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## Firms Must Act to Offset Post-Recession Diversity Setbacks

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*Of the Legal Staff*

Earlier this month, Legal affiliate The American Lawyer reported on a development that was as disheartening as it was expected. Citing its own yearly surveys of National Law Journal 250 firms, the legal profession's flagship publication found that the percentage of lawyers from racial minority groups practicing at the nation's largest firms decreased in 2009.

The decrease in percentage terms was relatively small from 13.9 percent to 13.4 percent. But it was significant because it was the first such decrease in the 10-year history of the Am Law "Minority Scorecard" survey, and because data from the survey combined with other factors suggest cause for more serious concern over the longer term.

I believe that we lawyers who work at large firms have an obligation to respond to this development in a manner that advances our commitment to greater diversity to a higher level. We are threatened with irrelevance if we don't.

It's fair to say that a lot of people concerned with diversity were worried that the economic downturn would have a negative impact on minority hiring and retention at firms, if only because disparities in unemployment between white workers and those from racial minority groups have always been part of the nation's economic landscape.

For example, during the country's last deep recession in the early 1980s, unemployment among African-American workers rose to twice that of white workers, climbing as high as 21 percent in 1983. This pattern has repeated itself during the so-called "Great Recession" of 2009. According to the Bureau of Labor Statistics, 9.7 percent of Americans remained unemployed as of February 2010. But while the percentage of unemployed whites numbered 8.8 percent, the percentages of African-Americans (15.8 percent) and Hispanics (12.3 percent) who remain unemployed were significantly higher. The percentage of unemployed Asians was lower than that of whites, at 8.4 percent.

It was probably asking too much to hope that the legal profession in general and large firms in particular would be immune to the "last hired, first fired" phenomenon. And there were signs of hope: Not only were there firms on The American Lawyer's list that maintained their positions vis--vis minority representation, but there also were firms that increased their minority representation despite the recession. But for this grouping of firms as a whole, the pattern with regard to who lost more attorney jobs in 2009 appears to be somewhat consistent with what's going on in the general labor market.

Overall, The American Lawyer found that the large firms they surveyed lost about 6 percent of their total lawyers in 2009. By comparison, in that same period the firms lost 9.7 percent of their Hispanic lawyers and 9 percent of their Asian lawyers, with Asian lawyers suffering the greatest losses in terms of actual numbers among minority groups.

In terms of the percentages of minority lawyers working at these firms, African-American lawyers were hit the hardest: the firms lost 13 percent from their total pool of African-American lawyers, and 16 percent of their African-American non-partners. As The American Lawyer noted, this meant approximately one in six African-American non-partners left the surveyed firms in 2009 without being replaced, a figure the publication described as "startling."

So far, there hasn't been much of a response to these findings from the firms that were surveyed. And, in general, there's not a lot of information available about what might have caused these reductions, although there are clues. A few weeks before the 2010 scorecard was published, the ABA's Presidential Diversity Initiative issued a report entitled, "Diversity in the Legal Profession: The Next Steps." Essentially a hodge-podge of conclusions and recommendations about how to advance diversity in various sectors of the profession, the report provides little in the way of actual facts about what's really going on in the legal market. (This is in marked

contrast to the ABA's 2006 Commission on Women in the Profession's report on women of color at firms, "Visible Invisibility," which provides detailed accounts of some of the obstacles minority women lawyers have faced as they have worked to develop meaningful legal careers.) The "Next Steps" document did report, however, that the recession was "drying up monies for diversity initiatives" at law firms and "creating downsizing and cutbacks that may disproportionately and negatively affect lawyer diversity thereby reversing the gains of the past decades." Coming out when it did, the AmLaw report almost seems like an empirical confirmation of the ABA group's observations.

The lack of data about what actually caused the reduction in the percentage of lawyers of color at large firms is all the more worrisome because it's not as if these firms were making progress on diversity all that quickly before the 2009 recession. Despite years of focusing on diversity, the legal profession is still less diverse than other professions, and our corporate clients' diversity efforts continue to outpace our own. If law firms were being honest with themselves, they would have to admit that for the most part, they've allowed their clients to take the lead on diversity, while they have mostly followed with varying degrees of commitment and interest. Although the number of attorneys of color at law firms has been increasing, these increases have not been particularly rapid. The rate of change has been particularly turgid at the partnership level.

There are concerns, moreover, that we are seeing only the beginning of the recession's lingering negative effects on minority hiring. It's pretty much agreed that most of the growth in minority hiring numbers over the past several years was the result of increases at the junior associate level. Citing the recession and client concerns about the use of junior associates on matters, large firms in general have significantly reduced the size of their first-year classes, making it that much more difficult for them to maintain,

much less increase, the number of minority lawyers who join their professional ranks and have a chance to advance through their organizations.

In other words, the recession and its effect on first-year associate hiring has in all probability significantly limited the potential impact that such hiring can make on law firm diversity for the immediate future, and perhaps permanently. Instead, what the recession has revealed is just how vulnerable the progress we've supposedly made over the past few years really is to outside factors that significantly threaten law firm earnings.

Given these realities, if the larger firms are going to continue to make progress on diversity, then more attention will have to be paid to minority retention issues, and this will mean coming to a better understanding of why some lawyers advance in firms while others don't. Although a number of minority lawyers make it to partnership every year, many more are derailed at some point after they enter large law firms as associates. Lawyers of color leave their firms for a variety of reasons, but the important point is that far too many of them leave before they even can be considered for partnership. The challenge is to keep more minority lawyers at firms longer by creating a system that will better support them as professionals and will convince more of them to choose a future with a large firm.

The promotion systems presently in place at most larger firms will not make meeting this objective any easier. For better or worse, the larger law firms are still basically "up-and-out" kinds of operations. This means that at bottom, these firms are geared more towards sorting contenders out than they are with bringing in new participants and keeping them. As those of us who work in such firms know, this sorting process a process that academic commentators have dubbed the associate-to-partner "tournament" creates an environment where some associates "win" the prize of partnership, but many move on at some point to other legal settings.

At larger firms, the tournament system and the competitive atmosphere it creates are not by-products of an aggressive personnel management philosophy. It is the management philosophy, and anyone who is uncomfortable with that fact will soon find a large law firm a difficult place to work. In addition, one of the things lawyers like most about the process at least the lawyers at the top of the large firm pyramid is that the system has been around so long that the whole tournament framework is generally accepted as an "objective" process in which "merit" prevails. To some extent,

this view of this system is supported by its performance. There is nothing inherently wrong with a competitive environment, as long as everyone in the race gets a decent shot out of the blocks and runs the same course. But the potential for bias in how these systems work is never acknowledged and rarely discussed, except by academics in law review articles and, to some extent, by organizations or individual professionals involved with diversity efforts.

In truth, by their very nature, efforts to make law firms more inclusive are to some extent in conflict with the tournament model. Large firm diversity strategies are concerned with opening doors to allow people from a wider variety of backgrounds to practice in firms or, at least with ensuring that the tournament isn't eliminating diverse candidates for the wrong reasons. Trying to police this system more carefully would call for a greater degree of accountability and transparency than most firms are used to.

In addition, because the natural flow of the "up and out" framework is more concerned with identifying and grooming particular individuals for partnership than it is with distributing professional benefits like training or good assignments equitably among would-be contenders, a rethinking of how assignments are made at firms is probably a prerequisite if diversity efforts are to have any meaningful chance of success.

To say that a situation is difficult to change is not the same thing, however, as saying change is impossible. Law firms can change if they want to, and they certainly will if the market forces them to change. The post-recession market for legal services is already forcing firms to look at their personnel practices more critically than they have in the past. One of the few benefits of this market from a diversity perspective is that it has encouraged larger firms to be more transparent with clients about how and why associates are assigned to particular client matters. This greater emphasis on partnering between firms and clients on staffing can create opportunities for diverse lawyers, to the extent that clients are willing to use their leverage to seek out lawyers of color and other diverse attorneys to represent them. In addition, firms themselves are responding to the associate morale issues occasioned by the market downturn in part by emphasizing enhancements to their mentoring and associate development programs, which if implemented conscientiously may improve more associates' ability to compete successfully for the best assignments.

But I don't see any of these things changing the tournament's essential nature. Nor do I see

firms taking a hard look at their promotion and assignment processes to determine whether they are actually fair to all of the firm's lawyers. Indeed, I have seen little or no evidence of critical thinking among law firms about whether the current model best serves the interests of all of their lawyers, which is the best way to ensure that clients have access to a firm's full complement of ideas and talent.

It is long past time for more large firms to engage in this kind of critical thinking and take their diversity efforts to another level. This is no longer just about firms "doing the right thing," or even about whether internal or external diversity champions have done enough to help firms really understand the "business case" for diversity. Our lack of responsiveness on diversity issues has put our credibility as lawyers at stake. For years now, corporate clients have tried to get firms to take more decisive action on diversity. Many are probably disappointed and somewhat surprised that we have not accomplished more. After all, lawyers are retained to solve their clients' problems. We are paid to bring intelligence, judgment, experience, energy and grit to the task of helping them achieve their objectives.

The larger firms have positioned themselves in the market as the class of professionals best suited to solve the corporate world's most complex legal challenges. When we market ourselves, lawyers talk less about what we might be able to do than what we have actually accomplished in the past under similar circumstances. Our most valuable currency is results, not magical thinking or excuses.

So, it must ring hollow to at least some of our clients when large firms complain that creating more inclusive working environments is a problem that is beyond our abilities to solve. More than anyone else, clients know and can appreciate what lawyers can accomplish when we bring all of our energies to solving difficult problems. They have seen us grow in size and profitability as we've extended ourselves around the globe, creating opportunities to provide our services to a greater number and wider variety of clients.

As a result, when we claim that "we can't fix diversity" it just doesn't sound consistent with our record of success in other areas. We don't present ourselves as helpless when we talk about resolving our clients' legal difficulties, so why should we expect clients to believe us when we claim we can't do more to improve the representation of diverse lawyers in our own offices?

Our failure as firms to move more decisively on diversity probably hurts our credibility with other stakeholders as well. For example, larger

firms have been telling law schools and law students for years now that diversity is important to them. Firms tout their diversity successes and achievements in brochures, clever magazine advertisements and on Web sites, and use them to attract minority and nonminority students alike. And yet, law students and their professors can see that the overall percentage of minority lawyers working at firms has improved only marginally over time, and that the number of minority lawyers at more senior levels has remained roughly the same.

This disparity between the words law firms use to describe their commitments to diversity and the results we've achieved can only breed cynicism in our younger lawyers, especially at a time when our responses to the economy's challenges are causing many of them to question their choice of professions. If they can't verify our commitment to an objective we claim to be passionate about, why should these future colleagues believe us about anything?

It is time for large law firms as a group to take a greater measure of responsibility for their lack of progress on diversity and to take appropriate measures to change things. I would start by proposing that like-minded firms form a working group on law firm diversity composed of law firm managing partners and other lawyers directly responsible for diversity, academics who study the legal profession, representatives from corporate clients who have experience with diversity planning, and diversity consultants and other related professionals. The group's first set of tasks would be to study minority recruiting and retention issues, to identify roadblocks to success on diversity that are common to large firms, and to propose a set of consensus "best practices" that firms interested in creating and maintaining inclusive environments can implement with a degree of confidence. The group would then turn its attention to providing guidance on how best to implement the guidelines it develops.

The group's findings and recommendations should be published, posted and widely disseminated. To inspire confidence in the work of such a group, the firms that choose to participate in this project must be willing to guarantee the working group's independence. There should be no attempt to evade or mask uncomfortable truths, just as there should be no limits on the publicity given to the diversity successes of individual firms. Information about what works can be as valuable as information about what doesn't, and this group should be looking for both. A fund created by the participating firms should pay for the project, including fees for consultants and honoraria for the professors asked to work with the group.

By arguing that firms should take on this task themselves, I am not suggesting that the work done on law firm diversity by the ABA or by groups like the Minority Corporate Counsel Association, which has published several insightful research studies on diversity issues, is without value. Indeed, one would expect a law firm working group to draw on every available resource including insights from these groups in its study of law firm practices, and that representatives from the organized bar and diversity advocacy organizations would be asked to address or even serve as members of the law firm group. Nor do I think that law firms should use their participation in a project like the one I've proposed as an excuse for not continuing to support, monetarily or otherwise, the diversity-related efforts of organizations like the MCCA.

Rather, my belief that firms should pull together on these issues comes from my experience with the Philadelphia Diversity Law Group. As readers of the Legal's "Insight on Diversity" column know, the PDLG is a nonprofit group of over 30 Philadelphia-area law firms and in-house corporate law offices dedicated to increasing diversity among the region's lawyers. The PDLG works to fulfill its mission by sponsoring programs, like its summer internship program, that are designed to increase opportunities for more lawyers from diverse backgrounds to work with our member organizations. The PDLG's activities are funded by its member firms. Because there is no paid staff, the bulk of the organization's work is done by the lawyers who are the member firms' representatives to the PDLG board of directors.

My experience with the PDLG has convinced me that law firms, especially when they work as equal partners with clients rather than waiting to be pulled or pushed into action, can make real progress on diversity issues. I attribute much of the success achieved so far by the PDLG to the fact that its representatives from firms and corporate law offices work shoulder-to-shoulder on the organization's diversity-related projects. The firms are there because they want to be there, and the in-house lawyers who work for the PDLG's member corporations appreciate the firms' and their individual representatives' genuine interest in diversity issues. All of the members are energized by the opportunity to work together in pursuit of common goals and beliefs. I believe that this model is transferable to other projects, as long as the law firms involved are willing to act as co-leaders and true collaborators, rather than followers.

We at large firms, and not our clients, bear the primary responsibility for improving our

firm's diversity records. For too long, the ABA, our clients and responsible advocacy groups have been forced to nudge large firms into meaningful action on diversity issues. For firms, the question is how long our clients will continue to accept our "deliberative" approach to diversity. In this post-recession market, clients have shown an increasing willingness to abandon relationships with firms that have not embraced more innovative approaches to bread and butter issues like staffing, responsiveness, and controlling costs. Any firm that resists these trends risks falling behind in our highly competitive market.

The same may well be true in the area of diversity. Time magazine reports that by 2050, whites will be a minority group in the United States. Even now, changes in the world economy, communications technology, and the accessibility of transportation put most American businesses and the nation's citizens in contact with people from different cultures on a daily basis. Many of our corporate clients have been preparing for and adjusting to these developments since the 1980s.

In the end, I cannot help but believe that clients and talent will be more interested in partnering with firms that are comfortable with both the demographic changes this century will bring, and the new market these forces are already creating. The alternative is to drift into irrelevance, while others who are more receptive to what the future holds forge ahead of us.

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