

“WHY”

Diversity and Inclusion Are Critical to the Success of Your Law Department

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I recently co-authored an article with a colleague in which we outlined actions that a corporate law department can take, internally and externally, to improve diversity and inclusion within its legal team.¹ When I asked friends and colleagues to critique our work, many said that the article didn't articulate “*why*” diversity and inclusion are important. To me, the *why* was clear, since I know that having such a team has been foundational to both my and my teams' successes over the years. But I had wrongly assumed that the reasons were obvious to others.

Even though the business case for diversity and inclusion has been articulated for years,² there's apparently still a need to summarize the compelling case for “*why*” it is important in a corporate legal team to help improve operational results. Establishing this “*why*” is critical. The fundamental belief that diversity and inclusion are more than just the socially right thing to do must exist as a starting point. It must extend beyond generating warm and fuzzy, self-congratulatory feelings. If there is not a collective agreement in the business value of diversity and inclusion it is unlikely that there will be any urgency to improve or that actions taken will be ongoing and sustainable.

As it will be made clear in this article, to have the overall greatest impact, diversity should be defined broadly. This definition should not be limited to the traditional protected classes. Rather, diversity should encompass all differences - an infinite range of individual characteristics and choices - including,

among other things, age, race, culture, geographic identity (national and international), gender (including transgendered), sexual orientation, religious beliefs, education (schools and undergraduate majors), social mobility, language, disability, military experience, professional/career experiences, marital status, familial composition, hobbies, and other experiences.

Building a culture of diversity and inclusion in your legal team is critical because it will improve your team's performance. First, it will allow you to attract superior talent. Second, it will allow you to better understand the needs of your customers. Third, it will create better strategies and solutions for questions and issues your team will need to address. Fourth, it will help establish an environment of innovation and creativity. Fifth, it will assist in developing an atmosphere of learning and continuous improvement. And, finally, all of this will work together to increase productivity.

I support several of the above six propositions with data and empirical studies, but others are more based on my experience. And my overall experience is that if you as a leader of a legal team want to show competitively superior results, you need to make developing this diverse and inclusive culture as important as any other operational and leadership action you take to drive performance. To maximize success, you can't treat this effort as a “feel-good” extracurricular exercise. It must be pursued like other significant business objectives - purposefully and with a sense of urgency.

Success Starts With Talent

Any leader or legal team is only as strong as the team as a whole. To identify and attract the very best talent, you need to be able to choose from the most expansive population pool. You need the broadest talent group possible to desire to be part of your team and your organization.

This talent pool is rapidly changing. Around the year 2042 the white majority in this country will become

¹ Mark Roellig & Marc Walters, *The Corporate Counsel's Guide to Growing Diversity and Inclusion*, ACC DOCKET, July/Aug. 2011.

² Kathleen Denchant & Gail Robinson, *Building a Business Case for Diversity*, ACAD. MGMT. EXEC., (Aug. 1997); Evan Osborne, *The Deceptively Simple Economics of Workplace Diversity*, 21 J. LAB. RES. 463 (2000); Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1 (2009); Marcus Robinson, Charles Pfeffer & Joan Buccigrossi, *Business Case for Diversity with Inclusion*, WETWARE, INC., (2003), http://workforcediversitynetwork.com/docs/business_case_3.pdf; Melissa Castro, *The Business Case for Diversity*, WASH. BUS. J., (June 21, 2010), <http://www.bizjournals.com/washington/stories/2010/06/21/focus1.html>.

the minority³ – never to be reversed. Currently 57% of enrollees and graduates at American colleges are women.⁴ And women comprised 44% of the law students in the 2008-2009 class.⁵ The American Corporate Counsel Association reports that in 2000 68% of its self-disclosing members were male, while 32% were female. Those figures shifted to 64% male, 36% female in 2005, 58% male, and 42% female in 2011. In addition, while minority representations in major law firms have been flat to decreasing, the American Corporate Counsel Association reports that from 2005 to the present it has increased by one percent to 17% in the corporate environment.⁶ Finally, women now represent slightly more than 20% of general counsels and minorities are close to 9% at this level in Fortune 500 companies.⁷ In both categories, there have been increases over past years percentages.⁸

To prepare now for these fast pace changes in demographics, to recruit and hire the best talent, no legal team can limit itself to less than half of the talent pool. And to attract the best talent, an organization needs to affirmatively and publically display that it values all people and their views. It has to be clear that a diverse array of individuals can and have become successful because of their talent and their work. Proof of “making it” can benefit the current team and potential new recruits, by placing these individuals in leadership or other positions with accompanying recognition and reward, when such individuals (both internal or external counsel) help achieve company and departmental objectives.

Your commitment to diversity in leadership is unsupported if all the leaders of a talented diverse team are white-males. Thus, not only must the team be diverse to obtain the best talent, but its leaders must also understand and represent those they are leading to be successful. And having a diverse workforce, created primarily by selection on competency and role appropriate skills, is a visible and demonstrable commitment by an organization to both meritocracy and to reflecting the composition of the societies within which we exist and the clients we seek to serve.

³ U. S. CENSUS BUREAU (2008).

⁴ AM. COUNCIL ON EDUC., GENDER EQUITY IN HIGHER EDUCATION (2010).

⁵ CATALYST, WOMAN IN THE LAW U.S. (2010).

⁶ Amanda Robert, *In-house: Growing Diversity Exists in Corporate Law Departments*, CHI. LAW. MAG. (July 1, 2011), <http://www.chicagolawmagazine.com/Articles/2011/07/01/Divrsity-in-corporations.aspx>.

⁷ DIVERSITY AND THE BAR, *Fortune 500, 2011 General Counsel Survey* (Sept. 2011).

⁸ *Id.*

Keep in mind that, to the extent that law firms or your competitors have trouble attracting, developing and retaining diverse individuals, your successes here can become a competitive advantage to the business. There have been times where I have worked hard to recruit a very talented woman or person of color who was considering alternative employment opportunities. In sharing with them what we have done, are doing and plan to do with respect to diversity and inclusion, I believe we have tipped the scales in our favor. Why wouldn't such an individual prefer to work in an organization where diversity exists and inclusion exists, where he/she will be given an equal opportunity to be successful, where upward mobility exists, and where different perspectives are valued?

To Be Successful in this Global Economy We Must Be Diverse

Just as the demographics in the United States are changing for attracting talent, they are also changing for attracting customers. Customers and suppliers of almost all businesses are also becoming more global; what looks like the population in the United States certainly does not reflect the population of the world as a whole. Effective and successful interactions with suppliers and customers requires a team of individuals who not only reflect these constituents, but also understand their needs and how they can best be met. Diversity brings to an organization such “cultural intelligence” which is necessary to effectively interact in our global economy.

One may argue that a legal team often interacts solely with internal clients and, therefore, does not need to reflect the population as a whole. This assertion is simply not true. For example, having a team member who is sensitive to and aware of cultural differences will greatly assist in understanding, negotiating or communicating on legal issues with individuals from different nationalities and cultures. Simply being able to coach one another on how to best interact and communicate with different populations adds value to the business. As we work on legal issues with customers, regulators, legislators and administrators, we often work to retain outside counsel that is “appropriate” for, and reflects those stakeholder groups – obviously the same rationale and benefits apply to a diverse in-house team.

And our internal clients are not a homogeneous group either. Most companies are embracing the notion that the employees of the company, including senior management, should reflect the population as a

whole. Thus, to best interact within the corporate enterprise your team needs to have a similar makeup.

Companies realize that to be successful, the business must consider and respond to customers' perceptions of them. Competitive alternatives exist for almost all products and services. Customers trust and want to do business with an entity whose workforce, marketing, and messaging reflects their individual characteristics. Incorporating diversity in all aspects of an organization sends a message to customers that you value differences and, therefore, value them as diverse customers/clients.

Diversity and Inclusion Makes for Better Decisions and Reduces Risk

Diversity and inclusion brings balance and equilibrium to any team or group and to the environment in which the team operates. And a diverse group will develop different strategies, approaches, solutions, and ideas. The more alternatives that exist to solve a particular problem, the greater the potential for a better decision. Another benefit of a broad range of ideas is the counterbalancing of "group think." A clubby group may be more cautious about calling out what is wrong, crosses the line, or may be illegal. Understanding, evaluating, and vetting different approaches allow a team to sharpen its thinking and choose better approaches. In addition, the members of diverse teams are more likely to make mistakes or fail diversely. This allows other team members to identify and raise these issues early, correct for them and reduce errors.

This outcome has been substantiated by studies that conclude that a diverse decision-making group outperforms homogeneous groups.⁹ And they will consider more information, more carefully deliberate and make fewer errors. Diversity encourages those homogenous group members to also raise more facts and make fewer errors. This effect is particularly telling when working with complex issues.¹⁰ Given the incredibly complex and multi-faceted legal challenges facing enterprises, it is logical to conclude that diversity will be of particular value in solving such problems. "[P]eople work harder in diverse environments both cognitively and socially. They

may not like it, but the hard work can lead to better outcomes."¹¹

In James Surowiecki's, *The Wisdom of Crowds* he discusses the decision making that led NASA's Mission Management Team ("MMT") to dismiss, as a matter of small concern, a large piece of foam that had broken off of the shuttle Columbia during take-off. In analyzing what caused the MMT to make the wrong decision and fail to treat that event with sufficient seriousness, Surowiecki identifies a cultural failing having to do with the make-up and structure of the MMT. He writes:

What was missing most from the MMT, of course, was diversity, by which I mean not sociological diversity but rather cognitive diversity. James Oberg, a former Mission Control operator and now NBC News correspondent, has made the counterintuitive point that the NASA teams that presided per the *Apollo* missions were actually more diverse than the MMT. This seems hard to believe, since every engineer at Mission Control in the late 1960's had the same crew cut and wore the same short-sleeved white shirt. But as Oberg points out, most of those men had worked outside of NASA in many different industries before coming to the agency. NASA employees today are far more likely to have come from the agency directly out of graduate school, which means that they are also far less likely to have divergent opinions. *That matters because, in small groups, diversity of opinion is the single best guarantee that the group will reap benefits from face-to-face discussion. Berkeley political scientist Charlan Nemeth has shown in a host of studies of mock juries that the presence of a minority viewpoint, all by itself, makes a group's decisions more nuanced and its decision-making process more rigorous.*¹²

If a group is diverse by gender, color, ethnicity and other factors, in most instances, that means that it possesses the desired cognitive diversity as well. Thus, when considering diversity of approach and thought, it is critically important to include the infinite range and combination of individual and unique characteristics and experiences that lead us to approach challenges differently and identify varying solutions. As I have said on many occasions, if a diverse team is in a room working on an issue, and

⁹ Hong Lu & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 NAT'L ACAD. SCI. 16385-89 n. 46 (2004).

¹⁰ Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS. SOC. PSYCHOL. 567-612 (2006).

¹¹ Katherine W. Phillips, *How Diversity Makes Us Smarter*, Scientific American (2014).

¹² James Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations*, emphasis added 355-56 iTunes version (2004).

the lights go off, what truly remains are those different backgrounds and experiences that make for alternative perspectives.

Having this full range of diversity is necessary, but not sufficient, to improve results. It is critical to have an inclusive environment where different perspectives are truly encouraged, listened to, and valued. While “diversity” reflects the makeup of the team, “inclusion” is the “active, intentional, and ongoing engagement with diversity in the organization.”¹³ Working with diverse teams and inclusion training can help to improve inclusion skills. Companies can create diverse teams just for numbers or window-dressing. But because the team or the organization really is not prepared for and does not value and listen to the different individuals and perspectives being offered, they fail to “mine” the value inherent in a diverse group. It is not what senior management “says” about diversity and inclusion, but it is the requirement that they “live it” and draw the value so that it becomes a natural and normal part of the corporate culture.

Diversity and Inclusion Sparks Innovation and Creativity

An organization that demonstrates its commitment to accepting and respecting individual differences will also be receptive to “idea” differences. Creativity and innovation are natural products of such an environment. Individuals will feel more comfortable both expressing their own ideas and challenging institutional assumptions and the ideas of others because the organization has established a safe environment, a safe culture, to encourage and try new things. (I would rather have ten ideas with only two good ones than none at all.)

For example, if a new individual walks into a conference room consisting of persons not known to this individual, but all appear similar to him/her, and who have all concluded that the correct solution to a problem is X, it is simply hard to suggest alternative Y. However, if one walks into a room where a diverse group of individuals are working in an environment where both different individuals and unique “against the grain” thoughts are accepted and encouraged, it is much easier to propose and debate/refine alternative Y. A CEO I used to work for often said, “when smart people ask dumb questions - - listen.” You need to create an environment where smart people are comfortable asking those “dumb questions.” Moreover, if the

¹³ K. Nalty, *Achieving Inclusiveness in Law Departments* (2011).

participants are diverse and the organization supports differences and inclusion, it is likely that good, constructive questions will be raised – which leads to more thorough discussions and better solutions. “The mere fact that an individual is different from most people around him promotes more open and divergent, perhaps even rebellious thinking in that person.”¹⁴ “Simply adding social diversity to a group makes people believe that differences of perspective might exist among them and that belief makes people change their behavior.”¹⁵ The freedom from conventional thinking and inspiring individuals to move out of their silos and collaborate (potentially even cross functionally), enhances innovation. “[F]or groups that value innovation and new ideas, diversity helps.”¹⁶

Thus, whenever I need to develop a unique legal strategy, confront and provide a solution to a challenge or respond to an adverse result, I do not close my door and start working. My first step is to pull together a team of smart, creative people. The group has to be diverse to ensure that all potential solutions are raised and all the possible downsides are identified and addressed.

When making a key decision, an individual with good judgment timely considers alternatives, weighs the value of the range of facts, and considers the impact on various stakeholders, as well as the risks, cost and likelihood of successful implementation of the proposed solution. A diverse and inclusive team will bring valuable input to each of these components, enhancing and refining both the decision-making process and the decision itself.

Diversity and Inclusion Fosters an Environment of Personal Development

For better or worse, we generally live our lives in a rather homogeneous world. As a result, we all carry certain stereotypes and biases.¹⁷ We should not necessarily be self-critical that we have such natural biases or stereotypical views. Without them, our minds would not be able to create “shortcuts” to allow us to react to the almost infinite amount of perceptions we receive on any given day. And the individuals we generally love and trust most are our families. Likewise, most employees spend the

¹⁴ FRANS JOHANSSON, *THE MEDICI EFFECT: BREAKTHROUGH INSIGHTS AT THE INTERSECTION OF IDEAS, CONCEPTS, AND CULTURES* 47 (2004).

¹⁵ Katherine W. Phillips, *supra*.

¹⁶ *Id.*

¹⁷ Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 *DUKE L.J.* 346 (2007).

predominant portion of their non-work time in their family environment. Generally, the family unit is *de facto* very homogeneous. We tend to be like our parents and our kids tend to be like us - biology works that way. In addition, we are likely to be more comfortable around people who are like us. Not all, but most people's friends have a tendency to be like them.

By understanding and discussing our natural biases, we have an increased opportunity to counteract them and allow them to have a reduced influence on our decisions.¹⁸ This self-awareness can have a significant impact on our choices around team composition and the hiring of internal and external counsel and it can better allow us to retain or include the best for the particular task.

We need to be aware of not only our potential "negative" biases, but also our "positive" biases. When we have a great project are we actively thinking to ensure we don't assign it to someone we know, like, and might enjoy working with, but to an individual based upon their ability. Results are the combination of ability and opportunity – we need to ensure we do not allow our biases to impact to whom we give opportunities. Otherwise, only a limited group will have the chance to obtain those visible great results.

The workplace is different from our predominately-homogeneous homes. At work, we are engaged in solving issues side-by-side with individuals who are often a different gender, race, religion, culture, geographic and socioeconomic background, just to name a few. This diversity allows us to interact with and learn about and from individuals who may be very different from ourselves. An environment of diverse individuals naturally fosters learning and personal growth because the person sitting next to you is likely to have different perspectives and different experiences. The optimal outcome is the creation of a learning environment that leads to the organization always looking at what is different, what is new and what can be improved.

In the current work environment, leadership is not a position, but a role. A different times we all play the roles of individual contributor, follower and leader. In addition, someone may be at times a "manager" who fills out appraisals, makes compensation

decisions, *etc.* A diverse individual's unique perspectives provide opportunities for them to play certain roles and be leaders with respect to those roles. Therefore, creating a diverse team and drawing upon the value of inclusion creates leadership opportunities for many.

Diversity and Inclusion Impacts the Bottom Line

If we think about our careers, we all know how much more we enjoyed working for a leader who we respected and who cared about us, our work, and our careers. To support this proposition, the 2010 Corporate Counsel Women of Color survey shows that "being valued" is the greatest driver of job satisfaction for in-house counsel woman of color.¹⁹ In addition, studies support the proposition that diversity effectiveness improves business results by increasing employee retention, facilitating collaboration, and inspiring employees to work slightly harder.²⁰ Moreover, if we think about how much more productive we were when we were valued by our leaders and had high job satisfaction, it is startling. We are energized to come to work early, go the extra mile on a project or spend our free time thinking about how to achieve better results.

An environment and culture that promotes diversity and inclusion is one where people bring their full selves to a diverse-friendly environment. This means that diverse people feel they are welcome and can "show up" to their jobs in full, without holding anything back. They trust they will not have to deal with the pain and discomfort of an unwelcoming environment and they can instead focus on adding value. Employees do not come to work wanting to be failures – they come to work wanting to be valued and to add value. In addition, engaged employees have been shown to increase average revenue growth by 11% over the industry average.²¹ If the environment encourages this attitude, productivity will soar. Conversely, if one is suppressing something because they feel it will be unwelcome – it is natural that such suppression will also invade their ideas, creativity and productivity.

¹⁸ Samuel R. Sommers, Lindsey S. Warp & Corrine C. Mahoney, *Cognitive Effects of Racial Diversity: White Individuals' Information Processing in Heterogeneous Groups*, 44 J. EXPERIMENTAL SOC. PSYCHOL., 1129-36 (2008).

¹⁹ CORP. COUNSEL WOMEN OF COLOR, THE PERSPECTIVES OF WOMEN OF COLOR ATTORNEYS IN CORPORATE LEGAL DEPARTMENTS (2011).

²⁰ Corporate Executive Board, Corporate Leadership Council, Human Resources, Employment Value Proposition Survey (EVP) 2008-2009.

²¹ Corporate Executive Board, Corporate Leadership Council, Human Resources, "The Business Case for Employee Engagement," 2009.

All of the factors outlined in this article work together to increase productivity and make for better results. Therefore, it is not surprising that companies with the highest percentage of women on their executive committees significantly outperform male-only teams in both return on equity and average Earnings Before Interest and Taxes margin.²² A 2001 survey also found that Fortune 500 firms with more female executives outperformed their industry medians by 34% in terms of profit as a percent of revenues and by 69% in terms of profit as a percent of stockholder's equity.²³ In addition, seventy-two percent of respondents to a 2010 McKinsey survey believe there is a direct connection between a company's gender diversity and financial success.²⁴ Finally, "highly diverse law firms generate greater revenue and turn higher profits than their peers, even after controlling for hours, location and firm size . . . The evidence suggests that diversity is both a cause and effect of good business."²⁵

Conclusion

For a long time, diversity has been championed in the name of "equality" and described as being the "right thing to do" from legal, moral, and religious perspectives. This certainly remains true today. Yet, law departments that want to drive competitively superior performance will recognize the affirmative business value of diversity and inclusion. They will move beyond satisfying the minimal standard of what is legally required and will attract and develop a very talented team, establish a culture that is different in many respects and is inclusive of all views and perspectives. Such a team and environment will allow every individual to provide his or her greatest value to the organization. The outcome will be more creative and proactive legal approaches and better decision-making that will generate superior results in addressing complex legal challenges and customer needs.

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²² MCKINSEY & COMPANY, WOMAN MATTER, WOMAN AT THE TOP OF CORPORATIONS: MAKING IT HAPPEN (2010).

²³ Rebecca Tuhus-Dubrow, "The female advantage." *Boston Globe*, May 3, 2009, final edition.

²⁴ MCKINSEY & COMPANY, MOVING WOMAN TO THE TOP: MCKINSEY GLOBAL SURVEY RESULTS (2010).

²⁵ Brayley & Nguyen, *supra* note 2, at 36.

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