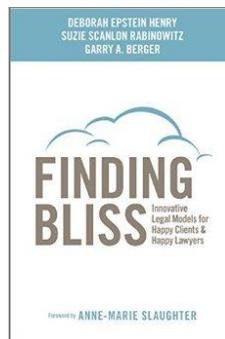




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DIVERSITY AND INCLUSION



What follows below is an excerpt from Chapter 6 of *Finding Bliss: Innovative Legal Models for Happy Clients & Happy Lawyers* (American Bar Association, 2015). To read advance praise, order the book and learn more, please visit www.blisslawyers.com.

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Introduction

Throughout this book, we have seen that the success and evolution of the legal marketplace, along with the development of new legal models and the innovation of traditional legal models, hinges on how effectively the talent pool meets the changing demands of the profession. In order to maximize the effect and impact of the talent pool, we must ensure that diversity and inclusion (D&I) are valued and integral to the delivery of legal services at each step of the process.

At the outset, we want to be clear that we believe the goal of a truly diverse and inclusive profession is not a shift in the balance of power for its own sake. If we get to the point where women and people of color refer business exclusively to other women and people of color, this is not progress to celebrate. The victory in D&I lies in providing opportunity, variety, and choice. Increased D&I throughout law firms and other legal service providers, in-house counsel teams, and non-legal professionals is necessary to reflect the diverse customer base of clients and employees that presently exists and will continue into the future.

As we explore the subject of D&I, there are a couple of important ground rules to establish. The first is that we want to be careful about stereotyping in general, or painting the issues with too broad a brush. . . . The other ground rule we would like to acknowledge is that when we talk about D&I, the “I” is just as much a crucial component as the “D.” In other words, we are not seeking to exclude anyone from the discussion. D&I is an acknowledgment of the effectiveness that a diverse environment provides

for employers, employees, and clients. The goal is to create more readily available opportunities in terms of roles and models for all lawyers, and to determine the most effective way to truly achieve D&I in a changing profession.

Where Are We Now?

To figure out how D&I might evolve in a profession of shifting models and markets, we first need to ascertain where we are now in terms of overall legal employment and elevated status, such as law firm partnership. The National Association for Law Placement (NALP) tracks minority attorneys including those whose race or ethnicity is black, Hispanic, American Indian/Alaskan Native, Asian, Native Hawaiian, or other Pacific Islander, and those of multi-racial heritage. Also included in the NALP diversity statistics are women, lawyers with disabilities, and lesbian, gay, bisexual, and transgender (LGBT) lawyers, each category of which is separately tracked. Minority women are also separately tracked as a category.

The results are not pretty. According to NALP, while minorities account for little more than 20 percent of all associates and staff attorneys, at the partner level, that number falls to about seven percent. The percentage of partners who are minority women dwindles even further to about two percent.¹ This increased drop for minority women is attributable to a “double bind” that minority women face where they confront additional obstacles in being both minorities and women.²

While the NALP data applies to law firms, the statistics for inhouse counsel are not appreciably better. The Minority Corporate Counsel Association (MCCA) releases its annual survey results of Fortune 1,000 women and minority general counsel. Its 2013 survey report shows 19 percent of women held the position of chief legal officer. Among the Fortune 500, minority women comprised four percent of the 21 percent women general counsel, two percent of whom were African American women, one percent Hispanic women, and less than one percent Asian American women. Of the 17 percent women general counsel in the Fortune 501–1,000, one percent were minority women. Total, there are seven percent minority general counsel in the top 1,000 companies.³ . . .

Slow Progress Among Women and People of Color

When we reflect on the slow progress among women and people of color, we note that recruiting, retention, and promotion continue to be the key challenges impacting diversity efforts. Importantly, though, not all minorities struggle equally with these prevailing challenges. . . .

When looking for explanations behind the sluggish D&I efforts, it is important to look at all of the constituents involved. While the focus on D&I should legitimately be on historically disadvantaged groups, progress cannot be made without making allies of those in power, often white men. A Catalyst study which focused on engaging men as champions of women found that only when men truly believed that there was a problem with the status quo would they begin to lobby and support efforts to increase D&I. The more a man was aware of gender-based biases, the more likely that man was to believe in the importance of gender equality measures.⁴ The Catalyst study found that simple awareness of gender bias was not enough, however, as there exist multiple obstacles that prevent men from supporting women. Apathy, fear, and real or perceived ignorance were the three largest barriers, with fear being cited by 74 percent of male interviewees.⁵ This fear could play out in a number of ways. Some men fear that equality for women would come at a harmful cost to men.⁶ For example, if there are 15 seats on the Executive Committee of a firm and a male member advocates for a woman to be brought on to the Committee, the other men may worry they will lose their coveted spot. Men also feared criticism, both from women who saw all men as part of the problem and from male colleagues whose disapproval would result in perceived loss of masculinity.⁷ Other men may fear that attempts to support women colleagues would be misconstrued as romantic interest, or that a male attempting to enact change would be an ineffective champion of a women’s cause.⁸ Many of these fears, including a fear of providing real feedback in an evaluation, may result in creating a real chilling effect in the workplace. Addressing these fears, whether seemingly legitimate or not, will become central to the success of any D&I initiative.

Beyond addressing fears, it is important that white men are active participants in the D&I efforts so they become invested in the issues and the vision of their organizations. One way to achieve that is by inviting white men to play leadership roles in diversity committees. This provides white men with the opportunity to not only develop a greater understanding of the complexities of the D&I issues but also

became more deeply committed to address them. Having white male colleagues become ambassadors to the D&I cause is critical to bridging communication and bringing unity to the D&I issues in organizations.

While most D&I initiatives tackle a range of subjects, one thing they all seem to have as a common focus, as it impacts all minority groups, is a paucity of representation at the top. This cannot be blamed merely on inadequate recruiting. In the case of white women, for example, there is no shortage of such lawyers—at least at the start. For nearly 30 years, female law school students have comprised 40– to 50 percent of the total enrollment in J.D. programs.⁹ However, representation of women equity partners at law firms hovers at 17 percent.¹⁰ Some have attributed women’s lack of critical mass at the equity partner level to be due to a pipeline problem. However, the issue cannot be conveniently explained this way, as there has been no shortage of women entering the profession. Something else is going on—the challenges for white women revolve around retention and promotion, while with women of color, recruiting challenges continue as well.

There are many negative results of the minimal representation of women and people of color at the top. One significant impact that is often overlooked is the notion of “covering.” This is the reluctance of diverse talent to bring their authentic selves to work which in turn prevents them from producing at their maximum capacity.¹¹ When diverse talent is underrepresented, especially at the leadership levels, the resulting missed opportunities for the business, in addition to the individuals, is significant. Thus, employers need to recognize that building an inclusive work environment will enable individual employees to thrive and, in turn, improve the bottom line.

Types of Biases

Many workplaces have yet to build an inclusive environment and are in the initial stages of confronting the lingering biases that remain. The term “unconscious bias” is an umbrella term for the unconscious attribution by an individual of particular qualities to a member of a certain group. Often these perceptions, attitudes, and stereotypes will emanate from individuals without their intention or awareness. . . . The unconscious bias can be especially harmful when individuals are placed in the role of evaluating others or they are otherwise in a leading capacity. . . .

Many individuals in power are not aware that they are making their employment decisions for either hiring or advancement motivated by biases. Yet these entrenched attitudes have repeatedly been revealed by studies showing preferences for white males over minority or female candidates. A 2003 study of race and employer hiring behavior done by Marianne Bertrand and Sendhil Mullainathan is a good example. These researchers altered the names atop two separate resumes while leaving the rest of the resumes identical. . . . [T]he same resume was sometimes presented as that of a presumed African American job seeker and other times, as that of a presumed white job seeker. The researchers found that presumed white applicants were called back approximately 50 percent more often than presumed African American applicants, regardless of industry or occupation.¹² . . .

Another compelling example of unconscious bias is reflected in the changed audition policies of most of the major U.S. orchestras in the 1970s and the 1980s. Historically, the composition of musicians in the symphony consisted largely of males who may have auditioned along with others but who had then been handpicked by the music director of the orchestra. When a decision was made to conduct blind auditions—behind a screen with no visual to influence the decision maker—the diversity of the talent that emerged was different. Among the five highest-ranked orchestras in the nation (located in Boston, Chicago, Cleveland, New York, and Philadelphia), the blind audition process resulted in three times the number of women being hired in little over a decade.¹³

The research studies surrounding unconscious bias and the repeated preferences shown for white males are irrefutable. That being said, it is important to note that every person, whether from a minority group or not, has these biases. . . . [A]ll individuals view the world through their own individual lens. Acknowledging that unconscious bias exists and putting in checkpoints, where possible, can help raise awareness and bring more parity.¹⁴

The Role of New Legal Models in Increasing Diversity and Inclusion

There are two unconscious biases that regularly play out in hiring and evaluating legal talent.¹⁵ The first we see is “commitment bias” that often arises with female applicants who are mothers. What lingers underneath the surface is a presumption that mothers are not fully committed to their careers. . . . The

other prevailing bias we see in hiring and evaluating legal talent is “competency bias.” Competency bias, as its name suggests, arises from the suspicion that certain individuals are less competent for the job or promotion. In situations where a mother’s career path is less linear, for example, some question the lawyer’s relevance and whether she can regain the skills and knowledge to be an effective contributor to the profession again. Lawyers in transition often face competency bias as well. For example, when a resume reflects that a lawyer was part of a large downsizing due to the recession, some may silently question why that individual was the one they chose to let go.

In closely watching the impact of commitment and competency biases,¹⁶ Debbie was excited to discover that secondments may become a compelling way to address unconscious bias in a new light. . . . [T]here is arguably no more effective means of remedying unconscious bias risks than allowing individuals to confront those biases directly by engaging and interacting with diverse lawyers. We believe the secondment model presents a powerful opportunity to disrupt the layers of unconscious bias on multiple levels.

When a company decides to bring on a seconded lawyer, it typically uses a different process than it does when making a traditional hire. The company’s screening and evaluation process is more removed because the engagement is temporary and because the company’s risk is minimized due to the outside secondment firm’s assumption of the employment risk. Thus, the alternative hiring approach potentially avoids some of the biases from sneaking into the regular recruiting procedures of many companies.

Once seconded employees get their foot in the door, many companies have found that these lawyers become integral to the department. As employers get to know the seconded lawyers who may not have otherwise had the opportunity to demonstrate their ability to contribute and thrive, the one-on-one personal relationship becomes an effective way to address bias. In approximately 15 percent of the cases, Bliss finds that such a “trial period” results in their seconded lawyers converting into permanent employees of their clients’ legal departments. If some of these seconded attorneys are women and people of color, secondments can serve as another way for diverse attorneys to enter the marketplace.

When Debbie identified this opportunity to address unconscious bias, she called it “On Deck Diversity” whereby the secondment allows diverse talent already on engagements to fill companies’ permanent hiring needs, having already proven themselves ready to deliver. . . .

While not every seconded lawyer finds a situation that will, can, or should convert into permanent employment, even in those situations where there is not such an opportunity, we believe the secondment model helps to remedy additional evils that underlie unconscious bias. From the lawyers’ perspective, the experience and resume value of working at in-house legal departments will make these lawyers more marketable for the future, enabling them to become better positioned to find other high level jobs or seek alternative opportunities to enhance their profile. For other diverse lawyers, it may give them the inspiration and confidence to similarly pursue growth opportunities now that they have role models who preceded them. From the company perspective, even if there is not a conversion to permanent employment, clients still gain increased exposure and direct personal experiences working with diverse individuals. We anticipate that this will help to combat their unconscious biases, making them more receptive to a diverse hire in the future.

To be clear, we are not suggesting that secondments are the sole remedy to address unconscious bias for all diverse candidates. Secondments are just one of many employment models, all of which should include a place for diverse lawyers to work and succeed. Instead, we are providing the secondment as one example of how diversity benefits may be gained by changing the employment model. Along these lines, we see temporary positions such as being hired as a summer associate at a law firm or being engaged to perform clinical work as a third-year law student to be other types of On-Deck Diversity opportunities. Like with secondments, these assignments can build a diverse candidate’s marketability and create a means to confront unconscious biases through one-on-one interaction. We hope that the secondment and these other examples will provide inspiration for application of On Deck Diversity opportunities in permanent, full-time employment for diverse individuals as well.

Other Opportunities for Diversity and Inclusion

Of course, with some firms and companies, diversity is the mission of their work. A minority- or women-owned law firm that is a member of the National Association of Minority & Women Owned Law Firms (NAMWOLF), for example, has woven diversity into its very fabric. In turn, NAMWOLF has become an effective advocate for women and minority-owned law firms to encourage companies to use diversity as a

criterion for selection of outside counsel. Additionally, companies certified as female-majority-owned businesses by the Women's Business Enterprise National Council (WBENC) are also likely to make diversity a signature of their work.

The evolving trend . . . where multiple legal service providers team up to represent a client, can also increase opportunities for diverse players as the demands of the client favor collaboration over competition. Clients can aid in this process by tracking large law firms' willingness to partner with and refer business to NAMWOLF firms, WBENC companies and other diverse suppliers.

Taking the true meaning of D&I to heart can create some additional complexities and challenges. An example is when one considers whether diverse law firms should refer business to other diverse legal suppliers and vice versa. The answer seems to be an immediate and resounding yes. So, what if the requirements of membership to NAMWOLF were broader and allowed for all diverse legal suppliers to become members and not just diverse law firms specifically? While this seems like an obvious step, arguably some NAMWOLF firms might face the risk of losing business to other diverse legal suppliers. Even though that risk is present, we would argue that such thinking is too narrow (and we readily admit that this is a self-interested point as Bliss is a WBENC certified business). While it is true that NAMWOLF firms could, at times, be viewed as competitors to other diverse suppliers, they are already facing such competition in banding with other diverse law firms. And, more importantly, if more diverse law firms and diverse legal suppliers worked in concert to provide greater choices for clients, the NAMWOLF membership and collective voice would be even more impactful. The focus should be about increasing the visibility and contribution of all diverse law firms and legal suppliers, thereby enhancing the options for clients. . . .

Conclusion

D&I that reflects the marketplace will result in a diversity of thought that is far more likely to improve the effective delivery of legal services in the future. Indeed, the research supports that "when teams have one or more members who represent the gender, ethnicity, culture, generation, or sexual orientation of the team's target end user, the entire team is far more likely . . . to understand that target, increasing their likelihood of innovating effectively for that end user."¹⁷ This diversity of thought, represented by the range of backgrounds of different individuals in a room, is what the legal profession needs to more effectively deliver legal services. Those who achieve it will have obtained a competitive advantage and arrived at the intersection of diversity and innovation.

1. The National Association for Law Placement. "Women and Minorities at Law Firms by Race and Ethnicity—An Update." NALP Bulletin, last modified February 2014, <http://www.nalp.org/0214research> (figures based on over a thousand law offices and firms totaling more than 110,000 lawyers).

2. See generally Kimberle Crenshaw "Intersectionality: The Double Bind of Race and Gender" Perspectives, last modified Spring 2004, <http://www.americanbar.org/content/dam/aba/publishing/perspectivesmagazine/women/perspectivesSpring2004CrenshawPSP.authcheckdam.pdf>.

3. "The Continuing Climb: Diverse GCs Power Up, MCCA's 14th Annual General Counsel Survey," Diversity & the Bar, last modified Sept./Oct.2013, <http://content.yudu.com/A2cmbh/DivTheBarSepOct2013/resources/1.htm>.

4. Jeanine Prime & Corinne A. Moss-Racusin, "Engaging Men in Gender Initiatives: What Change Agents Need to Know," *Catalyst*, 2009: 5.

5. *Ibid.* at 14.

6. *Ibid.*

7. *Ibid.* at 15.

8. *Ibid.* at 16.

9. "First Year and Total J.D. Enrollment by Gender, 1947–2011," The American Bar Association, last modified 2012, http://www.americanbar.org/content/dam/aba/administrative/legaleducationandadmissionstothebar/statistics/jd/enrollment_1yr_total_gender.authcheckdam.pdf.

10. "Report of the Eighth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms," National Association of Women Lawyers, last modified February 2014, http://www.nawlfoundation.org/pav/docs/surveys/Eighth_AnnualNAWLSurvey-Final.pdf.

11. See generally: Kenji Yoshino, *Covering: The Hidden Assault on our Civil Rights* (New York: Random House, 2006).
12. Marianne Bertrand and Sendhil Mullainathan, "Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination," *The American Economic Review* 94 (Sep 4, 2004): 991–1013.
13. Claudia Goldin and Cecilia Rouse, "Orchestrating Impartiality: The Impact of 'Blind Auditions on Female Musicians,'" *The American Economic Review* 90, no. 4 (Sept. 2000): 715–41.
14. See, e.g., Verna Myers, *Moving Diversity Forward: How to Go from Well-Meaning to Well-Doing* (Chicago: American Bar Association, 2011): 89–92.
15. Deborah Epstein Henry, *Law & Reorder: Legal Industry Solutions for Restructure, Retention, Promotion & Work/Life Balance* (Chicago: American Bar Association, 2010): 272.
16. *Ibid.*
17. Sylvia Ann Hewlett, et. al., "Innovation, Diversity, and Market Growth," (Center for Talent Innovation, 2013): 3. (Research found diverse teams were as much as 158 percent more likely to understand their target market.)