement of principle on diversity in the workplace, which included the following declaration:

We expect the law firms that represent our companies to work actively to promote diversity within their workplace. In making our respective decisions concerning selection of outside counsel, we will give significant weight to a firm’s commitment and progress in this area.⁶

Since then, it has become commonplace for corporations to include provisions addressing law firm diversity in their agreements with outside counsel.⁷

Despite these efforts, a 2016 ABA report described corporate clients as “frustrated” because “law firm demographics have not kept pace with the demand by clients for meaningfully diverse teams to handle their matters.”⁸ The ABA responded with a resolution that urges legal professionals “to expand and create opportunities at all levels of responsibility for diverse attorneys.”⁹ The ABA also offers tools, including model law firm diversity surveys, that can assist prospective clients in exerting pressure to further these goals.¹⁰

Why is corporate America so interested in diversity within the legal profession? Part of the answer is that it is the right thing to do. But altruism is not the entire motivation. As the United States Supreme Court has noted, the business benefits of diversity are “not theo-

retical but real,” as “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”¹¹

This observation is backed by empirical research. One study of data from 366 companies evidenced a strong correlation between diversity and financial performance: companies in the top quartile for racial and ethnic diversity were 35 percent more likely to have financial returns above the median for their industries.¹² Several factors contribute to these outcomes, including the ability to attract strong employees from a broader talent pool, better orientation with and ability to relate to diverse customers, increased employee satisfaction and morale, and a higher level of innovation and creativity fostered by an environment in which differing cultures and perspectives contribute to the development of new ideas.¹³ Increased diversity has also been linked to improved employee productivity and performance, a decrease in lawsuits, broader market opportunities, and an enhanced business image.¹⁴

The same business benefits translate to the industry of law. The recruitment of diverse lawyers and support staff can help law firms attract business from clients who are operating in a global market where differing backgrounds and perspectives are an everyday reality.¹⁵ In some cases, moreover, a lack of diversity can lead directly to the loss of existing client relationships. A 2011 survey on this topic revealed that 12.5 percent of corporations had reduced or terminated the use of specific outside law firms due to poor diversity performance.¹⁶

Three other diversity rationales unique to the legal profession are also significant. The first is the “democracy rationale,” which recognizes that diversity in the bar and on the bench enhances the trust of a diverse citizenry in the mechanisms of government and the rule of law. The second is the “leadership rationale,” which notes the importance of inclusivity in civic leadership positions, which often are filled by lawyers. The third is the “demographic rationale,” which emphasizes the importance of having a group of attorneys whose differing backgrounds better equip them to respond to a citizenry that is increasingly diverse, having been projected to become “majority minority” by 2042.¹⁷

Further perspectives on the importance of diversity are offered by Sharron Gatling,

who, as Assistant Director of Diversity for the College of William and Mary, is part of the pipeline that helps supply the Virginia State Bar with future attorneys. Gatling notes that an absence of diversity, particularly in top positions within any institution, can lead to decisions that overlook the needs of groups whose perspectives are absent from the policy making table. As an example, she points to the development of leave policies, which can be vital to women (including attorneys) in their childbearing years. If leave decisions are made by an executive management group that is predominantly or exclusively male, the family-related needs of female employees can easily be overlooked.

Gatling adds that there is a particular “need for lawyers who have an understanding of implicit bias.” Cultural differences can affect the way people understand each other, leading to disputes that a legal system with inadequate diversity will be ill-equipped to resolve. Lawyers must “be able to understand how other people think and behave.” Attorneys of all backgrounds can do this more effectively if they are exposed to diverse perspectives, not only within the profession but also during their legal education.

Diversity, Gatling notes, extends “past race and ethnicity.” It encompasses a variety of personal characteristics, including sex, disability, gender identity, and gender expression.

Ultimately, Gatling fears, a lack of diversity among those charged with enforcement of the law undermines trust in the system among groups who may feel that their viewpoints are overlooked. One of many factors believed to have contributed to widespread civil unrest following the 2014 shooting of Michael Brown was the composition of the Ferguson, Missouri police department, whose 54-person force included only four women and four African Americans in a town whose residents were 55 percent female and more than two-thirds African-American.¹⁸ Similarly, Gatling concludes, if the broader legal system fails to reflect the demographics of the community it serves, underrepresented segments of that community “won’t feel justice” and instead will see the system as a “threat to them.”

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Diversity, Gatling notes, extends “past race and ethnicity.” It encompasses a variety of personal characteristics, including sex, disability, gender identity, and gender expression. It can even be expanded to issues such as “generational gaps, socioeconomic status, military status, and religious differences: anything that impacts how we relate to and work with each other.”

The Virginia State Bar Diversity Conference is dedicated to making a positive impact in all of these areas. Its work is aimed at creating opportunities that encourage entry into and advancement within the legal profession among people of all backgrounds. Contrary to fears expressed by some bar members when the idea was first proposed, diversity is not achieved through mandates or quotas. The proper role of numbers is to retrospectively assess the effectiveness of initiatives that create opportunities for inclusion, not to serve as ends in their own right.¹⁹

Diversity is a worthy goal, which has broad benefits for both the legal profession and the public it serves. The Diversity Conference’s efforts to promote that goal deserve support from every member of the bar.

Endnotes:

- 1 See D. Rhode & D. Yu, “The ABA Goal IX Commission Reports: Tracking Progress and Trends,” 17 *Perspectives* 16 (Summer 2008). ABA Goal IX has since been restated as part of Goal III.
- 2 See, e.g., G. Conyers, “Diversity in the Legal Profession, Past and Future,” *Mich. Bar J.*, May 2015, at 18-19 (describing the history of diversity efforts by the Michigan State Bar, which commenced in 1986).
- 3 See Calvert Investments, *Examining the Cracks in the Ceiling: A Survey of Corporate Diversity Practices of the S&P 100* (March 2015).
- 4 See S. Templeton, “8 Companies With Chief Diversity Officer Positions,” *ITSP Magazine*, Mar. 16, 2017.
- 5 R. Teixeira & J. Halpin, *Building an All-In Nation: A View from the American Public* 21 (2013).
- 6 “Diversity in the Workplace: A Statement of Principle,” 9 *Bus. L Today* 41 (July-Aug. 2000).
- 7 See, e.g., Association of Corporate Counsel, Excerpt from Wal-Mart Stores, Inc. Agreement, at 12 (2008) (https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/38th_conf_session2_pages_from_sample_document_walmart_outside_authcheckdam.pdf)
- 8 American Bar Association, Report Accompanying Resolution No. 113, adopted by the ABA House of Delegates on Aug. 8-9, 2016 (“Resolution No. 113 Report”), at 4.
- 9 American Bar Association, Resolution No. 113 (2016).
- 10 Resolution No. 113 Report at 6.
- 11 *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing *amicus curiae* briefs filed by 3M and General Motors Corporation).
- 12 V. Hunt, D. Layton & S. Prince, *Diversity Matters* 3 (2015).
- 13 *Id.* at 9-13.
- 14 K. Etsy, R. Griffin & M. Hirsch, *Workplace Diversity: A Manager’s Guide to Solving Problems and Turning Diversity into a Competitive Advantage* 9-10 (1995).
- 15 M. Greene, H. Johnson, A. Torres & L. Wong, “Beyond the Business Case - Diversity and the Small/Medium Firm,” presentation to the ABA Litigation Session Annual Conference (“ABA Presentation”), April 24-26, 2013, at 2.
- 16 Institute for Inclusion in the Legal Profession, *The Business Case for Diversity: Reality or Wishful Thinking* 9 (2011).
- 17 ABA Presentation at 2.
- 18 U.S. Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* 88-89 (2015).
- 19 This aligns with the broader approach of diversity programs across American industry, and is the only legally permissible approach to the issue. See 41 C.F.R. § 60-2.16(e) (federal requirements that expressly forbid quotas, set-asides for specific groups, guarantees of proportional representation, or other numerical mandates that would supersede merit selection principles).



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